

ACCESS TO JUSTICE FOR INDIGENOUS PEOPLES IN AFRICA

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Introduction

In preparation for the 2014 World Conference on Indigenous Peoples, Indigenous community representatives from across Africa traveled to Nairobi for a conference in December 2012. The participants identified access to justice as a primary concern for Indigenous Peoples in Africa—whether political recognition and participation, criminal justice, or land rights, Indigenous representatives were clear that their communities struggle to access remedies for violations of their rights.³ This paper provides a broad overview of the situation for access to justice on the continent—from national legal frameworks, to judicial decisions, to regional human rights bodies, to transitional justice mechanisms. While African Indigenous Peoples' access to justice concerns are similar to those of Indigenous Peoples around the globe, some specific issues emerge in the African context, such as how to understand the very existence of Indigenous Peoples on the continent. Ultimately, the paper makes clear that access to justice for Indigenous Peoples is more a political than legal issue, and that State political will to implement positive decisions in favor of Indigenous rights is one of the primary challenges for Indigenous Peoples.

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3 See Mainyoi Pastoralist Integrated Development Organisation (MPIDO), *Proceedings Report: Africa Preparatory Meeting for the World Conference on Indigenous Peoples*. (Nairobi: Dec. 2012).

i. Do Indigenous Peoples exist in Africa?

The first challenge to access to justice for Indigenous Peoples in Africa is simple recognition of indigeneness as a valid identifier for communities with unique histories and relationships to territories. The existence of Indigenous Peoples in Africa remains a contested notion. An unstudied, yet common, refrain is that all black Africans are Indigenous to Africa. Accordingly, the concept of Indigeneness loses any meaning because it includes every black African. Scholars have presented a more nuanced critique identifying the risk of using the notion of Indigeneness in the contexts of ethnically diverse and divided societies. As Felix Ndahinda, a Rwandan scholar, points out, the “[i]mplications of indigenous identification for other groups in multi-ethnic countries remains one feature of indigenous rights discourse in need of further clarification.”⁴ Indeed, in regions where tribalism remains a major threat to peace and stability, the idea of Indigeneness can appear to feed such divisive notions.

The colonial legacy in Africa and the legacy of pan-African struggles for political independence created unique struggles for Indigenous Peoples. In recent decades, the concept of Indigeneness has begun a transition from a term that included all black Africans in contrast to white settlers, to a term that now includes certain self-identified African communities in contrast to their (often surrounding) African neighbors. This view appears to be acquiring resonance even among states such as the Republic of Congo (Brazzaville) which recently adopted a law on Indigenous Peoples’ rights.⁵

Across the globe the definition of Indigenous Peoples has been contested in part because the relationships between Indigenous Peoples

4 FM Ndahinda, Indigeneness in Africa—a contested legal framework for empowerment of “marginalized” communities. (The Hague: Springer, 2011), p. 211.

5 Act No. 5-2011 of 25 February 2011, On the Promotion and Protection of Indigenous Populations, available at http://www.iwgia.org/iwgia_files_news_files/0368_Congolese_Legislation_on_Indigenous_Peoples.pdf. This law defines Indigenous Peoples thus: “the term Indigenous populations mean populations who are different from the national population by their cultural identity, lifestyle and extreme vulnerability.” This definition underscores two characteristics that are being deployed elsewhere in the continent: ethno-cultural distinctiveness from dominant populations and economic vulnerability.

and dominant or mainstream groups in society vary from country to country. While the United Nations Declaration on the Rights of Indigenous Peoples⁶ deliberately avoided developing any definition of Indigenous Peoples, a working definition of common characteristics was proposed by the United Nations and is relevant to the controversies surrounding indigenes in Africa:

“Indigenous communities, Peoples and nations are those which, having a historical continuity with pre-invasion and pre-colonial societies that developed on their territories, consider themselves distinct from other sectors of the societies now prevailing in those territories, or parts of them. They form at present non-dominant sectors of society and are determined to preserve, develop and transmit to future generations their ancestral territories, and their ethnic identity, as the basis of their continued existence as Peoples, in accordance with their own cultural patterns, social institutions and legal systems.”⁷

The critical issue in relation to identifying Indigenous Peoples in Africa is the focus on territory and distinctiveness. Africa traditionally has been and remains a continent of Peoples tied to their land, with distinct ethnic communities claiming certain territories. Colonial domination tended to enhance ethnic enclaves within arbitrary borders, often naming regions for the ethnic groups that were found within them when the settlers arrived. Migration of Peoples in response to climatic change and conflict has been a constant feature of African life for centuries; many African ethnic groups adopted nomadism as a tool of survival. All of these factors make the modern notion of Indigenous rights a complicated overlay for the African context.

Despite this, many African communities have self-identified as Indigenous and have been recognized as Indigenous by the State. Traditional hunter-gatherer Batwa, residing in Uganda, Rwanda, Burundi and the Democratic Republic of the Congo are some of the most widely recognized, and most marginalized, Indigenous Peoples

6 UN GA Res. 61/295, 107th Plenary Meeting, 13 September 2007.

7 Study of the Problem of Discrimination Against Indigenous Populations, Sub-Commission on the Prevention of Discrimination and the Protection of Minorities, UN Doc. E/CN.4/Sub.2/1986/7/Add.4 (1986).

in Africa. Khoe-San, including their subgroups, reside primarily in the Northern and Western Cape regions of South Africa.⁸ Some San subgroups still rely in part on hunting and gathering, but all Indigenous groups in South Africa have had to adopt other livelihoods. Khoe-San have been recognized by multiple authorities, including the South African government, as the first inhabitants and self-identified Indigenous Peoples of South Africa.⁹ Highly multi-ethnic nations such as Nigeria and Kenya include multiple communities that self-identify as Indigenous Peoples. In Kenya for instance, where the census identifies well over 100 distinct ethno-linguistic groups,¹⁰ these include traditional hunter-gatherer communities such as Ogiek and Sengwer, multiple pastoralists groups such as Maasai, Turkana, Samburu, and Endorois, as well as fisher Peoples such as Il Chamus.¹¹ In North Africa, Imazighen are Indigenous inhabitants of the Maghreb residing in Morocco, Algeria, and Tunisia.¹² Imazighen have preserved their language, Tamazight, and have traditionally lived a semi-nomadic existence. In West Africa, Tuaregs self-identify as the Indigenous Peoples of the Sahel. These communities have clamored for more definitional clarity of Indigeneity on the continent.

In 2010, a Kenyan case before the African Commission on Human and Peoples' Rights (African Commission) responded to those concerns. In its decision in the communication on *Endorois Welfare Council v. Kenya*, the African Commission confirmed guidelines on identifying Indigenous Peoples that were laid out by its Working Group of Experts on Indigenous Populations/Communities. The four criteria for identifying African Indigenous Peoples are: the occupation

8 University of Pretoria Centre for Human Rights, South Africa: constitutional, legislative and administrative provisions concerning Indigenous Peoples. (Geneva: ILO, 2009), pp. 4–5.

9 *Id.*, pp. 2–3.

10 Ethnic affiliation for the 2009 census is reported by the Kenya National Bureau of Statistics at <http://www.knbs.or.ke/censusethnic.php>.

11 MO Makoloo, Kenya: Minorities, Indigenous Peoples and Ethnic Diversity. London: Minority Rights Group International, 2005, <http://www.minorityrights.org/download.php?id=147>.

12 M Martin, *Moroccan Constitutional Reform: Berbers Say the Battle's Just Begun*, International Business Times. July 6, 2011 <http://www.ibtimes.com/articles/175560/20110706/morocco-constitution-morocco-constitutional-reform-berber-activists.htm>.

and use of a specific territory; the voluntary perpetuation of cultural distinctiveness; self-identification as a distinct collectivity, as well as recognition by other groups; and an experience of subjugation, marginalization, dispossession, exclusion or discrimination.¹³ The African Commission further specified that Indigenous groups in Africa include hunter-gatherers, certain pastoralists, and other groups for which “survival of their particular way of life depends on access and rights to their traditional land and the natural resources thereon.”¹⁴

The African Commission’s definitional guidelines in the *Endorois* decision also highlight an important trend in the approach to Indigenosity in Africa. Faced with challenges from the State and other actors to the very notion of Indigenosity, many African Indigenous communities have instead adopted “marginalized” community as an alternative identifier. Using the proxy of marginality to address the concerns of Indigenous Peoples has proven less politically volatile for some groups, but also strips Indigenous Peoples of their recourse to international and regional standards, such as the UN Declaration on the Rights of Indigenous Peoples. In Kenya for example, the proxy of marginality has been embedded in the Constitution (2010) in which “marginalized” groups and communities (of which Indigenous Peoples are included along with multiple other categories) are given certain protections under law.¹⁵ The specific rights of Indigenous Peoples, however, are not recognized.

Accordingly, the first access-to-justice challenge for Indigenous Peoples in Africa remains the very validity of the concept of indigenosity in the African historical, political and ethnic context.

ii. African legal frameworks

Access to justice is a fundamental human right enshrined in African regional human rights instruments, specifically the African [Banjul]

13 Communication No. 276 / 2003 – *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v. Kenya, Decision on the Merits* (African Commission on Human and Peoples’ Rights 2010), para. 149.

14 *Id.*

15 See, e.g., articles 260, 56 and 100 of the Constitution of Kenya (2010).

Charter on Human and Peoples' Rights¹⁶ (ACHPR), as well as in the majority of African constitutions. For Indigenous Peoples in particular, effective access to justice has multiple pillars that should operate holistically to ensure that the most vulnerable groups in society can make use of the multiple systems they need to protect their rights. Accordingly, access to justice for Indigenous Peoples encompasses the constitution and laws, customary justice systems, formal justice mechanisms, administrative mechanisms, legal aid policy, and rights-based education and awareness.

For Indigenous Peoples, access to justice ultimately depends on the interaction of these legal structures with their collective rights: the right to recognition, the right to land and natural resources, the right to development, the right to participation, the right to non-discrimination and substantive equality, and the right to be free from violence. Although this paper cannot comprehensively address each of these topics for the entire continent, the following paragraphs use selected examples to give a broad view of access to justice for Indigenous Peoples in Africa.

ii.a. Formal legal frameworks

Across Africa, constitutional and legislative frameworks are rapidly transforming. This transformation has been largely positive, from a purely legal standpoint. Many African nations are now enjoying “third generation” constitutions having grown through first generation colonial instruments, second generation independence-era constitutions, and, in the last two decades, third generation constitutions that have emerged out of transitions from military rule or other forms of political oppression and violence. These third-generation constitutions embrace third-generation human rights,¹⁷ encompassing protections not only for civil and political rights, but also for economic and social rights, as well as environmental rights and “collective” rights in some African

16 OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), *entered into force* Oct. 21, 1986.

17 See Karel Vasak, *Human Rights: A Thirty-Year Struggle: the Sustained Efforts to give Force of Law to the Universal Declaration of Human Rights*, UNESCO Courier, 30:11, Paris: United Nations Educational, Scientific, and Cultural Organization, November 1977.

countries. South Africa's Constitution is widely acclaimed for such progressive human rights protections, but other nations also have demonstrated extremely progressive provisions in their constitutional frameworks that are directly relevant to the protection of the rights of Indigenous communities. The Ethiopian Constitution's (1995) model of ethnic federalism was designed to protect cultural, linguistic and self-determination rights among others.¹⁸ The Constitution of Kenya (2010) protects first, second and third generation rights and specifies a cadre of rights applying only to marginalized communities and groups as noted above. The Constitution of Namibia (1998) provides clear protections for third generation rights.¹⁹ Most African constitutions also explicitly recognize customary law, to the extent that customary law does not conflict with constitutional human rights protections.

It is in the translation of constitutional provisions into legislation where one first sees the challenges in implementation of Africa's progressive constitutions. While many laws in African countries provide important protections that can apply to Indigenous Peoples,²⁰ legislation often fails to live up to the constitutional ideals it is intended to make operational. Breakdown in the translation of constitutional principles into applicable legislation often has a deleterious impact on Indigenous Peoples in Africa.²¹ Indigenous Peoples often lack the political power to force changes in laws, either when they are proposed or after they are promulgated. Accordingly, third generation constitutions do not always translate into effective protection of third generation rights for Indigenous Peoples on the ground.

18 Tsegaye Regassa, *Making Legal Sense of Human Rights: The Judicial Role in Protecting Human Rights in Ethiopia*, *Mizan Law Review*, 3(2), pp. 288–330.

19 Oliver Ruppel, *Third-generation human rights and the protection of the environment in Namibia*, in *Human Rights and the Rule of Law in Namibia*. Eds. Horn N / Bösl A (Windhoek: Macmillan Publishers) (2008).

20 For instance, Namibia's Traditional Authorities Act (No. 5 of 2000) provides important sovereignty for so-called "traditional" communities and their role in protection of natural environmental resources in Namibia.

21 For example, in the context of Kenya, minority representation has been denuded by an unclear legal framework despite constitutional intent to promote inclusion of marginalized communities. See e.g. Korir Sing'Oei, Yash Ghai, Jill Ghai & Waikwa Wanyoike, *Taking diversity seriously: minorities and political participation in Kenya*. (Nairobi: Katiba Institute, Jan. 2013).

ii.b. Interaction of formal and customary laws

While formal legal frameworks tend to undermine and dilute collective rights, customary systems of dispute resolution, community governance, family law, and land management are still dominant in the lives of most African communities. This is particularly the case for African Indigenous Peoples. The recognition of customary law across Africa varies widely. Even in situations in which customary law is effectively recognized by the State, in practice it often will be recognized only to the extent that it manages affairs within the community or between community members. South Africa has developed a robust legislative system for recognition of customary law, yet it has found such recognition to be challenging. In 2010, for example, the Constitutional Court rejected the Communal Land Rights Act in its entirety.²² The act had been designed to provide enhanced security of tenure to communities in South Africa by vesting ownership in the community as a whole.

Accordingly, customary law has proven to be a double edged sword for African Indigenous communities. On the one hand it provides critically important access to dispute resolution for community members who have no access to formal court systems because of distance, user-fees, and language or cultural barriers. Moreover, customary systems of negotiation and peace building have been effectively used to mitigate inter-community conflict, including cross-border conflicts, in some countries.²³ Customary justice systems also perpetuate culture in communities that are under constant pressure to assimilate. On the other hand, Indigenous communities in Africa find that their systems of customary justice are under continual attack and regularly

22 *Tongoane and others v. Minister for Agriculture and Land Affairs and others.* (CCT100/09) [2010] ZACC 10; 2010 (6) SA 214 (CC); 2010 (8) BCLR 741 (CC) (11 May 2010).

23 See, e.g., Chopra, Tanja, *Peace versus justice in northern Kenya: Dialectics of state and community laws*, in Ghai, Yash, and Jill Cottrell, eds. Marginalized Communities and Access to Justice. Routledge, 2010; Laura A. Young and Korir Sing'Oei, Land, livelihoods and identity: Inter-community conflicts in East Africa. (London: Minority Rights Group International, 2011); Abraham Korir Sing'Oei, Customary Law and Conflict Resolution among Kenya's Pastoralist Communities, Indigenous Affairs. (Copenhagen: IWIGIA, Jan-Feb 2010).

are misconstrued. Attacks related to gender inequity and harmful practices are frequent from state institutions and the international human rights community. Harmful practices, such as trial by ordeal or corporal punishments have been banned, but often without providing viable and culturally valid alternatives.²⁴ The treatment of Indigenous women in African customary justice systems often is analyzed with little understanding of the diversity and nuance within these systems and a lack of understanding of loci of power for women in Indigenous cultures. While the dangers of patriarchy and inequality are very real for Indigenous women (as they are for all women), the potential for African women to effectively exploit customary systems with which they are intimately familiar and which have a proven ability to adapt throughout changing contexts often has been underestimated.²⁵ African Indigenous women live by, and challenge, customary law on a daily basis, continually pushing the boundaries of custom to change and recognize their rights in a changing world.

The clash of custom and formal laws creates significant challenges for Indigenous Peoples' access to justice. Indigenous communities also find themselves forced to interact with the formal or state legal system in many instances, in relation to land and natural resources disputes with the state, disputes with corporate bodies, and criminal prosecutions, for example. While the formal justice system may in some instances recognize certain aspects of custom, as a South African scholar points out, formal or "State" justice systems have been unable so far to accommodate customary law in its difference, in its otherness.²⁶ Attempting to fit dynamic, adaptive customary law systems into a box that can be contained within the legal reasoning of the formal system has often proven impossible. This can significantly hamper Indigenous Peoples' access to justice because legal results become arbitrary and unpredictable.

24 For example, in Liberia, transitioning away from a system that made regular use of trial by ordeal has been an ongoing challenge in the post-conflict period.

25 See, e.g., Laura A. Young, Challenges at the intersection of gender and ethnicity in Kenya. (London: Minority Rights Group International, 2012).

26 Wilmeine Wicomb, The Emancipatory Potential of Customary Law for the Rights of Women to Access Land, Indigenous Affairs. (Copenhagen: IWGIA, Jan-Feb 2010).

An effort to change these paradigms is ongoing in Uganda, for example, where a non-governmental organization is challenging the traditional notions of patriarchy in Indigenous customary law and also is attempting to make customary law more accessible when it intersects with the formal courts. In the Teso region of Uganda, the non-governmental Land and Equity Movement in Uganda (LEMU) builds upon Uganda's constitutional recognition of customary land and inheritance rights to enhance protection for women's tenure rights. The group worked closely with Iteso leaders over a period of years to document customary tenure rights and land management practices in Iteso clans. The result is a booklet that is available to community members, clan leaders, and to the Ugandan judiciary which is entitled *Principles and Practices to provide for rights over customary land, procedure for sale of land and to provide for other land-related and land incidental [sic] matters in Teso*. Designed to assist customary authorities and formal courts in making determinations about land conflicts, the *Principles and Practices* highlight the detailed ways in which Iteso regulate land holding, land use, and land transfers.

The *Principles and Practices* are based on a consultative community process and integrate gender equity provisions in a way that makes sense for Iteso culture. The *Principles and Practices* contain specific provisions about the rights of Iteso widows—some of the most marginalized members of African communities—for example:

“l) All widows whether living alone or with a male partner from within the clan become heads of their families upon the death of their husbands with full rights to manage her land and the land of her children who are minors.

m) The clan of the deceased husband shall appoint a man to protect the land rights of a widow from trespassers but the land rights of the widow shall not pass onto the officer appointed to protect the widow.”

A similar process of “restatement” of customary law is ongoing in Namibia, instigated not by an NGO but by a decision of the Namibian Council of Traditional Leaders.²⁷ The restatement project has multiple

27 George Mukundi Wachira, *Applying Indigenous Peoples' Customary Law in*

goals, including preserving customary practices for future generations as well as bringing the customary laws of various Namibian communities into alignment with human rights protections as specified in the Namibian Constitution. These types of efforts to enhance the recognition and understanding of customary principles will be critical to maintaining Indigenous Peoples' identity through customary law while enhancing their access to legal remedies.

ii.c. Judicial protection of rights of minorities

Like minorities around the globe, Indigenous Peoples in Africa have sought recourse in formal courts. However, despite positive judicial decisions, many African States have stubbornly refused to be bound by the declarations of their own courts. While known for their inefficiency and corruption, courts in Africa “have become the theatre for dramatizing the plight of Indigenous rights and the sheer scale of their destitution.”²⁸ The role of courts in protecting minority rights was aptly captured in the celebrated South African case of *State v Makwanyane and Machunu*, where the Court held that:

“The very reason for.... vesting the power of judicial review of all legislation in the courts was to protect the rights of minorities and others who cannot protect their rights adequately through the democratic process. Those who are entitled to claim this protection include the social outcasts and marginalized people of our society. It is only if there is a willingness to protect the worst and the weakest amongst us, that all of us can be secure that our own rights will be protected.”²⁹

An example from Kenya, where many Indigenous communities have attempted to litigate violations of their rights, demonstrates state

Order to Protect their Land Rights in Africa, Indigenous Affairs. (Copenhagen: IWGIA, Jan-Feb 2010).

28 Korir A Sing'Oei, *Indigenous People in Africa: A Quest Yet Unmet* in Hakima Abbas (ed) *Africa's Long Road to Rights: Reflections on the 20th Anniversary of the African Commission on Human and Peoples' Rights.* (2007) 36 (Fahamu - Oxford: London).

29 *State v Makwanyane and Machunu*, 1995 (3) SA 391 (CC).

failures to recognize judicial decisions on Indigenous rights. The Il Chamus (also known as the *Njemps*), are a Kenyan Indigenous People with a distinct history and language living around the shores of Lake Baringo. Before the High Court of Kenya, they argued that they were an Indigenous minority group and that a member of their community had never and could never represent them in parliament because the demarcation of the constituency boundaries in Baringo made them a perpetual minority.³⁰ Consequently, the Il Chamus contended that this demarcation violated their fundamental right to representation. The Constitutional bench³¹ declared:

“minorities of whatever time and shade are entitled to protection. And in the context of Constitution making it is to be remembered that the Constitution is being made for all, majorities and minorities alike and accordingly, the voice of all should be heard...what is called for in a society such as ours is a balance between majoritarian principle of one person one vote and the equally democratic dictates of minority accommodation in the democratic process...”

The Constitutional bench further held that:

- The Il Chamus are a unique cohesive homogenous and a cultural distinct minority being. “A group numerically inferior to the rest of the population of a state, and in a non-dominant position whose members—being nationals of the state—poses ethnic, religious or linguistic characteristics differing from those of the rest of the population and show, if only implicitly, a sense of solidarity, directed towards preserving their culture, traditions, religions and language.”³²
- The Il Chamus have the right to influence the formulation and implementation of public policy, and to be represented by

30 Kenya High Court Civil Application 305/2004 *Rangal Lemaiguran and Others v Attorney General and others* (Per J.G. Nyamu J. and M.J. Anyara Emukule J.).

31 Kenya at the time had no permanent constitutional court and used administrative powers granted to the Chief Justice to appoint a constitutional bench whenever an application of a constitutional nature was brought before the High Court.

32 The definition was proposed by the United Nations Special Rapporteur Francesco Capotorti of the United Nations Sub-Commission on Prevention of Discrimination and Protection of Minorities in the context of Article 27 of the International Covenant on Civil and Political Rights.

people belonging to the same social, cultural and economic context as themselves. The Electoral Commission of Kenya had a duty to protect minority interests—the principle of one-man one vote notwithstanding. It should not submerge minority groups in drawn boundaries.

- For a political system to be truly democratic, it has to allow minorities a voice of their own, to articulate their distinct concerns and seek redress and thereby lay a sure base for deliberative democracy. Participation is a lifeline of democracy and a clear constitutional recognition of a minority—to participate in the State's political process and to influence State Policies.
- The Il Chamus' rights to exist, be treated without discrimination, the preservation of their cultural identity, freedom of conscience, freedom of association and their participation in public life had been violated.

The Court then directed the Electoral Commission of Kenya to take into account all the requirements set out in section 42 of the then Constitution of Kenya at its next Boundary Review and in particular ensure adequate representation of sparsely- populated rural areas, population trends, and community of interest, including those of minorities especially the Il Chamus. Despite this judicial determination, more than five years later the Il Chamus have yet to enjoy the political recognition ordered by the court due to the Kenyan state's failure to abide by the judgment.

These concerns are not limited to East Africa. In Southern Africa, the Basarwa, a hunting gathering and mobile minority and Indigenous community resident within the Central Kalahari Game Reserve³³ sought a High Court declaration that their removal from the Reserve was unlawful and unconstitutional and the termination by the Botswana government of provision of water and other essential services within the Reserve amounted to a deprivation of the right to life under the

33 Similar in size to Belgium, the Reserve is home to a significant population of wildlife, including antelopes such as gemsbok, hartebeest, eland, giraffe, kudu and wildebeest and carnivores such as lion, leopard, cheetah and hyenas.

Botswana constitution and international law.³⁴ The court acknowledged that there were clear structural bases for the historical disadvantage of the community in the social, economic and political social strata:

“The language employed by the Colonial Government makes reference to the Basarwa and the Bakgalagadi as ‘little people’, ‘uncivilized’ and ‘wild’... The Colonial Government’s failure to carve out a ‘tribal territory’ for either group, in the same way that it carved out ‘tribal territories’ or ‘native reserves’ for some ethnic groups in the then Bechuanaland Protectorate.”³⁵

Accepting the Basarwa’s arguments, the court recognized their claims of discrimination and State failures:

“The Basarwa and to some extent the Bakgalagadi, belong to an ethnic group that is not socially and politically organised in the same manner as the majority of other Tswana speaking ethnic groups and the importance of this is that programmes and projects that have worked with other groups in the country will not necessarily work when simply cut and pasted to the Applicants’ situation.”³⁶

It therefore found “...that creation of the [Reserve] did not extinguish the ‘native title’ of the Bushmen to the [Reserve]...[and therefore] neither the declaration of the Ghanzi Crown land nor of CKGR extinguished the native rights of the Bushmen to [Reserve].”³⁷ While the State, in this case the Botswana government, “saw the economic-development potential, the health benefits and the educational opportunities to the children of the Applicants (Basarwa), of the relocations, [it] failed to see the cultural and social upheavals that could result.”³⁸ Like, their Il Chamus counterpart in Kenya, the decision of the court

34 Botswana High Court Miscellaneous Application No. 52 of 2002 *Roy Sesane and Anor v. The Attorney General of Botswana*. Per Dipotelo J., Dow J., and Phumaphi J. (Delivered on December 13, 2006).

35 Judgment of Dow J. at p. 165.

36 *Supra*, note 34, pp. 231–232.

37 *Supra*, note 34, p. 337.

38 *Supra*, note 34, p. 243.

has not only been ignored by the Botswana government, but has also been actively resisted.³⁹

iii. African regional human rights mechanisms

Given the failures of African States in many instances to effectively implement their own constitutions or to abide by the decisions of their own courts, African Indigenous Peoples have sought access to justice in other fora. The African regional human rights system, including the African Commission on Human and Peoples' Rights (African Commission) and the African Court, has made rapid strides to recognize and protect the unique collective rights of Indigenous Peoples. Although the African human rights system is a creation of African States through the African Union, the African human rights system's approach to Indigenous Peoples' rights has far outstripped the comfort level of many African governments.

The main African human rights treaty is the African Charter on Human and Peoples' Rights (African Charter).⁴⁰ The African Charter has been signed by 53 African countries and has been supplemented by protocols on the rights of women and on the rights of the African child. The African Charter is among the most progressive human rights instruments in the world because of its clear recognition of not only civil-political and social-economic rights, but also Peoples' rights.

iii.a. The African Commission

The African Commission was established as the monitoring and enforcement body for the African Charter. The Commission has both a promotional and protective mandate with regard to the rights protected in the Charter; it not only examines and educates about human

39 Hitchcock Robert & K. Rodney, *Tourism, Conservation, and Culture in the Kalahari Desert, Botswana*, Cultural Survival. 2010 at <http://www.culturalsurvival.org/ourpublications/csq/article>.

40 African Charter on Human and Peoples' Rights, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), entered into force 21 October 1986.

rights but receives complaints (communications) from individuals and organizations in relation to violations.⁴¹

During the past decade, the African Commission has made significant progress in interpreting and addressing the human rights situation of Indigenous Peoples in Africa. The African Commission's Working Group on Indigenous Populations/Communities (WGIP), established in 2001, has been the focal point for these efforts.⁴² Early on, the WGIP explored the place of Indigenous rights norms in the continent's human rights framework and worked to raise awareness about the human rights situation of Indigenous Peoples. The seminal Report of the African Commission's Working Group of Experts on Indigenous Populations/Communities⁴³ issued in 2005 highlighted the significant and widespread violations of Indigenous Peoples' collective rights, and raised the profile of communities that had previously been unknown or unrecognized as Indigenous Peoples.

One section of the WGIP's report specifically addresses denial of justice to Indigenous Peoples.⁴⁴ The report primarily focused on discriminatory treatment of Indigenous Peoples in the criminal justice systems of multiple African countries, still an important issue today. The report highlighted the common pattern across Africa of criminalizing Indigenous Peoples' attempts to access traditional territory from which they have been forcibly removed. This practice of arrests, harassment, denial of bail, and then prosecution of Indigenous Peoples who carry out their traditional practices on their traditional territory has been particularly prevalent in regard to hunter-gatherers, such as Batwa in Uganda and DRC, Ogiek in Kenya, and San in Botswana. For Indigenous pastoralists (many of whose communities were split by arbitrary borders during colonial map-drawing exercises) arrests and harassment on the basis of cross-border movement also was identified by the Report as a significant denial of justice concern.

41 *Id.*, art. 30. Complaints can be brought to the commission only after exhaustion of domestic remedies.

42 ACHPR Resolution on the Rights of Indigenous Peoples' Communities in Africa (Resolution 51), 6 November 2000.

43 Report of the African Commission's Working Group of Experts on Indigenous Populations/Communities, Adopted by the African Commission on Human and Peoples' Rights at its 28th ordinary session (2003), (published in 2005).

44 *Id.*, section 2.4.

Adoption and publication of the WGIP Report paved the way for the expansion of the mandate of the WGIP. The WGIP now gathers, requests, receives and exchanges information and communications from all relevant sources, including Governments, Indigenous populations and their communities and organizations on violations of their human rights and fundamental freedoms; it undertakes country visits to study the human rights situation of Indigenous populations/communities; it formulates recommendations and proposals on appropriate measures and activities to prevent and remedy violations of the human rights and fundamental freedoms of Indigenous populations/communities; and it cooperates with other international and regional human rights mechanisms, institutions and organizations.

Despite the WGIP not being an adjudicative mechanism, its role in raising awareness of the existence and rights of Indigenous Peoples in Africa has been extremely important for Indigenous Peoples' access to justice on the continent. Specifically, the 2005 WGIP Report laid the groundwork for adjudication of Indigenous Peoples' rights at the African Commission and at the African Court.

As described above, the African Commission's landmark 2010 decision in the *Endorois* communication⁴⁵ was a huge step forward for Indigenous Peoples' recognition on the continent. Apart from crafting clear indicators for Indigenousness in Africa, this decision recognized the validity of collectively held Indigenous ancestral lands as well as Indigenous communities' right to natural resources and self-determined development. As noted earlier, however, this decision has outstripped the national government's willingness and ability to take action on Indigenous Peoples' rights in Kenya. More than three years after the case was determined by the African Commission, the Kenyan government has not taken any concrete steps toward implementation of the Commission's recommendations despite continual advocacy by the Endorois community and their allies.

45 Communication No. 276/2003, *Centre for Minority Rights Development & Minority Rights Group International (on behalf of the Endorois community) v. Kenya* (2010).

iii.b. The African Court

The African Union (AU) adopted the Protocol to the African Charter on June 10, 1998 (the Protocol). The Protocol establishes the African Court on Human and Peoples' Rights (African Court) to "reinforce and complement the functions of the African Commission on Human and Peoples Rights."⁴⁶ Unlike the African Commission which issues recommendations to States, the African Court issues binding judgments. The Protocol also states that "the jurisdiction of the Court shall extend to all cases and disputes submitted to it concerning the interpretation and application of the African Charter, this Protocol and any other relevant Human Rights instrument ratified by the States concerned."⁴⁷ Accordingly, the African Court has broad discretion to receive submissions, particularly when governments fail to comply with the recommendations of the African Commission. Moreover, the African Court will apply the African Charter as well as other treaties ratified by the state concerned when determining a dispute.⁴⁸ These developments are important for Indigenous Peoples whose rights have been articulated both in the African Charter and in several other African Union treaties such as the Convention for the Protection and Assistance of Internally Displaced Persons in Africa (Kampala Convention),⁴⁹ the Convention on the Conservation of Nature and Natural Resources,⁵⁰ and the Protocol to the African Charter on the Rights of Women in Africa.⁵¹ The African Court's sources of law also include United Nations treaties ratified by the African state, such as the International Covenant on Civil and Political Rights and the International Convention on the Elimination of of All Forms of Racial Discrimination, both of which have been interpreted in favor of the protection of Indigenous rights.

46 Protocol to the African Charter on Human and People's Rights on the Establishment of an African Court on Human and Peoples' Rights, June 9, 1998, OAU Doc. OAU/ LEG/EXP/AFCHPR/PROT (III), at Preamble.

47 *Id.*, art. 3.

48 *Id.*, art. 7.

49 Adopted by Special Session of the African Union, 22 October 2009.

50 Adopted at the Second Ordinary Session of the African Union, 11 July 2003.

51 Adopted at the Second Ordinary Session of the African Union, 11 July 2003.

The African Court is in the very early stages of its operation. One of the first cases it accepted was an Indigenous rights case in 2012. The case relates to the Ogiek Indigenous hunter-gatherers of the Mau Forest in Kenya. Like many forest dwelling Indigenous Peoples, the Ogiek have been displaced in waves of evictions over the decades, in the name of forest conservation. International efforts to create a system of carbon trading and carbon credits have accelerated the process. Conservation of the forest, however, has not been the outcome of Ogiek evictions. On the contrary, huge tracts of forest have been settled by non-Ogiek communities with the consent of the government of Kenya and logging of the Mau Forest continues to date. Ogiek legal cases in the Kenyan courts languished for decades without resolution, and in 2009 the community brought a communication to the African Commission. The Commission promptly issued provisional measures, enjoining the Kenyan government from further evictions of the Ogiek or from further destruction or settlement in the Mau Forest. When the Kenyan government violated the provisional measures put in place by the Commission, the Commission referred the case to the African Court.

The Ogiek case at the African Court is set for trial in 2014. It is a pivotal case related to access to justice for Indigenous Peoples on the continent. The case is primed to develop precedent on a number of issues, such as the right to recognition as an Indigenous community, the right to own and manage land, territory and resources, the right to development, and principles related to the intersection of indigenous rights and environmental conservation.

Moreover, assuming that the Ogiek are successful in proving at least some of their claims, the African Court's judgment in this case will be a major test for the African human rights system in general. The case will provide a platform to assess whether an African State will comply with its obligations under the protocol that established the Court, namely to abide by the judgments and orders of the Court. Already, the Kenyan government has failed to comply with provisional orders issued by the Court which reiterated the provisional measures issued by the Commission. The behavior of the Kenyan State and the Court's response will be an important benchmark by which to measure the commitment of African governments to the rule of law and access to justice.

iv. Transitional justice mechanisms

The nexus between transitional justice in Africa and Indigenous Peoples in countries undergoing transition has not been extensively explored, but it is another important platform through which Indigenous groups are seeking redress for historical and contemporary wrongs in Africa. Transitional justice is a victim-centered field of practice and inquiry. The rights of victims, including the right to truth, the right to justice, the right to reparation, and the right to guarantees of non-repetition, form the guiding principles of transitional justice efforts. Tools of transitional justice include specialized prosecutions, truth seeking, amnesty, systems reform, vetting, lustration, memorials, official apologies, and reparations.⁵² In the past decades, transitional justice has moved from the “exception to the norm to become a paradigm of rule of law.”⁵³

In the African context, transitional justice in the past three decades has emerged as a full-fledged movement mirroring the field’s global dominance. Truth commissions and post-transition prosecutions have been implemented across Africa.⁵⁴ Truth commissions in particular have provided an important context in which to consider how Indigenous Peoples can gain redress for violations of their rights. The treatment of Indigenous Peoples in post-conflict transitional justice processes reflects a continuum of the way in which governments have approached the notion of Indigeneness in Africa. The transitional justice processes in Rwanda, South Africa, Kenya, and Morocco provide useful examples.

In Rwanda and South Africa, the transitional justice processes led to a denial of indigenous identity in the service of other political goals. After the genocide in that country, Rwanda embarked on multiple transitional justice initiatives, including an international criminal tribunal, the

52 L Bickford, *Transitional Justice*, in *The Encyclopedia of Genocide and Crimes Against Humanity*. 2004, 1045–47.

53 R Teitel, *Transitional Justice Genealogy*, *Harvard Human Rights Journal*, vol. 16, 2003, p. 71.

54 For information about the multiple truth commissions across Africa visit the United States Institute for Peace’s Margarita S. Studemeister Truth Commissions Digital Collection at <http://www.usip.org/publications/truth-commission-digital-collection>.

local *gacaca* justice mechanism, a truth and reconciliation commission which is now a permanent body, and extensive memorialization through museums and memorial sites around the country. Marginalized for centuries, the traditionally forest-dwelling Batwa have largely been left out of the dominant Hutu-Tutsi narrative of the genocide in Rwanda. The dominant narrative created out of Rwanda's transition led to an official policy of strict non-discrimination, but in practice went to the extreme of absolute denial of differential identity based on ethnicity. Batwa expressed strong concerns about how the local *gacaca* prosecutorial mechanism, put in place to deal with genocide perpetrators, would protect minority rights; there were no Batwa elected judges for the *gacaca* for example.⁵⁵ Indeed, a New Partnership for African Development (NEPAD) African Peer Review Mechanism report for Rwanda found that the government's actions with respect to the Batwa during the transitional justice process were based on "a policy of assimilation...[and] a desire to obliterate distinctive identities and to integrate all into some mainstream socio-economic fabric of the country."⁵⁶

The South African transition from apartheid to democracy was accompanied by multiple transitional justice measures, including a new constitution, institutional reforms, and a truth commission that operated from 1995–2002 (the latter four years being primarily amnesty application hearings). Despite the multitude of literature related to transitional justice in South Africa, especially the truth commission, there is hardly a mention of South Africa's first inhabitants, the Indigenous Khoe-San.⁵⁷ As with other truth commissions, the "terms and categories the TRC adopted served to organize, summon and exclude particular identities."⁵⁸ The TRC used the term "indigenous" in its report as a counterpoint to the category of white settlers,

55 *Twa Community Concerned Over Gacaca System*, *IRIN News*, June 6, 2001, <http://www.irinnews.org/report.aspx?reportid=21981>.

56 APRM, *Country Review Report of the Republic of Rwanda*, June 2006, para. 153.

57 The Khoe-San are recognized by multiple authorities as the first inhabitants and the self-identified Indigenous Peoples of South Africa. See, e.g., University of Pretoria Centre for Human Rights, *South Africa : constitutional, legislative and administrative provisions concerning indigenous Peoples*. (Geneva: ILO, 2009), 2–3.

58 Fullard & Rousseau 2010, *Truth Telling, Identities, and Power in South Africa and Guatemala*, in *Identities in Transition: Challenges for Transitional Justice in Divided Societies*, ed. Paige Arthur (Leiden: Cambridge University Press, 2010), p. 72.

setting up a dichotomous narrative between state “authorities” and an “indigenous liberation movement.”⁵⁹ This dichotomy appropriated Indigenous identity away from the Khoe-San in the service of other political interests in the post-apartheid era, specifically countering the white-settler narrative that Bantu Africans were migrants to South Africa. Moreover, the TRC interpreted its mandate in a manner that excluded many types of human rights violations that disproportionately impact Indigenous Peoples. The TRC stated that despite expectations to the contrary the TRC would not investigate “forced removals of people from their land” and thus victims of those types of violations would be excluded from reparations.⁶⁰ Indeed, the UN Special Rapporteur on the situation of human rights and fundamental freedoms of Indigenous Peoples noted in a 2005 report that Indigenous Peoples’ representatives in South Africa complained “that they were not included in the negotiations leading to the democratic transition, nor in the new national constitution nor in the Truth and Reconciliation process.”⁶¹ In these contexts, transitional justice mechanisms did little to enhance Indigenous Peoples’ access to justice.

In contrast, however, truth commissions elsewhere have taken more account of the rights of Indigenous Peoples. The transitional justice mechanisms operating in Kenya, in response to post-election violence in 2007–08, included a new constitution that has mandated an extensive slate of institutional reforms, a truth commission, memorialization efforts, and an international criminal court prosecution. The Truth, Justice and Reconciliation Commission (TJRC) provided the most explicit forum for the expression of Indigenous issues. The mandate of the Kenyan TJRC included a requirement that the commission “inquire into and establish the reality or otherwise of perceived economic marginalization of communities and make recommendations on how to address the marginalization.”⁶² Moreover, the TJRC was mandated to “inquire into the root causes of ethnic tensions and

59 Truth and Reconciliation Commission of South Africa, Final Report, vol. II (1998), para. 74.

60 *Ibid.*, para. 48–49.

61 Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, Rodolfo Stavenhagen, Mission to South Africa, UN Doc. E/CN.4/2006/78/Add.2, December 15, 2005, para. 32.

62 The Truth, Justice and Reconciliation Act, 2008, art. 6(p).

make recommendations on the promotion of healing, reconciliation and co-existence among ethnic communities.”⁶³ The TJRC interpreted this mandate in a way that allowed for significant interaction with Indigenous Peoples across Kenya.

The TJRC conducted outreach in Indigenous communities, hired Indigenous staff members, and in public hearings heard a substantial number of grievances from Indigenous Peoples. Leaders of Indigenous groups appeared on behalf of their communities to present their claims relative to ancestral lands, to discuss the roots of conflicts with neighbouring communities, and to highlight human rights violations by the State and corporations. Indigenous Peoples appeared before the TJRC in traditional dress, spoke in their community’s language, and specifically distinguished themselves from other ethnic communities who also testified to marginalization but who were not the “Indigenous” inhabitants of the land in pre-colonial days. The TJRC Final Report highlights the extensive concerns of Indigenous communities across Kenya, including discrimination, marginalization, and insecurity. The final report also highlights the *Endorois* decision as well as the *Il Chamus* political representation case and recommends that the State take action to urgently implement those decisions. The government is currently considering the process of implementation of the report.

In Morocco, although the truth commission did not explicitly have a mandate to deal with Indigenous Peoples’ concerns, the process of the ongoing transition in that country has been driven in substantial part by the demands of the Imazighen (Berbers), the Indigenous inhabitants of the Maghreb. Morocco’s truth commission, known as the IER (Instance Équité et Réconciliation), operated from December 2004 until November 2005. A member of the indigenous Berber community was appointed to lead the IER as its president, along with 16 other commission members.⁶⁴ The IER’s mandate stretched from 1956 to 1999 and was focused on establishing the truth about past violations, providing reparations to victims and families, and recommending measures aimed to prevent future abuses. However, the violations that the IER was mandated to address included only arbitrary detention

63 *Ibid.*, art.6(s).

64 John Hursh, *Moving toward Democracy in Morocco?*, ASPJ AFRICA & FRANCOPHONIE. 2010, pp. 64–78.

and disappearances. While many in Moroccan civil society were disappointed with the limited mandate of the IER and its narrow results, the advocacy and political process leading to its creation included several gains for Indigenous identity such as enhanced language and cultural rights. The Kenyan and Moroccan examples demonstrate that the recognition of Indigenous identity can be an important factor in peaceful transition and, indeed, that African Indigenous Peoples can be active participants and leaders in transitional justice processes. However, from an access to justice perspective, it remains to be seen—as with the implementation of progressive constitutions—how far implementation of truth commission reports and recommendations will substantively impact the justice concerns of Indigenous Peoples in Africa.

Conclusion

In Africa, the rights of Indigenous Peoples are increasingly being recognized in national constitutional frameworks, in some national laws, and in judicial decisions. However, access to justice remains a substantial challenge for Indigenous Peoples. Although Indigenous Peoples may be recognized on a formal legal level, substantive recognition continues to lag behind official law and policy. African regional human rights mechanisms have been progressive in addressing the rights of Indigenous Peoples, such as in the Endorois decision, but the problem of African States abiding by the decisions of these human rights mechanisms remains. Moreover, there have been substantial challenges in African States abiding by the judicial decisions of their own national courts when those decisions have supported the rights of Indigenous communities. For justice concerns within communities, custom remains a significant route for access to justice, though these systems are regularly under threat and have not been effectively integrated into national systems. The problem of access to justice is often a problem of political will and is intimately linked to the history of the concept of Indigenousness in Africa. African States remain reluctant to effectively address the concerns and claims of Indigenous Peoples and, accordingly, access to justice remains elusive.