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PROTECTION OF INDIGENOUS PEOPLES IN AFRICA: THE CASE OF THE BATWA IN RWANDA

A research paper submitted in partial fulfilment of the requirements of the LLM degree in International and Human Rights Law

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DECLARATION

I declare that **'*Protection of indigenous peoples in Africa: The case of the Batwa in Rwanda'*** is my own work, that it has not been submitted for any degree or examination in any other university, and that all the sources I have used or quoted have been indicated and acknowledged by complete references.

Full name: Venant Nkurunziza

Date.....

Signed……..

DEDICATION

To all indigenous peoples

To the Batwa in Rwanda

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LIST OF ABBREVIATIONS

AU	African Union
ACHPR	African Commission on Human and Peoples' Rights
ADIGMAR	Association for the Integrated Development of the Marginalized Groups in Rwanda
AREDETWA	Association pour le Relèvement Démocratique des Twa
CAURWA	Communaté des Autochtnes Rwandais
CBD	Convention on Biological Diversity
CERD	Convention on the Elimination of all forms of Racial Discrimination
COPORWA	Communauté des Potiers Rwandais
DRC	Democratic Republic of Congo
HRC	Human Rights Committee
IACHR	Inter-American Commission on Human Rights
IAITPTF	International Alliance of Indigenous and Tribal Peoples of the Tropical Forests
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICJ	International Court of Justice
IJR	Institute for Justice and Reconciliation
ILM	International Legal Materials
ILO	International Labour Organization
IRDP	Institute of Research and Dialogue for Peace
IRIN	Integrated Regional Information Networks

IWGIA	International Work Group for Indigenous Affairs
MINALOC	Ministry of Local Government and social affairs
MRG	Minority Rights Group International
NEPAD	New Partnership for Africa's Development
NGO	Non-governmental Organisation
OAU	Organisation of African Unity
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNESCO	United Nations Educational, Scientific and Cultural Organisation
UNDP	United Nations Development Programme
UNDRIP	United Nations Declaration of the Rights of Indigenous Peoples
UNPO	Unrepresented Nations and Peoples Organisations
WGIPC	Working Group on Indigenous Populations/Communities

KEYWORDS

Indigenous peoples

Minorities

Peoples

Marginalisation

Discrimination

Universal rights

Specific protections

Collective rights

The Batwa

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CHAPTER ONE: INTRODUCTION

1. BACKGROUND

Indigenous peoples are spread across the world, living traditional lives on their traditional lands. They have suffered from various historic injustices, which prevent them from exercising their rights under international law.[1] While the degree of experience may differ from country to country, the critical situation of indigenous peoples is the same across Africa. Many are threatened with serious human rights violations. In Africa, the highly discriminated and marginalised indigenous peoples live in the equatorial forests of Central Africa and Great Lakes Region. [2] The marginalisation of these peoples, both before and after colonial administration, is well documented; similar experiences have been recorded across the region in DRC, Burundi and Uganda.[3]

For several hundred years, the Batwa have been a very small minority in central Africa. [4] This small ethnic group is part of a wider group of the Central Africa equatorial forest, who lived there long before other African peoples inhabited the region; and they are frequently referred to as '*autochtones',* 'first peoples', or 'indigenous peoples'. [5] In Rwanda, the Batwa are treated by their neighbours as '*Abasangwabutaka',*[6] which means 'first inhabitants' in home language. The issue is still problematic, however, mainly owing to the fact that the government refuses to recognise their indigenous status.

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[1] The preamble of the United Nations Declaration of the Rights of Indigenous Peoples (UNDRIP), UN Doc A/61/L.67 (2007) para 6.

[2] IWGIA 'Indigenous peoples in Rwanda' at *http://www.iwgia.org/regions/africa/rwanda* (accessed 05 September 2012).

[3] Lewis J *The Batwa pygmies of the Great Lakes Region* (2000).

[4] Lewis J (2000).

[5] Jackson D 'Twa women, Twa rights in the Great Lakes Region of Africa' (2003) 36.

[6] Jackson D (2003) 36.

2. PROBLEM STATEMENT

The problem of indigenous peoples is still controversial in Africa because most African governments maintain that 'all Africans are indigenous to Africa and that no particular group can claim indigenous status'.[7] This is also the position of the government of Rwanda.[8] It is important to examine the reasons behind this position of African governments on the issue of indigenous peoples. It may be argued that one of the symptoms is the failure to ratify the ILO Convention No169[9], which remains the only internationally binding instrument specifically designed to protect the rights of indigenous peoples. Nevertheless, African States including Rwanda are parties to various other international and regional legal instruments that are also applicable to indigenous peoples.[10] Particularly, the African Charter on Human and Peoples' Rights (African Charter) is the most appropriate treaty ratified by Rwanda which has the potential to provide such effective protection to indigenous peoples. Lack of recognition and protection of indigenous peoples is regarded as discriminatory treatment which violates most of this and other instruments.

In view of the situation described above, one may ask the following questions:

- Is the Batwa of Rwanda an indigenous people in legal terms?
- If Rwanda government continues to refuse recognition of the Batwa as an indigenous people, are they entitled to legal protection under international law?
- What measures can be taken to ensure that the Batwa's rights as indigenous people are upheld as guaranteed in international and regional instruments?

To answer all these questions, it is important to examine the nature of indigenous peoples in legal terms and the extent to which they are protected by modern international law. The issue that will be

[7] African Commission on Human and Peoples' Rights (ACHPR), *Indigenous Peoples in Africa: The Forgotten People? The African Commission's work on Indigenous Peoples in Africa* (2006) 11- 12.

[8] Viljoen F 'Reflections on the legal protection of indigenous peoples' rights in Africa' in Solomon D (ed), *Perspectives on the rights of minorities and indigenous peoples in Africa* (2010) 90.

[9] The Convention Concerning Indigenous and Tribal Peoples in Independent Countries (ILO Convention No 169), 1989, 1650 U.N.T.S. 383.

[10] These instruments include UDHR, ICCPR, ICESCR, CERD, CRC, CEDAW, CBD, UNDRIP and the African Charter on Human and Peoples' Rights (African Charter), 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982).

addressed, therefore, is whether international and regional instruments relevant to indigenous peoples or minority' s rights are sufficient for the protection of African indigenous peoples, including the Batwa in Rwanda.

3. OBJECTIVE

The protection of indigenous peoples' rights is based on the fundamental premise of human rights law that 'all human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood'.[11] The objective of this study is to suggest possible legal recognition and effective protection of the Batwa.

4. METHODOLOGY

The methodology for this research is essentially secondary and qualitative. This method requires the analyses of materials from the research developed upon the available literature on human rights. The primary source is literary works, which include books, articles, papers, reports and jurisprudence, etc. Apart from the library, the methodology includes the use of internet sources.

5. STRUCTURE

The study is divided in four chapters. Chapter two adopts analytical approach, commencing with clarification of the meaning of the concept of indigenous peoples and identification of the content of their rights. Even if this chapter specifically focuses on the protection of indigenous peoples with specific rights according to their different needs, it shows also possibility of general protections of indigenous peoples as any other human beings. Chapter three focuses on the protection of the Batwa in Rwanda. The chapter shows the possible legal and specific protections of their specific rights as indigenous people. Chapter four concludes and gives some effective recommendations to the problem of indigenous peoples that are facing the Batwa.

[11] Article 1 of the Universal Declaration of Human Rights (UDHR), UN GA Resolution 217 A (III) (1948).

CHAPTER TWO: INTERNATIONAL PROTECTION OF INDIGENOUS PEOPLES

The international recognition of indigenous peoples has taken a very long time and still faces some challenges. In most parts of the world, indigenous peoples are actively seeking recognition of their identities and protection of their rights. International consensus is yet to be achieved on which communities and peoples are recognised as indigenous peoples. This is the dilemma faced by many indigenous peoples throughout Africa. However, African states have been reluctant to acknowledge the existence of indigenous peoples in their territories. This chapter analyses the concept of indigenous peoples and the protection they are afforded under international law. The chapter commences with an introduction of the concept of indigenous peoples. The chapter then discusses the protection of indigenous peoples, focusing on both general and specific rights guaranteed to them. Finally, a brief conclusion is provided.

1. THE CONCEPT OF INDIGENOUS PEOPLES: AN INTRODUCTION

The aim of this section is to examine the concept of indigenous peoples. The concept of indigenous peoples is further complicated by the blurred line that exists between indigenous peoples and minorities.

1.1. Indigenous peoples

Considerable debate has been devoted to the definition of indigenous peoples. This is not surprising as a comprehensive and inclusive definition of indigenous peoples is important for the establishment of a truly international regime that provides for the recognition and protection of indigenous peoples' rights.

Let us begin with the etymological meaning of the term 'indigenous'. This word derives from the Latin word *indigena,* which is comprised of two words, *indi*, meaning 'within', and *gen* or *genere,* meaning 'root'.[12] Accordingly, the term 'indigenous' refers to be 'born in', 'native' or 'aborigine'.[13] The term indigenous may also mean the one born in a country, or inherent, innate, originating from or produced naturally in a country or region, in contrast to 'foreign' or 'brought in'.

[12] *Longman dictionary of contemporary English* (1995) 724.

[13] Gupta A *Human Rights of Indigenous Peoples* (2005) 94.

The most common description of indigenous peoples was provided by Martínez-Cobo, the UN Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities, who formulated a working definition, highlighting several important characteristics of indigenous peoples. Martínez Cobo's seminal study was an important milestone in the relationship between indigenous peoples and international law. It was the first time since the establishment of the UN that a commitment was made to address the problem of discrimination against indigenous peoples.

Although international law is yet to provide a legal definition for indigenous peoples, Martínez Cobo's definition was accepted by an international gathering of indigenous peoples[14] and remains authoritative to date.[15] According to Martínez Cobo,

> *[i]ndigenous 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 on 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 system.*[16]

The following four elements can be derived from Martínez Cobo's definition of indigenous peoples. First, priority in time; second, willingness to preserve, develop and perpetuation of cultural uniqueness; third, self-identification as indigenous peoples; and fourth, the experience of subjugation, marginalization, dispossession, exclusion, and discrimination by the dominant population in a society.[17]

The ILO Conventions also provide some insight into the meaning of the term indigenous. However, these definitions have not been consistent. The first specific ILO Convention No107 did not

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[14] Mc Neish J Eversole R *Indigenous peoples and poverty: An international perspective* (2005)4.

[15] Tennant C 'Indigenous peoples, international institutions, and the international legal literature from 1945-1993, (1994) 16 *Human Rights Quarterly* 1.

[16] Martinez Cobo JR *Study on the problem of discrimination against indigenous populations* (1984) paras 196-197.

[17] Yousef TJ 'Towards participatory equality: protecting minority rights under international law' (2008) 41 (3) *Israel Law Review* 659.

adequately define indigenous peoples. In this convention, indigenous and tribal population groups are both referred as 'tribal or semi-tribal' populations. In contrast, Article 1 (1) (b) of ILO Convention No.169 identifies indigenous peoples as being:

> *[P]eoples in independent countries who are regarded as indigenous on account of their descent from populations which inhabited the country, or a geographical region to which the country belongs, at the time of conquest or colonization or the establishment of present states boundaries and who, irrespective of their legal status, retain some or all of their own social, economic, cultural and political institutions.*

Even then, the ILO Convention No 169 does not provide a strict definition to indigenous peoples. However, a combination of the elements outlined in Article 1(1) (b) of the Convention, which constitute the objective criteria, and the principle of self-identification, underlined in Article 1(2) of the said convention, provide useful elements in defining indigenous peoples. The following aspects underpin the foregoing ILO Convention's statement of coverage of indigenous peoples:[18]

a. Living in historical continuity in a certain area, or before others "invaded" or came to the area. e.g. they are pre-conquest/colonization societies;
b. Territorial connection with traditional life styles;
c. Culture and way of life different from the other segments of the national population, (e.g. in their ways of making a living, language, customs, etc.);
d. Own socio-economical organization and political institutions;

The United Nations Declaration of the Rights of Indigenous Peoples (UNDRIP) does not define the term 'indigenous'. It simply identifies indigenous peoples as being the beneficiaries of the rights contained in the Declaration.[19] However, scholars, such as Martin Scheinin,[20] have proposed elements, based on the Declaration, that are critical to the understanding of indigenous peoples. These include:

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[18] Lee S & Graciela J & et al. 'ILO Convention No169: A manual Geneva, International Labour Office' (2003) 8.

[19] The UN Document A/61/L.67 12 September 2007.

[20] Scheinin M 'What are indigenous peoples' in Ghanea N & Xanthaki A (eds) *Minorities, peoples and self-determination* (2005) 3

a. Distinctiveness in the sense of being different and wanting to be different. Indigenous peoples consider themselves different, and to be respected as such;[21]
b. Being first in their geographic area is not a condition *sine qua non,* [22] but living continually on their traditional lands, at least in relation to the present dominant population was provided;[23]
c. Dispossession of lands, territories and resources through colonization or other comparable events in the past, causing today a denial of human rights or other forms of injustice;[24]
d. Retain their distinct political, economic, social and cultural institutions;[25]
e. Non dominant position. In respect of the internationally recognized state that today exercises sovereignty in the area where their 'lands' are located, indigenous peoples can be said to be in a minority situation in relation to the dominant population.[26]

From the foregoing discussion, it is apparent that the understanding of indigenous peoples under both the Convention No 169 and the UNDRIP are based on Martínez-Cobo's definition. However, Martínez-Cobo's definition has attracted criticism in Africa.[27] This definition makes all Africans indigenous, without any need for extra protection for any particular group, and regardless of whether or not they had been born there or not. This meaning is quite similar to the colonial meaning of the term indigenous, which was applied to all peoples found in colonised territories.

It is still not clear how the concept of indigenous peoples is understood in Africa. The ACHPR, through Working Group on Indigenous Populations/Communities (WGIPC), has recognised the above challenge and has recommended indicators that can be used to define indigenous peoples in Africa. These are:[28]

a. The occupation and use of a specific territory;

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[21] Para 2 of the preamble of the UNDRIP.

[22] Art 2 & para 4 of the preamble of the UNDRIP.

[23] Arts 25-27 of the UNDRIP.

[24] Arts 10, 28 to 30 & para 6 of the preamble of the UNDRIP.

[25] Art 5 & Para 9-10 of preamble of the UNDRIP.

[26] Para 6 of the preamble of the UNDRIP. See also Makkonen T *Identity, difference and otherness: The concepts of people, indigenous people and minority in international law*, 2000.

[27] UNDRIP, Assembly/AU/Dec141 (VII), 8 Session, January 2007.

[28] *Final Report of the African Commission's WGIPC* (2005).

b. Self-identification as a distinct peoples, as well as recognition by other groups;
c. The voluntary perpetuation of cultural distinctiveness; and
d. Experience of subjugation, dispossession, exclusion marginalisation or discrimination.

The ACHPR has also been given an opportunity to develop jurisprudence on the issue through the landmark case of the *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v. Kenya* (Endorois case).[29] The pastoralist Endorois community, who self-identify as indigenous, claimed a breach of their collective rights as peoples.[30] By relying on the above criteria accepted by the ACHPR/WGIPC, the Commission highlighted a certain number of criteria for determining whether the Endorois community can be regarded as peoples and attained indigenous status. The Commission indicated, *inter alia*, that self-identification as both 'indigenous' and as 'peoples', the reality of durable relationship with their land, racial or ethnicity identity, cultural and linguistic unity, religion and ideological affinities are important in identifying indigenous peoples.[31]

The Commission emphasized that the term indigenous should not be intended as 'first inhabitant' of a territory exclusively because all Africans would then be indigenous.[32] Besides, 'if the concept of indigenous is exclusively linked with a colonial situation, it leaves us without a suitable concept for analysing internal structural relationships of inequality that have persisted after liberation from colonial dominance'.[33]This approach is in line with the position taken by the Inter-American Commission on Human Rights (IACHR), which has extended its existing jurisprudence on indigenous

[29] Ashamu E 'Centre for minority rights development (Kenya) and minority rights group international on behalf of Endorois Welfare Council v Kenya 'A landmark decision from the African commission' (2011) 55 *Journal of African Law* 2.

[30] ACHPR *Consideration of reports submitted by states parties under the terms of Article 62 of the African Charter, concluding observations and recommendations on the 9th and 10th Periodic Reports of the Republic of Rwanda*, 47th Ordinary Session of the ACHPR (12 -26 May 2010), Banjul, (2010) para 29-30.

[30] ACHPR (2010) paras 156-157. See also *Endorois* case, para 162.

[31] In this case, the Commission affirmed that Kenya had violated the rights of the Endorois indigenous peoples as provided under African Charter. The Commission recommended that the Respondent state restitutes Endorois ancestral land and protect their rights as indigenous peoples. See Endorois case, paras 150-157&162.

[32] The AWGIPC Report (2003) 92.

[33] The AWGIPC Report (2003) 92.

peoples' rights to include some Afro-indigenous communities, who were resettled in Suriname only in the eighteenth century in context of the slave trade.[34]

1.2. Minorities

An attempt to clarify the term 'indigenous peoples' would not be complete without indicating the similarities and differences it shares with the term it is often confused with, namely 'minorities'. Despite various references to minorities and indigenous peoples in international instruments, both concepts lack a universally agreed, legally binding definition. The reason for this lacuna, at least, on the part of minorities may lay in the fact that no definition would possibly address all minority communities that exist.[35] The definition could also be used by states as an excuse to neglect potentially contentious minority issues by claiming that communities concerned do not qualify as 'minority'.[36]

The ICCPR does not make any reference to indigenous peoples but provides provisions on the protection of minority rights. Article 27 of the Covenant states that:

> *[I]n those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language.'*

The interpretation of this provision with regard to indigenous peoples developed through the communications brought before the HRC. Despite the clear connotation of the Article that it applies to minority protection with regard to the ethnic, religious and linguistic rights, the HRC interpreted the Article to protect the rights belonging to the indigenous peoples as well. The interpretation of Article 27 of the Covenant to include indigenous peoples is consistent with the broad understanding of minorities. This interpretation is relevant for the protection of indigenous peoples, who also qualify as

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[34] *Moiwana Community v Suriname*, IACHR, (ser. C) No. 124 at 102 (2005). See also *Saramaka people v Suriname*, IACHR, (ser. C) N° 172 at 84, 96 (2007).

[35] Rehman J *The Weaknesses in the international protection of minority rights* (2000)14. See also Capotorti F *Study on the rights of persons belonging to ethnic, religious and linguistic minorities* (1991) 5.

[36] Geldenhuys D & Rossouw J *The International Protection of Minority Rights* (2001) 3-4.

minorities. It should be noted that although indigenous peoples may be classified under minorities, this is not always the case.[37]

Francesco Capotorti, the Special Rapporteur of the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities in 1979, proposed the following definition of a minority in the context of Article 27of the ICCPR:

> *A group numerically inferior to the rest of the population of a State, in a non-dominant position, whose members - being nationals of the State - possess ethnic, religious or linguistic characteristics differing from those of the rest of the population and show, if only implicitly, a sense of solidarity, directed towards preserving their culture, traditions, religion or language.*[38]

The definitions and characteristics of the concept of minorities are similar to those of indigenous peoples. There are, however, differences between the two concepts. The similarities include having a separate cultural, religious and linguistic identity, being non-dominant and having the wish to keep that separate identity.[39] On the other hand, the differences lie in the requirement of indigenous peoples retaining their own social and economic identities. Then, regardless of their legal status, indigenous peoples must be regulated by their own customs, traditions and the special relationship to their ancestral lands. These are far broader than ordinary minority rights.[40]

Furthermore, indigenous peoples themselves tend to emphasize that they are not minorities. This is mostly due to the fact that the former claim that their rights are stronger and more detailed than the latter.[41] While minority rights are solely individual rights that can be exercised in community with other members, indigenous rights include rights to be exercised by the group itself.[42]

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[37] General Comment No 23 HRC, Article 27, 50 Session, 1994, UN Doc HRI/GEN/1/Rev.1 at 38 (1994). See also Mukundi GW *Vindicating indigenous peoples' land rights in Kenya*, (2008) 88-89.

[38] Capotorti F (1991) 98.

[39] Kristin H *Minorities, International Protection* (2011) 17.

[40] Yoram DMT *The Protection of Minorities and Human Rights* (1991) 16.

[41] Kristin H (2011) 18.

[42] Sedletzki V *Fulfilling the right to education for minority and indigenous children: Where are we in international legal standards? state of the world's minorities and indigenous peoples* (2009) 47.

2. PROTECTION OF INDIGENOUS PEOPLES

Once we identify indigenous peoples, the next task is to determine the nature and extent of protection afforded to them. This protection must comply with both the generally accepted standards of human rights law and also with specific standards that particularly address the rights of indigenous peoples. Indigenous peoples should benefit from both general and specific protections.

2.1. Universal standards

Individuals belonging to indigenous peoples enjoy all human rights and fundamental freedoms as does everyone else. These rights are available to all individuals, including individuals members of indigenous community. These fundamental rights are inalienable and inherent human rights that every human being has from birth regardless of any distinction.[43] Equality *de jure* and *de facto* is, thus, set out as 'a governing principle of law and society'.[44] This principle has resulted into the twin principles of equality and non-discrimination, which also form part of the core claims of indigenous peoples all over the world.

In addition, individuals members of indigenous community are entitled to the rights provided by the Universal Declaration of Human Rights (UDHR), including the right to life, the rights to freedom of expression, thought, conscience and religion, the rights to free movement, as well as rights to liberty, health, food, education, housing, social security and the rights to work. These rights constitute the basic standard of protection of indigenous peoples. The protection of individuals belonging to indigenous communities can also be found in major international human rights treaties. These treaties provide a framework, on the basis of which, individuals members of indigenous community can seek protection against prejudice, neglect and marginalization.[45] The provisions of CERD are more specific.

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[43] Tomie M & Swepston L 'Indigenous and Tribal Peoples: A Guide to ILO Convention No 169' (2009) 32 available at *http://www.ilo.org/public/english/employment/strat/poldev/papers/1998/169guide/contents.htm* (accessed 6 December 2011).

[44] Fergus M 'Indigenous peoples' rights and the UN Committee on the elimination of racial discrimination' in Solomon D (ed), (2010) 155.

[45] Some of these protections form part of customary international law and *jus cogens*. See Art 53 of the 1969 Vienna Convention on the Law of Treaties UN *Treaty Series*, v 1155, p. 331. See also Art 2, 3-25 of American Convention on Human Rights, 21November 1969 UN *Treaty Series*, v 1155 (331).

Article 2(1) (a) of CERD provides that State parties are enjoined to desist from engaging in acts of racial discrimination against any persons or groups of persons. Under CERD, racial discrimination means 'any distinction drawn or exclusion based on a person's race, colour, descent, or national or ethnic origin, aimed to or actually depriving the person from enjoying his or her rights equally with everyone else'.[46] The CERD requires States to eliminate racial discrimination in the enjoyment of the 'right to equal participation in cultural activities'.[47]

Furthermore, UNESCO pays particular attention to the general protection of the diversity of culture. It emphasizes the importance of the recognition of equal dignity by respecting all cultures, including the cultures of individuals belonging to indigenous communities.[48] The rights to enjoy culture under Article 27 of the ICCPR were also clarified in the interpretation made by the HRC in *Kitok vs. Sweden*.[49] It was highlighted in this case that subsistence and other traditional economic activities of individuals belonging to indigenous peoples are an integral part of their culture, and interference with those activities can be detrimental to cultural integrity and survival within the meaning of Article 27 of the ICCPR.[50] It recognized that '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.'[51]

The protection of the rights of individuals belonging to indigenous communities is also generally guaranteed in different African human rights instruments. Article 2 of the African Charter provides for the right of every individual to the enjoyment of all the rights and freedoms guaranteed in the charter without distinction of any kind such as culture, ethnic or other status. The African standards show that every individual shall be equal before the law and shall be entitled to equal protection of the law.[52] In addition, Article 19 provides that '[a]ll peoples shall be equal and they shall enjoy the same respect and shall have the same rights. Nothing shall justify the domination of a people by another…'

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[46] Art 1(1) of CERD. See also Article 2 of UDHR.

[47] Art 5*(e) (vi)* of CERD.

[48] Arts 2 (3) &7(b) of the UNESCO Convention on the protection promotion of the diversity of cultural expressions, 2005.

[49] *Ivan Kitok vs Sweden*, Communication No 197/1985, CCPR/C/33/D/197/1985 (1988).

[50] *Ivan Kitok vs Sweden*, para 9 (2).

[51] General Comment No 23 (Art 27), adopted 6 Apr. 1994, U.N. GAOR, HRC, 50th Session, 1314th mtg., 7, U.N. Doc. CCPR/C/21/Rev.1/Add.5 (1994) para 5 (2).

[52] Art 3 (1, 2) of African Charter.

Therefore, the rights to equality and human dignity, and other rights in the African Charter, are available to all individuals, including members of indigenous communities without any discrimination.

The general protection of rights of indigenous peoples in Africa is also supported by the African Charter on the Rights and Welfare of the Child. The Children's Charter was adopted with the aim of ensuring that African States recognize the unique problems that confront children in Africa, including those of indigenous peoples.[53] Despite the absence of any provisions specifically addressing the situation of indigenous children, the Children's Charter is an important treaty for the protection of indigenous children's rights.[54] Indeed, the Children's Charter prohibits discrimination based on race or ethnicity.[55] It also contains provisions, which protect the cultural identity of the child.[56] Clearly, all provisions apply equally to children belonging to indigenous communities.

Another important regional instrument is the Protocol to the African Charter on the Rights of Women.[57] The Protocol is very important for women belonging to indigenous communities because it recognizes certain indigenous women's rights that are not expressly included in the African Charter. Article 18(2) (c) of the Protocol provides that 'States Parties shall take all appropriate measures to protect and enable the development of women's indigenous knowledge systems'. In addition, Article 24(a) of the Protocol calls up on states to ensure the protection of poor women, including women from marginalized population groups. It is also clear that all the rights contained within the Women's Protocol also apply equally to women belonging to indigenous communities.

However, general protection cannot suffice. Indigenous peoples have to be identified and specifically protected from mainstream society. As distinct, marginalised and discriminated group, indigenous peoples need a specific protection. It is to these protections that the next section turns on.

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[53] Para 3 of the preamble of Children's Charter.

[54] The Children's Charter establishes an African Committee of Experts on the Rights and Welfare of the Child which has both promotional and protective mandates (Arts 32, 42 and 45 of the Children's Charter). The Charter also authorizes the Children's Committee to investigate, or to receive complaints against State parties (Arts 44 & 45 of the Children's Charter) and whereas possible to seize the African Court under Art 5 of Court Protocol.

[55] Arts 3 and 26 of Children's Charter.

[56] Arts 9, 11(2), 12, 13, 17(2) *(c) (ii)*, and 25(3) of Children's Charter.

[57] The Women's Protocol was adopted by the AU in July 2003 and came into force on 25 November 2005.

2.2. Specific protections

In this sub-section, the focus is on some international instruments that specifically deal with indigenous peoples. It analyses the relevant steps made by the ILO and the UN and highlights some of the important mechanisms, which have been established to facilitate the protection of the rights of indigenous peoples.

2.2.1. Historical development

Historically, the ILO was the first international body to specifically address the question of indigenous peoples. In 1921, the organization undertook studies on the situation of indigenous workers. Shortly after, in 1926, the Committee of Experts on Native Labour was established in order to set up standards for the protection of indigenous workers. Later in 1956, based on proposal from the Committee of Experts, the ILO reviewed the situation of indigenous peoples around the world and recommended different ways for resolving many problems, including the meaning of indigenous peoples and a guide to their identification.[58]

The important step under ILO was the adoption of the first international legal convention on Indigenous and Tribal Populations (No 107).[59] The Convention addresses many issues that are important to indigenous and tribal peoples such as land rights, non-discrimination, labour and education. This Convention was, however, ratified by only six African States[60] and is now closed for ratification. It remains binding on those states that have already ratified it until they ratify ILO Convention No 169, the Convention that replaced Convention No 107.

The adoption of the ILO Convention No 169 was motivated by a number of factors. First, while the previous convention refer to the term 'population', it was proposed during the negotiations leading to the adoption of ILO Convention No 169 that the term 'peoples' be adopted to describe 'Indigenous,

[58] IL Conference 'Living and working conditions of indigenous population in independent Territories', Report VIII (1), 39 session, Geneva: International Labour Office, 1956 (b).

[59] Convention Concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries (ILO Convention No 107)1957, 328 UNTS 247.

[60] These are: Angola, Egypt, Ghana, Guinea-Bissau, Malawi & Tunisia.

other tribal and Semi Tribal Populations'.[61] This was a reasonable understanding because the term 'populations' does not reflect the distinctiveness that indigenous groups are looking and fighting for based on their social, economic, culture and political status. Second, while ILO Convention No 107 is intended to protect indigenous, other tribal and semi-tribal populations, it was underlined by an approach of a progressive integration of these populations into the life of the dominant society.[62] This approach undermines the existence of indigenous populations as they would lose their identity. Another reason may be that ILO Convention No 107 did not get much support from former big colonial powers, which voted against it.[63]

The ILO Convention No 169 adopted in1989, remains the only internationally binding instrument that focuses on the basic and specific protection of the rights of the indigenous peoples. As argued by legal experts, this convention is 'meaningful as part of a larger body of developments that can be understood as giving rise to new customary international law with the same normative thrust'. [64] The Convention has, therefore, gained, total recognition as the foremost international policy document on indigenous peoples.

A parallel development aimed at protecting indigenous peoples can also be seen at the UN. The indigenous peoples question has a history of over 60 years at the UN. The first formal step that was taken by UN was in 1949 to study the conditions of indigenous Americans.[65] The next significant event took place in the early 1970s, when the UN sent its Special Rapporteur, Martínez Cob, to undertake a comprehensive study on the situation of indigenous peoples.[66] In 1982, The UN-system created the Working Group on Indigenous Populations (WGIP), which is a subsidiary organ of the Sub-Commission on the Promotion and Protection of Human Rights. It is the first and only UN body involved exclusively with matters concerning the human rights of Indigenous Peoples. [67] It was WGIP

[61] IL Conference, 75th Session, Partial Revision of the Indigenous and Tribal Populations Convention 1957 (No 107), Report VI (2), Geneva (1988) para 12-14.

[62] Art 2 (2) (c) of Convention No 107.

[63] The following countries among others did vote against this convention: USA, UK and Australia.

[64] Anaya J *Indigenous Peoples in International Law* 2 ed (2004).

[65] General Assembly Res. 275 (III) of 11May1949.

[66] Martinez Cobo JR (1986).

[67] ECOSOC Res. 1982/34, UN Doc E/1982/82 at 26.

that took the initiative to draft a declaration on the rights of indigenous peoples.[68] Its work culminated in 2007 with the adoption of the UNDRIP. [69] The UNDRIP represents a global consensus on the standards of indigenous peoples. Being the latest instrument, its provisions are compatible and mutually supplementary with previous instruments that are specific to indigenous peoples.

In addition to supporting the adoption of international instruments addressing the problem of indigenous peoples, the UN has established a number of mechanisms that aim at facilitating the specific protection of indigenous peoples. These include the two International Decades of the World's Indigenous Peoples, which was created and proclaimed by the UN General Assembly since 1995 to focus on indigenous peoples.[70] During the first Decade (1995-2004), it managed to get indigenous issues on the UN agenda. Indigenous peoples were provided information about violations of their human rights and how to promote and protect their human rights.[71] The adoption of a second Decade (2005-2014) can be seen, first of all, in the light of the enormous problems that indigenous peoples continue to face despite the international efforts made during the first Decade. Second, it could be seen as an expression of the growing interest of the international community in the issues of indigenous peoples, and reflects that the indigenous question has become more prominent on the international agenda[72]

In 2000, the UN established the permanent forum for indigenous peoples. This is an advisory body to the Economic and Social Council with a mandate to 'provide expert advice and recommendations on indigenous issues to the Council, as well as to programmes, funds and agencies of the United Nations, through the Council; raise awareness and promote the integration and coordination of activities related to indigenous issues within the UN system; prepare and disseminate information on indigenous issues'.[73] The UN has undertaken further initiatives to promote and protect indigenous peoples. This

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[68] Resolution 1985/22, *adopted* 29 August 1985, UN ESCOR, CHR, 38th Session, (1985).

[69] This happened before its abolition in 2006 when the new Human Rights Council (HRC) was established in replacement of the Commission of Human Rights (CHR).

[70] UN General Assembly resolution, A/RES/48/163,86th of 21 December 1993.

[71] Barume AK *Land Rights of Indigenous peoples in Africa, with focus on Central, Eastern and Southern Africa* (2010) 234.

[72] IWGIA, Second International Decade of the World's Indigenous Peoples (2005-2014).

[73] Leaflet N° 6: The Permanent Forum on Indigenous Issues, at http://www.ohchr.org/Documents/Publications/GuideIPleaflet6en.pdf (Accessed 22 August 2012).

includes the appointment of the Special Rapporteur on the situation of human rights and fundamental freedom of indigenous people, the independent experts that present their views on specific issues. This important mechanism was created in 2001, with the mandate to include visits to countries, communications to States regarding human rights violation, and presentation on particular topics or situation of special importance concerning the promotion and protection of the rights of indigenous peoples.[74]

The Expert Mechanism on the Rights of Indigenous Peoples is another UN mechanism that was created on 14 December 2007. Its adoption is a major step forward in the promotion and protection of indigenous peoples' human rights, with the mandate 'to assist the Human Rights Council in the implementation of its mandate by providing thematic expertise and making proposals to the Council pertaining to the rights of indigenous peoples'.[75]

In Africa, although the African Charter does not explicitly include indigenous peoples, there is no reason why they should not benefit from the Charter's guarantees, either as individuals or more importantly, as peoples. First, the Charter upholds peoples' rights or collective rights, which apply to indigenous peoples as a group.[76] These rights are found in Articles 19 to 24 and are also among the core rights that indigenous peoples are struggling for. These include the rights to existence and right to self-determination as provided in Article 20 of the Charter. The Second reason is the meaning of the term 'peoples' as embodied in the African Charter. This term can possibly reflect the distinctive group of all peoples including indigenous peoples. While there is no express reference to indigenous peoples in the African Charter, its embodiment of group or peoples' rights can be seen as addressing their

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[74] 'UN Human Rights, OHCHR, Special Procedures of the Human Rights Council', at *http://www.ohchr.org/EN/HRBodies/SP/Pages/Introduction.aspx* (Accessed 12 August 2011).

[75] IWGIA, 'The Expert Mechanism on the Rights of Indigenous Peoples (EMRIP)', at *http://www.iwgia.org/human-rights/un-mechanisms-and-processes/expert-mechanism-on-the-rights-of-indigenous-peoples* (Accessed 14 August 2012).

[76] The African Charter's exemplification of group rights has been viewed as truly revolutionary in term of human rights theory and practice, in dealing with indigenous peoples. Therefore, the African Charter is seen and taken as an innovative and unique human rights document compared to other regional human rights instruments, as it brings together three categories of rights and emphasis on the rights of 'peoples'. The African Charter indeed seems to provide as an all-inclusive approach, which, if innovatively used, can afford such effective protection for indigenous peoples in Africa.

rights. In addition, in the view of the ACHPR/ WGIPC, it is generally accepted that the concept of peoples in the Charter applies to and includes indigenous peoples.[77] It is abundantly clear that the African Charter has the potential to protect indigenous peoples under the African regional human rights system.[78]

Furthermore, there are some other relevant instruments of the AU dealing with natural resources that people working on human rights issues should consider as further materials specific to the protection of indigenous peoples.[79] For instance, the African Convention on the Conservation of Nature and Natural Resources protects local knowledge and traditional rights of local communities.[80] Additionally, the parties to the Convention are enjoined to take necessary measures to facilitate active participation of indigenous peoples in the process of planning, management and protection of natural resources which such communities depend on.[81]

The Convention on Biological Diversity (CBD) is another important instrument, which supports and protects the rights of indigenous peoples. Articles 8(j) and 17 of the CBD require Contracting Parties to support indigenous peoples, whose traditional lifestyles are relevant to the CBD's objectives. Its protocol instructs Parties to take appropriate measures to ensure that 'all benefits arising from utilization of genetic resources or arising from the use of traditional knowledge will be reasonably shared with indigenous peoples holding such knowledge'.[82]

In Africa, the ACHPR, the implementing agency of African Charter, has done substantive work to raise understanding and promote the rights of indigenous peoples in Africa.[83] The Commission has also the mandate to invoke international legal principles, when, for example, dealing with communications brought by indigenous peoples or when considering national periodic reports as

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[77] ACHPR (2003).

[78] Joa Oloka-Onyango 'Reinforcing marginalized rights in an age of globalization: International mechanisms, non-state actors, and the struggle for peoples' rights in Africa' 18 *Am. U. Int'l. L. J.*851, 857.

[79] Treva BLM 'The African Human Rights System: A Guide for Indigenous Peoples' (2008) 21.

[80] African Convention on the Conservation of Nature and Natural Resources was adopted by the OAU and revised in Maputo on 11 July 2003 (the Maputo Convention).

[81] Arts VI (3) (a) and XVII (2-3) of the Maputo Convention.

[82] Art 5 of Nagoya Protocol, 30 October 2010. See also Preamble and Article 10 (c) of the CBD.

[83] Arts 30 and 45 of the African Charter.

provided by Article 60 of the African Charter. ACHR has also established some mechanisms, which specifically protect indigenous peoples' rights. In 2001, the Working Group on Indigenous Populations/Communities (WGIPC) was officially established at the ACHPR's 29th Session in May 2001, with a mandate to examine the concept of indigenous peoples and communities in Africa; study the implications of the African Charter, wellbeing of indigenous communities and consider appropriate recommendations for the monitoring and protection of the rights of indigenous communities. Furthermore, the mandate of the Working Group is to look at peoples' rights as well as individual rights. The WGIPC is an important specific development for protection of indigenous peoples as its creation represents the first time that the ACHPR has addressed the issue of indigenous peoples in Africa and the rights that may apply to them under the Charter. The Working Group includes African indigenous groups among its members.

Even if the African Court on Human and Peoples' Rights (African Court),[84] which is established in 1994,[85] does not represent a specific mechanism for indigenous peoples, its establishment is an important milestone in the protection of individuals and collectives' rights in Africa.[86] Its adoption raises hope among indigenous peoples because it has jurisdiction covering all cases submitted to it 'concerning the interpretation and application of any relevant Human Rights instrument ratified by the States concerned'.[87] Therefore, it enforces indigenous peoples' rights guaranteed in the African Charter and in any other relevant human rights instruments.

From the foregoing, it is clear that indigenous issues did not feature in the early days of human rights discourse. One can, however, now confidently declare that indigenous peoples have entered the international arena. More importantly, they have come to be recognized as a distinguished category with specific protection within international law.

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[84] Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights (Court Protocol) AU, Ougadougou, Burkina Faso, 1998, OAU/LEG/MIN/AFCHPR/PROT (1) Rev.2.

[85] In 1994, the OAU decided to establish a working group of governmental experts to look at ways to strengthen the African human rights system and to consider creating an African Court on Human and Peoples' Rights. The Court Protocol came into force in January 2004.

[86] The African Court's mission is to complement the protective mandate of the ACHPR by issuing binding decisions and ordering specific remedies. See Art 2 & 27(1) of Court Protocol.

[87] Arts 3 & 7 of Court Protocol.

2.2.2. Major specific protections

The value of the specific protection of indigenous peoples is to acknowledge their specific rights. These rights are by definition rights that belong to communities as collective rights that cannot be exercised by individuals. These rights are related to the capability of these groups to survive as peoples wherever they are in the world. Most important, they represent a response to some of the most crucial demands made by indigenous peoples.[88]

1. Self-identification

Self-identification is one of the core rights of indigenous peoples, which attaches fundamental importance to whether a given person identifies himself or herself as belonging to a given peoples and accepted as such by the group.[89] This principle is taken as a key criterion for identifying indigenous peoples rather than aboriginality.[90]

The ILO Convention No. 169 was the first international instrument to recognize the importance of self-identification.[91] The Convention's coverage is based on a combination of objective and subjective criteria. Thus, the principle of self-identification, which is a subjective criteria, completes the objective criteria, and vice versa.[92] This means that the peoples, who fulfil the requirements of the ILO Convention No 169, Article 1(1) (b), should identify themselves as indigenous, and as distinctly different from other groups within the state.[93]

A similar approach underlies the UN system. According to the UN agencies, the most important approach is to identify rather than define indigenous peoples, thereby allowing any community or peoples the freedom to define itself as indigenous.[94] This makes sense because one of the core claims of indigenous people is their right of self-identification and group consciousness of being indigenous peoples. The right to self-identification of indigenous peoples is allowed, therefore, to help indigenous

[88] Lerner N *Group rights and discrimination in international law, international studies in human rights* (1990) 35-36.

[89] ACHPR (2006) 11. See also A Guide to ILO Convention No 169, (2009)10.

[90] A Guide to ILO Convention No 169 (2009)10.

[91] Art 1(1) of ILO Convention No 169.

[92] A Guide to ILO Convention No 169 (2009) 10.

[93] Art 1(2) of ILO Convention No 169.

[94] Art 9 & para 2 of the preamble of UNDRIP.

peoples in their struggle of recognition and protection against discrimination that they continue to suffer.

The principle of self-identification has also been recognised by most African communities and supported by African human rights documents and instruments.[95] This principle is preferred by indigenous peoples themselves and is also emphasised by leading organisations working on indigenous issues, such as the ILO and UN Agencies. This principle, as expressed in ILO Convention No. 169, is also a key principle that guides the deliberations of the ACHPR.[96] After self-identification, indigenous peoples may possibly freely decide their rights to self-determination.

2. Self-determination

The principle of self-determination, which at the same time is a right, has no distinct definition under international law. However, it has been defined by the ICJ as '…the need to pay regard to the freely expressed will of peoples'.[97] Self-determination in international law is the legal right for a 'people'. This includes the right of all peoples to establish and maintain political, economic, legal, cultural and social institutions of their choice. The right to self-determination is a fundamental principle of international law and enshrined in many international and regional instruments.[98] The principle of self-determination was the starting point of the UN Charter, since its adoption in 1945.[99] Article 3 of the UNDRIP provides that 'Indigenous peoples have the right to self-determination. By virtue of that right, they can freely determine their political status and freely pursue their economic, social and cultural development.' The above provision reproduces exactly the classic statement of the rights contained in common Article1 of both Covenants (ICCPR & ICESCR), except for the word 'indigenous peoples' as a replacement for the word 'all peoples'. It is an affirmation that indigenous peoples are included in the category of 'all peoples'. This appears to have been the intention because the Declaration repeatedly provides that 'indigenous peoples are equal to all other peoples.[100] Besides, it is stated that 'nothing in this Declaration may be used to deny any peoples their right to self-

[95] ACHPR (2006) 15.

[96] ACHPR (2006) 101.

[97] The *Western - Sahara Case*, Advisory Opinion, ICJ (1975), para12.

[98] Art 4, 32(1), 32 (2) & 35 of UNDRIP. Article 20 of the African Charter.

[99] Art 1(2) of UN Charter.

[100] The preamble para 2 & Art 2 of UNDRIP.

determination, exercised in conformity with international law'.[101] As one can understand, the UNDRIP makes it clear that indigenous peoples possess the same genre of self-determination as is enjoyed by 'all peoples' under the Covenants. In the light of the jurisprudence of the HRC,[102] it is acknowledged that indigenous groups are ethnically, linguistically, geographically, historically and politically considered sufficiently distinct from the dominant population to qualify as 'peoples' under public international law and are entitled to the right of self-determination under Article 1 of both Covenants. Similar the African Charter reaffirms, in its Article 20, the unquestionable and inalienable right to self-determination. However, the idea of self-determination is viewed with hostility by most African states. It is seen by them as a principle aimed to divide countries and to challenge government authority. A number of states objected to the recognition of the unqualified right to indigenous peoples, fearing that their sovereignty and territorial integrity would be seriously undermined.[103]

The right to self-determination has two dimensions: external and internal dimensions. The Committee Against Racial Discrimination brought some clarity on this issue by identifying and defining two aspects of the right to self-determination. The internal aspect is related to 'the rights of all peoples to pursue freely their economic, social and cultural development without outside interference. In that respect there exists a link with the right of every citizen to take part in the conduct of public affairs at any level...'. [104] The external aspect of self-determination confers on the peoples 'the right to determine freely their political status and their place in the international community based upon the principle of equal rights and exemplified by the liberation of peoples from colonialism and by the prohibition to subject peoples to alien subjugation, domination and exploitation'. [105]

This seems to be consistent with the ACHPR's response to the Katangese people's request, made in terms of Article 20(1) of the African Charter, for recognition of their right to self-determination. The Commission acknowledged, albeit implicitly, a connection between the existing political rights of the Katangese and the possibility for them to achieve internal self-determination in its multiple variants,

[101] The preamble of UNDRIP, para 18.

[102] General Comment No 23 (50) UN Doc HRI/GEN/1/rev 5 para 3 (2) & 7.

[103] *Report of the Working Group on the Draft Declaration*, U.N. ESCOR, CHR., 52nd Session, 28, UN Doc E/CN.4/1996/84 (1996).

[104] General Recommendation No 21(48): Right to self-determination, adopted on 23 August 1996 by CERD, UN Doc A/51/18, annex VIII at 125 (1996), para 4.

[105] General Recommendation No 21(48) para 4.

including self-government and other collective rights that may be beneficial to indigenous communities.[106] Only if they cannot exercise meaningful internal self-determination, the ACHPR seems to suggest, they are claimed to exercise the external self-determination.

Some argue that indigenous peoples have the rights to exercise external self-determination. Others, on the other hand, limit the right of indigenous peoples to internal self-determination. The proponents of the former view argue that the indigenous peoples may secede in order to establish a different sovereignty in accordance with Article 1 of the Covenant. The latter argue that the self-determination of indigenous peoples extends to independent resource management only. [107] Nevertheless, indigenous peoples position is that they will not accept any limitation to self-determination. [108] They 'should be granted the full rights and obligations of external self-determination. Indigenous nations and peoples who wish to limit themselves to the exercise of internal self-determination only should be granted the freedom to do so'.[109]

It is submitted that it is very important to achieve first the internal aspect of the right to self-determination, and then, decide the possibility that indigenous peoples may exercise their full right to self-determination depending on their positions of strength *vis-à-vis* the state. This can happen only under specific conditions. These may, for example be where indigenous peoples are seriously discriminated and marginalized, fall under foreign military occupation, for example, or any kind of colonisation and oppression, and where indigenous peoples are denied meaningful political participation in their government.

3. Institutions, traditions and cultural identity

The term 'institutions' is used to refer to physical organizations while in other instances it may have a broader meaning that includes indigenous peoples' practices, customs, and cultural patterns as well. The UNDRIP recognizes the inherent inter-connectivity between indigenous peoples' institutions, culture, traditions or customs. The Declaration stresses the need to maintain and strengthen these

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[106] *Katangese Peoples'Congress v Zaire* in Communication 75/92 of 1995 in the 8th Annual Activity Report of the ACHPR, para 4-6.

[107] Burger J *Report from the Frontier: State of the Word's indigenous*, 1987.

[108] Burger J (2000) 52.

[109] Burger J (2000) 52.

institutions in order to promote their development in accordance with the aspirations and needs of indigenous peoples.[110]

The ILO Convention No 169 similarly recognises the aspirations of indigenous peoples to exercise control over their own institutions. In fact, Article 1(1) of the Convention identifies indigenous peoples as those who have retained some or all of their own social, economic, cultural and political institutions, irrespective of their legal status. In this way, government action shall include measures to provide necessary resources in order to establish the full development and promote the full realisation of the social, economic and cultural identity rights of these peoples.[111] An important safeguard against the destruction of culture and institutions of indigenous peoples is ensuring that indigenous peoples are not assimilated into other groups or societies in a way that would result in the destruction of their cultural identity. [112]

The ILO Convention No 169 recognises that if indigenous peoples choose to participate fully in the political, economic, and socio-cultural life of their State, they shall have the right to retain their own traditions, customs and institutions.[113] This is also precisely the objective behind Article 22 of the African Charter, which guarantees all peoples the right to cultural development and protection from assimilation. However, indigenous peoples are still facing serious assimilation pressures and often involuntarily lose their languages and other cultural symbols around the world, particularly in Africa.

4. Consultation and participation

The principle of consultation requires governments to '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

[110] Para 10 of the Preamble of the UNDRIP.

[111] Arts 2(1) (b), 5 (b) & 6 (1) (c) of ILO Convention No 169.

[112] This can be one of the reasons why ILO Convention No. 169 does not insist on language criterion in order to recognize and protect them as indigenous peoples. Instead, the Convention promotes the upholding and development of their customs and traditions, cultural values, and their institutions. See Art 2(2) (b) of the ILO Convention No 169.

[113] Arts 5, 20 & 34 of UNDRIP. See also Arts 8(2), 9(1) & (2) of ILO Convention No 169.

directly'.[114] Consultation allows indigenous peoples to express their views for government measures, which have or will have a direct effect on their lives. ILO Convention protects the rights of indigenous peoples to participate in decision-making processes that influence their future. [115] The consultations must be undertaken in good faith and in a form appropriate to the circumstances, with the objective of achieving agreement or consent to the proposed measures.[116]

The same principle of consultation is embedded in the UNDRIP, which provides that the purpose of consultation is to achieve free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect indigenous peoples.[117] That said, lack of consultation with indigenous peoples has often resulted in the adoption of development policies and programmes that are unsuited to their real needs. According to research conducted by the ILO, indigenous peoples often have very different perceptions of poverty and wealth, as well as priorities for poverty reduction, than other sections of the national population.[118]

Consultation goes together with 'participation', another fundamental principle in the protection of indigenous peoples. According to Article 18 of UNDRIP, indigenous peoples shall 'have right to participate in decision-making in matters which would affect their rights; they shall participate in the formulation, implementation and evaluation of plans and programmes for national and regional development, which may affect them directly'.[119] Participation ensures for indigenous peoples their rights to equitable representation in public affairs. [120] Article 25 of the ICCPR provides for all peoples the right to take part without discrimination in the conduct of public affairs, to vote and to be elected to public service in their country.

However, consultation and participation face serious challenges in Africa. While indigenous peoples regard participation as an important part of their struggle towards the full enjoyment of their human

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[114] Art 6 (1) (a) of ILO Convention No 169.

[115] ILO Convention 169: A manual, (2003) 15.

[116] Art 6 (2) of ILO Convention No169.

[117] Arts 19 & 17(2) of the UNDRIP.

[118] Tcoumba B *Peuples Indigènes et Tribaux et Stratégies de Réduction de la Pauvreté au Cameroun* ILO (2005) 220.

[119] Art 18 of UNDRIP.

[120] Art 7 (1) of ILO Convention No 169.

rights,[121] the right to participate in terms of Article 13 of the African Charter is often equated with the narrow right to vote, which is often couched in individualist terms and this may not be sufficient for indigenous peoples.

In order to control the rate and extent of their development, indigenous peoples should be fully involved in all relevant processes, not only by consultation, but also by participating in any activity or initiative provided by government. The indigenous peoples' rights to consultation and participation include also the right to vote and associated political rights. Additionally, consultation and participation includes the right to be consulted on a broad range of legislative and administrative measures that affect them, including legal reform, and the drafting and implementation of development policies, programmes and projects, which will affect them and their rights, such as displacement on their traditional lands.

5. Non-displacement on traditional lands

Indigenous peoples have maintained a special relationship with their traditional lands and natural resources.[122] States must give legal recognition and protection to these lands, territories and resources, which have a fundamental importance for the collective physical and cultural survival of indigenous peoples.[123] Under international law, the indigenous peoples' rights to maintain their various relationships to their traditional territories must be protected. The law protects the rights of indigenous peoples to ownership and possession and calls for measures of protection of their land rights.[124] It is the existence of such relationships that gives rise to rights of restitution or other remedies. [125]

The ILO Convention No 169 states that indigenous peoples should not be removed from their traditional lands.[126] Even if displacement is unavoidable in the name of progress, their land cannot be a

[121] The Arusha Res. (1999) para 18 (3).

[122] Arts 25 & 26 of the UNDRIP. Anaya J 'The evolution of the concept of Indigenous peoples and its contemporary dimensions' in Solomon D (2010) 33.

[123] Daes, Erica-Irene A, UN Doc E/CN.4/Sub.2/2001/21, 11 June (2001) para 20.

[124] Arts 14, 15(1), 17, 18 & 19 of ILO Convention 169. See also Article 10 of the UNDRIP.

[125] Daes Erica-Irene A (2001) para 20.

[126] Art 16 (1) of ILO Convention No 169.

product, which can be acquired but a material element to be enjoyed freely.[127] Notwithstanding, where the displacement of indigenous peoples is considered necessary, such displacement should only occur as an exceptional measure and in circumstances where it may be unavoidable and they must understand fully the meaning and consequences of the displacement and that they accept and agree to it.[128] The relocation should be temporary. In addition to receiving restitution or compensation,[129] the community concerned should also be moved to areas that resemble as closely as possible their home areas.[130]

There are cases where relocation is necessary and yet is opposed by indigenous peoples. In this case, international bodies have provided procedural steps to be taken. These are public inquiries where appropriate. This might be in the form of a public hearing or investigation, or other ways best suited to a particular solution.[131] There is also the possibility of returning to their traditional lands as soon as the problems for relocation cease to exist.[132] If they cannot return to their lands, there must be a plan for the resettlement and rehabilitation of the displaced people. When indigenous peoples are resettled, they must be provided with lands of quality equal to, and with the same or better legal title as the lands they have lost. In other cases, indigenous peoples may be given the option of compensation for their lost lands.[133]

The African Charter also provides for the right to restitution and adequate compensation. It states that all peoples have the rights to their wealth and natural resources and in no case should a people be deprived of it and that 'in case of expulsion, the dispossessed people shall have the right to the lawful recovery of its property as well as to an adequate compensation.'[134]

The most important case in relation to the displacement of indigenous peoples was *Sessana & Others v The Attoney General*, where the Bushmen of the Central Kalahari Game Reserve had been evicted by

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[127] Martinez Cobo JR (1987) para 196-197.

[128] Art 16 (2) of ILO Convention No 169.

[129] Art 10 of the UNDRIP.

[130] Martinez Cobo JR (1983) para 558.

[131] Art 16 (2) of ILO Convention No 169.

[132] Art 16 (3) of ILO Convention No 169.

[133] Art 16 (4) of ILO Convention No 169.

[134] Art 21(1) (2) of the African Charter.

the Botswana government from their ancestral lands since 1997. In 2006 they won the case when Botswana's High Court ruled that their eviction was unlawful and unconstitutional and that they had the right to live inside the reserve on their ancestral land with the right to hunt and gather in the reserve.[135] Another remarkable case was a recent decision involving 3,000 Nama people from Richtersveld/Nama community. They took the South African government to court after they were evicted from their diamond-rich land. The Constitutional Court ruled that the Nama people had both communal land ownership and mineral rights over their territory.[136]

The right to land, natural resources and the preservation of the environment form part the core claims that indigenous peoples make.[137] Actually, the protection of the collective right to land and natural resources is particularly important because access to land and natural resources has a direct bearing not only on the very identity and existence of people but also are often linked to the culture and traditional way of life of peoples.[138] This can be the reason why HRC, CERD and the International Law Commission have also concluded that restitution comes first among the forms of reparation and that only when restitution of lands was reasonably impossible that the right to prompt compensation could be applicable.[139]

3. CONCLUSION

The present situation of indigenous peoples represents a remarkable innovation in the field of international human rights law. This has manifested from definition to the detailed rights of the peoples concerned. While minority rights are formulated as individual rights, indigenous peoples' rights are collective rights and may be exercised by persons belonging to indigenous communities individually, as well, as in community with other members of their group. In addition, the core rights to indigenous peoples, such as the right to self-identification, self-determination, non-displacement on

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[135] *Sessana & Others v The Attoney General* (52/2002) BWHC1 2006.

[136] *Alexkor Ltd and the Government of the Republic of South Africa v Richtersveld Community* 2003 (12) BCLR 1301 (CC) (South Africa) para 131. See also Barry M 'Now another thing must happen: Richtersveld and the dilemmas of land reform in post-apartheid South Africa' (2004) 20.

[137] Art 21 of the African Charter.

[138] The General Comment No 23 (Article 27 of ICCPR): 08/04/94.CCPR/C/21/Rev.1/Add.5. para 3 (2), (7).

[139] Report of the International Law commission, 53rd session (23 April-1 June and 2 July-10 August 2001). See also General Recommendation No 23: CERD, UN Doc. A/52/18, annex V, para 5.

their traditional lands and the like go a long way in protecting the core most interests of indigenous peoples.

To date, despite numerous challenges, the African human rights system signals a positive future with regard to the protection of indigenous peoples' rights. From the above discussion, it seems clear that the African Charter seems to offer a significant and strong legal framework, potentially capable of vindicating the claims of indigenous peoples in Africa. Nonetheless, the road towards effective protection of indigenous peoples is still problematic. Most African governments have shown little interest in recognizing indigenous peoples. The next chapter examine Rwanda's legal framework on indigenous peoples.

CHAPTER THREE: PROTECTION OF THE BATWA AS INDIGENOUS PEOPLE

1. INTRODUCTION

Rwanda, famously known as the 'land of the thousands hills', is a small poor country located in central Africa. It is home to three ethnic groups. Historically, Rwanda's three ethnic groups have been identified with distinct aspects of the economy: the *Batwa* with the forests, the *Batutsi* with cattle and the *Bahutu* with the land.[140] All Rwandans speak the same language, *Kinyarwanda*,[141] and live intermixed throughout the same territory; they are, thus, widely considered to share a common culture.

Although it is not known exactly when they first arrived in Rwanda, the *Batwa* are believed to be the first inhabitants of Rwandan territory.[142] The historical narrative maintains that the *Bahutu* farmers invaded the region during 500 to 1000 AD, [143] and subsequently, the *Batutsi,* the cattle breeders, settled there around the 15th century AD. [144] As other ethnic groups moved to the territory, bringing livestock, farming and cultivation, the *Batwa* were forced to move from their traditional areas of forest. This interfered with their hunter-gatherer livelihoods.

Although the country is experiencing demographic growth, the number of *Batwa* continues to diminish, creating a threat of extinction amongst the *Batwa*.[145] The 1989 governmental census puts the population size of the *Batwa* at 45.000. The recent estimation shows that only around 33,000 to 35,000 of Rwanda's total population are the *Batwa*.[146] This means that as the population of Rwanda stands at 11Million, the *Batwa* makes up only 0.3 per cent of the population whereas the *Bahutu* and the *Batutsi* comprise 85 and 14 per cent respectively.

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[140] Vansina J Le Rwanda ancien: Le royaume Nyiginya (2001) 37, 45.

[141] UNPO Alternative Report submitted to the UN CERD at the 78th Session during the consideration of the 13th – 17th Periodic Reports of the Republic of Rwanda (2011) availabe at http://www2.ohchr.org/english/bodies/cerd/docs/ngos/UNPO_Rwanda78.pdf (accessed 12 August 2013).

[142] MARTHA A P *Changing Poison into Medicine through Social Processes of 'Finding Pathways Out'*: *The Rwandan Construction of a New Destiny in the Aftermath of the 1994 Genocide* (2011).

[143] Hans PH The Batwa and the Hadzabe, Norwegian church aid, Occasional Papers 4/02 August (2002) 15.

[144] Martha A P (2011).

[145] Projet d' Intégration et de Développement des Pygmées (IRDP), '*Reconstruire une Paix durable au Rwanda: La Parole au Peuples'* (2003) 104.

[146] IWGIA (2012).

This chapter provides insight into the experience of the Batwa in relation to recognition and protection of their rights. The chapter commences the discussion by discussing the socio-economic and political status of the Batwa. The chapter then provides analysis on the protection of the rights of the Batwa as indigenous people.

2. WHO ARE THE BATWA?

The term 'twa' is often used by the Bantu people of sub-Saharan Africa to refer to those hunters and gatherers, who kept relationship with their tradition lands, and/or about people, who have very low status.[147] The focus here is on the social, economic and political status of the Batwa.

The social status of the Batwa in Rwanda is characterised by discriminatory practices and marginalization. The Batwa are disadvantaged and remain poorly integrated into Rwandan society. They are regarded as abnormal and inferior people; it is said that 'they are looked upon as stupid, without intelligence, unable to realise or to do a given thing or objective, a person with whom we cannot share, whom we cannot get married to… Mutwa[148] is an individual good only for work and bad work at that...'.[149] The Batwa are socially discriminated against on the basis of their ethnicity:

> *'They can neither eat nor drink with their neighbours; they are forbidden to enter their houses and are not permitted to have sexual partners other than from their own ethnic group. The Batwa communities live on the outskirts of other people's settlements. Even sitting down with a Mutwa would be considered as an insult or a dishonour to the friends and family of any Hutu or Tutsi who agrees to do so. If an individual non-Mutwa should sympathise with the Batwa and become their friend, his peers will treat him as ridiculous or mentally disturbed.'*[150]

The inferior social position attached to the Batwa can be easily detected in some proverbs and jokes used by other ethnic groups. One can cite, for example, the following negative expression '*Nta bwenge bw'umutwa*', which means 'a Twa is devoid of intelligence'. The expression: '*Uri umutwa*', 'you are a

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[147] Wouter SBT, *The Twa indigenous of Rwanda A marginalized people in a post-conflict society seen from a cultural and human rights perspective* (2007) 2.

[148] Mutwa is a singular name of Batwa in the Bantu language.

[149] Mugarura B & Ndemeye A *The Experience of the Twa Pygmies of the Great Lake Region* (2001) 3.

[150] ACHPR/WGIP (2003) 22.

Twa', is a common insult, which actually means 'a person of no reason.' [151] In sum, the Batwa are perceived as backward, dirty, unintelligent and lazy.[152]

The Senate Commission in charge of Social Affairs and Human Rights published the 'Report on the conditions of some Rwandans disadvantaged throughout history' (the senate report), widely understood to be focused on *Batwa*. This report highlighted that 'some people still have the attitude of despising Batwa, of not seeing them as genuine human beings, and they address them in words stimulating discrimination'.[153] In May 2009, the HRC also stated that members of the Batwa community are victims of marginalization and discrimination.[154] The *Projet d' Intégration et de Développement des Pygmées*[155] notes that it is unimaginable that in the 21st century we could see a group of humans being socially marginalised to this extent.

The Batwa are also subject to economic marginalisation. Traditionally, the Batwa, economically speaking, were semi-nomadic, hunters and gatherers. It is the government that forced them to be agriculturalists. In the modern era, widespread subsistence and commercial agriculture, national parks and tourism development have forced the *Batwa* to leave the remaining areas of forest, which they occupied.[156] It is known that after being evicted from the forest areas in order to create room for agriculturalists and wildlife parks, more than 85 per cent of the Batwa become landless. The Batwa's once-respected hunter-gatherer life style is no longer allowed. They are forbidden from hunting or collecting food in their traditional forests. Unable to access their ancestral lands and practice traditional activities, the majority of the Batwa continue to make pottery as their principal activity, which has become a 'loss making' activity. Their skills are not considered very 'marketable' in modern society. [157] Furthermore, the UNPO has noted the exclusion and discrimination of the Batwa

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[151] Mugarura & Ndemeye (2001) 3.

[152] Report ACHPR/WGIPC: Mission To The Republic Of Rwanda (2008) 31.

[153] Rwanda, Senate Chamber, Commission in charge of Social Affairs, Human Rights and Social Issues, *Report on the Living Conditions of Some Rwandans Disadvantaged Throughout History*, Kigali (2007).

[154] HRC/CCPR/C/RWA/CO/3, para 22.

[155] IRDP (2010) 104.

[156] Report of the independent expert on minority issues on her mission to Rwanda (31 January–7 February 2011) 15. UN Doc A/HRC/19/56/Add.1.

[157] X The challenges of the Batwa communities and modern developments, at *http://www.irinnews.org/InDepthMain.aspx?InDepthId=9&ReportId=58627* (accessed 22 March 2012).

from certain development programs and the detrimental effects of some of those programs on them.[158] In addition to their absence in decision-making, discrimination is the main reason preventing the Batwa from development and enjoying other aspects of modern society.[159] Presently, the Batwa constitute the poorest and most economically marginalized ethnic group in Rwanda. [160]

Furthermore, generally speaking, the Batwa play a limited role in Rwandan political affairs. Of course, in the wake of the political emancipation of the Rwandan population, the Batwa were relatively politically active. In 1960, some of them took the initiative to form a political party known as AREDETWA.[161] The party aimed at improving the position of the Batwa and enhancing their level of political participation. However, it died a silent death in 1962.[162] It merged into PARMEHUTU, the main Bahutu political party that had taken the lead after the monarchy. Since 1980, the Batwa have been neglected in the political discourse. They do not have any political party to represent them, as well as to protect and promote their civil and political rights. Given their relative lack of representation in decision making bodies, the Batwa have attempted to organise themselves into groups to persuade the government to recognise their right to be represented in governmental decision-making bodies. They worked with civil society organisations to advocate their political interests. In this regard, they formed the Association for the Democratic Restoration of the Twa (APSB) and the Association for the Integrated Development of the Marginalized Groups in Rwanda (ADIGMAR) that focused on the *Impunyu* (forest Batwa).[163]

From the foregoing, it is clear the Batwa have been subordinated to social, economic and political exclusion. It is important to note that, in Rwanda, as it is the case everywhere in the world, the social, economic and political status of Batwa is highly influenced by education, which remains very low, poor and far below the national average. Lack of education is, therefore, the main factor leading to Batwa's poverty, hunger, marginalization and discrimination in their social and political life.[164] The

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[158] UNPO Alternative Report submitted to the UNCESCR for the consideration of the Initial Report of Rwanda during the 50th Pre -Sessional Working Group (2012) 9.

[159] MRGI *The Batwa Pygmies of the Great Lakes Region* (2000) 26.

[160] Lewis & Knight (1995)51-62. Woodburn J (1997) and Kenrick & Lewis (2001).

[161] It can be translated in English as 'Association for the Democratic Restoration of the Twa'.

[162] UNPO Report (1994) 13.

[163] UNPO Report (1994) 15.

[164] Muhereza R 'Discrimination forces Batwa out of school' (2010) *Daily Monitor*, at

big problem for many Batwa, however, in relation to education, is not only the inferior schooling or complete formal education, but also the content and objective of education made available to them. While the education may have been intended to help the Batwa to improve their status, it became a tool of forced assimilation and adversity affected their traditional knowledge.

3. PROTECTION OF THE BATWA

From the foregoing, it is clear that the rights of the Batwa continue to be systematically ignored and unprotected. The government has the responsibility to protect the Batwa community not only as human being, but also as indigenous people. The Batwa as indigenous people, can beneficiate both from general and specific protections.

3.1. General protections

The enjoyment of rights without distinction as to race, sex, religion, language and ethnicity has been elaborated in universal and regional human rights instruments. Therefore, all individuals belonging to indigenous peoples 'are free and equal to all other…individuals and have the right to be free from any kind of discrimination, in the exercise of their rights, in particular that based on their indigenous origin or identity'.[165] The individuals that belong to the Batwa community, like all other individuals in Rwanda, are entitled to universal individual rights such as right to life, right to liberty and personal security, right to privacy, right to education, right to employment, right to fair trial and right to equality and non-discrimination. The question is whether Rwanda provides and protects such universal human rights generally, and whether members of the Batwa community can benefit from these protections.

Under the Constitution, the Government of Rwanda has the duty to defend, respect and protect every human being, who is considered sacred and inviolable according to the Constitution.[166] The Constitution provides for the important principles of universal human rights.[167] The constitution states that '[a]ll human beings are equal before the law. They should enjoy, without any discrimination,

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http://www.monitor.co.ug/News/National/- /688334/929040/-/x0a6cn/-/ (accessed 23 March 2012).

[165] Art 2 of the UNDRIP.

[166] Arts 10 & 11 of the Rwandan Constitution.

[167] Preamble paras 6, 9 & 10 of the Constitution.

equal protection of the law'.[168] Like other citizens of Rwanda, individuals that belong to the Batwa community enjoy freedom such as freedom of religion, freedom of thought, freedom of expression, and freedom from torture and inhumane treatment.[169] The Constitution provides, from Articles 29 to 50, a wide range of civil and political rights, as well as some economic, social and cultural rights, in particular, the right to freedom of association and freedom of assembly.

In addition, the Law No 47/2001 on Prevention, Suppression and Punishment of the Crime of Discrimination and Sectarianism has been influential in the fight against discrimination in Rwanda. The Criminal Code establishes penalties for hate speech, discriminatory acts, employment discrimination and physical attacks. There are also anti-discrimination provisions in the Labour Code, the General Statute of Public Service, Organic Law N^{o} 20/2003 concerning Education in Rwanda and legislation relating to the justice sector, including the police.

Despite the normative and moral stature of the non-discrimination and equality principles, discrimination against the Batwa continues to be pervasive and persistent in Rwandan society. The UNPO denounces the exclusion and discrimination of the Batwa from certain development programs and the detrimental effects of some of those programs on them.[170] The discrimination and unequal position before the law are a punitive reality and are clear examples of human rights violations and failure of State obligation to protect the Batwa from discrimination and fulfil their right to equal treatment and equality before the law. The 'Institute of Research and Dialogue for Peace', in its study, indicates that ethnic-based discrimination remains a problem in Rwandan society.[171] It is also noticed that the Government's own research, documented in the 'Rwanda Reconciliation Barometer', notes that 'although ethnic discrimination is banned in Rwanda, it still occurs'.[172] In May 2009, the HRC stated its concern regarding reports that members of the Batwa community are victims of marginalization and discrimination. The Committee recommended that Rwanda 'should take steps to

[168] Art 16 of the Rwandan Constitution.

[169] Arts 33-36 of the Rwandan Constitution.

[170] UNPO Alternative Report submitted to the UN Committee on the ESCR Rights for the consideration of the Initial Report of Rwanda during the 50th Pre -Sessional Working Group (2012) 9.

[171] IRDP (2010).

[172] UNDP-Department for International Development, Institute for Justice and Reconciliation (IJR) and the Institute of Research and Dialogue for Peace, Kigali (2010).

ensure that members of the Batwa community are protected against discrimination in every field, that they are provided with effective remedies in that regard and that they take part in public affairs'.[173]

It appears from the discussion above that the universal system of protection of individual rights is necessary and can address some of the problems that Batwa people suffer. However it alone cannot ameliorate the Batwa's particular social, economic and political situation. Therefore, the Batwa, like all other indigenous peoples, must be afforded specific protections.

3.2. Specific protections

The individual human rights, although necessary, are not sufficient to respond to the specific needs of the Batwa as a community. They must necessarily be complemented by collective rights that are specific for all indigenous peoples. The specific rights are, therefore, based on the importance to survive as a group of people. This can only be achieved by acknowledging and protecting among others, Batwa's rights to self-identification, rights to self-determination, rights to participation and consultation, rights to lands and natural resources, and rights to culture and traditional institutions as well. The question is whether Rwanda provides for such group protection.

1. Protection of the Batwa's rights to self-identification

As it is well-established in international law,[174] self-identification, as a member of indigenous community and acceptance as such by the group, is an essential element of indigenous peoples' sense of identity. Therefore, the Batwa have rights to freely identify themselves as belonging to a different culture and ethnic group. They have 'collective and individual rights to maintain and develop their distinct identities and characteristics, including the right to identify themselves as an indigenous people and to be recognized as such.'[175]

There are no specific laws or any other official policies in Rwanda that acknowledge the rights of Batwa to self-identification. The Constitution does not mention anywhere in its provisions the word 'indigenous people' or 'minority'. In fact, the resistance from government to self-identification of the

[173] HRC/CCPR/C/RWA/CO/3, para 22.

[174] Supra pp. 21-2.

[175] UN Doc. E/CN.4/Sub.2/1997/14, para129.

Batwa and their recognition as indigenous people is evident. This is clear from the response of the Rwandan government to the request introduced by the Batwa to organise themselves as an indigenous people. In 1995, after being totally forgotten and ignored in their home country, the Batwa took the initiative to form the Community of Indigenous People of Rwanda (CAURWA). Although this Organisation was aimed at representing the Batwa, who do not have the capacity and resources to represent themselves in all matters affecting them as vulnerable indigenous people, the Government declined to grant legal status to their organization unless it stopped identifying the Batwa as *'indigenous people'*. They changed the name of their organisation to the Community of Rwandan Potters (COPORWA) even if it was against the wishes of members of the Organisation.[176] This indicates that Rwanda is not willing to recognise the Batwa as an indigenous people.

Despite the social reality, the government banned all ethnic identification in Rwanda. Since 1994, neither the *Bahutu* nor the *Batwa* are recognized and they are not officially mentioned as ethnic groups in the country. Ethnic identities were replaced by a single Rwandan national identity. The only politically acceptable and legally permissible identity is that of a Rwandan citizen.[177] The Constitution aims at the eradication of ethnic, regional and other divisions and the best way to achieve this, according to the government, is to refrain from providing recognition to the ethnic groups.[178] It is also provided in the Constitution[179] that Rwandans enjoy the privilege of having one country, the same language, the same culture, as well as the same history.

The government's line of argument for not recognizing the Batwa as an indigenous people is the need to strengthen national unity and reconciliation by encouraging a homogenous Rwandan identity and avoiding the encouragement of divisionism which, in the past, led to genocide. [180] As such, no group of people is allowed to identify themselves under ethnic, culture, regional differences or, even based on

[176] Barume AK (2010) 44.

[177] However, the Constitution, mentioned the *Batutsi* ethnic group reference to the genocide committed against them. See Preamble para 1, 4 & Art 14 of the Rwandan Constitution.

[178] Arts 9 (2) & 33 of the Rwandan Constitution.

[179] Para 7 of the Rwandan Constitution

[180] ACHPR *Eighth periodical report of Rwanda* 2002-2004 (2005) 42.

indigenousness. According to the government, it cannot recognize a community seeking to identify itself as an indigenous people that claim to have special rights from the rest of the citizens.[181]

The position of the Rwanda government has been criticised by the African Commission. The Commission notes that Rwanda continues to deny the existence of indigenous people in the country.[182] The continuous denial to recognise the Batwa as an indigenous people makes it difficult for the Government 'to develop appropriate strategies suitable to enhance the welfare of the Indigenous community and this may account for the continuous underdevelopment, marginalisation and discrimination of the Batwa'.[183]

The right of the Batwa to identify themselves as an indigenous people and the government's version that prohibits the recognition of ethnic groups in Rwanda is also addressed by the CERD Committee. The committee, first, stated that 'such identification shall, if no justification exists to the contrary, be based upon self-identification by the individual concerned'.[184] It then expressed the regret at the government's policy of not recognizing the Batwa community as an indigenous people.[185] The Committee advised the government to take into account the needs and specificities of each of the groups that make up its population, including the Batwa.[186]

The self-identification of the Batwa as an indigenous group must not be seen as a threat. It is a means through which targeted measures can be employed to raise their standard of living. It has the additional benefit of reducing the level of inequality in Rwanda, understood by the government itself to be 'rising and high'.[187] The Batwa are a distinct ethnic group with distinct challenges, the solutions to which are also distinct. In so doing, domestic law relevant to ethnicity, identity, equality and non-discrimination has to recognise such rights to self-identification and ensure that no individual or group suffers from

[181] Rwanda report to the CCPR/C/RWA/3, UN Doc. (2009) para 289.

[182] ACHPR (2010) para 29-30.

[183] ACHPR (2010) para 30.

[184] General recommendation N° 8 (1990) (Art 1, paras 1 & 4).

[185] CERD/C/RWA/CO/13-17 (2011) para 9.

[186] CERD/C/RWA/CO/13-17 (2011) para 11.

[187] MINALOC, National Social Protection Strategy (2010)12.

any disadvantage or discriminatory treatment on the basis of their freely chosen identity as belonging to or not belonging to an ethnic, culture or any other group. [188]

In sum, non-recognition of the Batwa as indigenous peoples has led them to being ignored in government programmes. [189] It is very important, therefore, to guarantee the Batwa community the rights to freely express their ethnic and cultural identity. The government of Rwanda is required, therefore, to recognise the Batwa people and to protect them according to their specific rights, including the rights to self-determination, which is the focus of the next section.

2. Protection of the Batwa's rights to self-determination

The right to self-determination is one of the core claims of indigenous peoples. It offers indigenous peoples the means through which they can assume control of their own lives and destinies and gain a greater recognition of their distinct cultures, traditions and customs as well as greater control over their traditional lands and their own economic development.[190]

Rwanda has an international obligation to respect the common Article 1(1) of the both Covenants, which states that; 'All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development'. This protection is also provided by the ILO Convention, the UNDRIP, the CBD and the African commission,[191] as well as Article 5 of the CERD, which obliges the State of Rwanda to develop legislative means for the protection of traditional collective land rights of the Batwa community, to achieve its rights to complete self-determination. In this regard, it is important to examine whether Rwanda provides for the right to self-determination, both in its internal and external dimensions.

In this regard, the territory of Rwanda is divided into two main administrative entities; the central government and local government. While local government consists of four tiers (i.e. districts, sectors,

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[188] UNDP-Department for International Development, IJR and the Institute of Research and Dialogue for Peace, Kigali (2010).

[189] Kagabo & Mudandagizi 'Complainte des gens d'argile, les Twa du Rwanda' (1974) 77 *Cahiers des Etudes Africaines* N° 53: 14 (1) 75-87. See also Report ACHPR/WGIPC: Mission to the republic of Rwanda (2008) 31.

[190] ILO Convention: A Manual (2003).

[191] Supra p. 21-23.

cells and villages), the central government includes provincial administrative regions and the capital city of Rwanda.[192] Although, the goal of this political and administrative devolution was to empower all Rwandan people to determine their destiny by respecting the principle of local autonomy, identity, interests and diversity,[193] it is almost impossible for the Batwa to enjoy the right to self-determination, in its internal or external dimensions. Given the structure of the Rwandan state, it is clear internal self-determination for the Batwa may not be fully realized. The Batwa community was destroyed and individuals were dispersed in different villages of the country without any consideration of their economic, social and cultural development.[194] In addition, the removal of the Batwa from their traditional lands continues unabated. This is mainly founded on the fact that the Batwa's right to their ancestral territories and natural resources is not recognized and respected.[195] External aspect of self-determination, which confers on the peoples some degree of economic, cultural and political autonomy in the international community, is a controversial subject for the Batwa, as it requires territories for the creation of indigenous states, regions, provinces or other administrative arrangements.[196]

Furthermore, the Rwandan report to the ICESCR Committee deliberately denies the rights of the Batwa to self-determination. The report interprets the right to self-determination absolutely as the right of the Rwandan State to administer itself without any foreign interference. In addition, it interprets self-determination as requiring a devolution process so that citizens are in charge of their own affairs. Even then, the Rwanda government, as indicated above, does not address the possibility of economic, political, social or cultural devolution of the Batwa, as required under Article 1 of the both Covenants. Their freedom to choose their own government or to define their relationship with an existing one and, to dispose and use the wealth and natural resources found in their territories is denied.

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[192] Art 2 the Organic Law N° 29 of 2005 determining the administrative entities.

[193] Bericht, Right to Adequate Housing. The Destruction of Batwa houses in Rwanda, at *http://www.kigalicity.gov.rw/IMG/pdf/National_Decentralization_Policy.pdf* (accessed 22 August 2013).

[194] UN Sub-Commission on the Promotion and Protection of Human Rights, 52nd Session, 31 July-18 August 2000, available at: *http://www.minorityrights.org/787/advocacy/un-subcommission-on-the-promotion-and-protection-of human-rights-52nd-session-31-july18-august-2000.html#sthash.YNDqDseL.dpuf* (accessed 11 May 2013).

[195] Tauli-Corpuz V 'Self-Determination & Sustainable Development' in Ann Loreto Tamayo, et.al., *Reclaiming Balance: Indigenous Peoples, Conflict Resolution and Sustainable Development* (2004) 46.

[196] CERD General Recommendation N° 21 (48), UN Doc A/51/18126, para 4.

3. Protection of Batwa's rights of consultation and participation

Consultation and participation are twin-principles. While the right to consultation can be seen as space for indigenous peoples to negotiate and to protect their rights,[197] the right to participation ensures equitable representation in public affairs. It allows indigenous peoples to decide their priorities for the process of development as these affect their lives.[198]

To begin with, there is no specific legislation regulating consultation of the Batwa as indigenous people in Rwanda. This may be one of the reasons why the local authorities continue to pay insufficient attention to the concerns of the Batwa.[199] Hence, the Batwa face systemic marginalization in national planning processes. Often, they are not consulted on major land use policies and on the effects that these policies have on their livelihoods.[200] The Government's 'Bye Bye Nyakatsi' programme, which required demolition of thatched roofed homes (*nyakatsi*) to be replaced by iron-roofed structures, is a pertinent example of non-consultation of Batwa. Local authorities demolished their houses before any replacement houses or appropriate assistance has been provided. While the program does not particularly target the Batwa people, they disproportionally affected as they commonly live in rudimentary thatched shelters. Furthermore, they exist in conditions of disadvantage and vulnerability, which means they are poorly equipped to respond to difficulties created by the dismantling of their homes.[201]

The right to political participation is generally guaranteed to all Rwandans and is effected through free and fair elections. Article 45 of the Rwandan Constitution guarantees to all citizens the right to participate in the governmental bodies of their country, whether directly or through freely chosen representatives in accordance with the law. The same article also guarantees to all citizens the right of equal access to public service in accordance with their competence and abilities. However, there is no specific law that protects the rights of the Batwa to fully participate in government programs.

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[197] Saugestad S 'Developing Basarwa Research and Research for Basarwa Development' 10 *Anthropology Today (1994)*20-22.

[198] Art 7 (1) of ILO Convention No 169.

[199] UN Doc A/HRC/19/56/Add (2010)18.

[200] MRGI (2000) 6.

[201] Bericht, Right to Adequate Housing. The Destruction of Batwa houses in Rwanda, available at *http://www.gfbv.de/inhaltsDok.php?id=2143* (accessed 22 August 2013).

In terms of representation in parliament, Article 82 (2) of the Constitution stipulates that eight members of the chamber of Senate must be appointed by the President of the Republic, who shall also ensure representation of historically marginalized communities. The Batwa have one representative in the Senate at the moment. In contrast, the lower house, the chamber of deputies, has no representative that emanates from the Batwa community. The same is true with other political offices. For instance, under Presidential Order, Land commission was established and operated at all levels of public administration but there was no provision made for Batwa's participation.[202] Due to the major problem of removing the Batwa from their traditional lands, and their current situation of landlessness, it would seem imperative that, at least, some Batwa representation is included in local level committees. It is clear that the 'informed consent'[203] of the Batwa community has not been sought.

The Batwa have been locked out of the governing structures of the country. They are largely side-lined from the political process and face challenges in participating in the country's decision-making procedures. This is related to the fact that they are numerically small and are not recognized as a distinct group, including the fact they often face rampant discrimination.[204] Hence, the concerns of the Batwa community have not been addressed due to their poor participation and representation in political life, including even at the local level. Due to the absence of representation and lack of consultation, some policies and practices caused major risks to the Batwa people, such as displacement from their traditional lands.

The government has a duty to acknowledge the Batwa as a distinct population group by implementing targeted programmes to improve their conditions. This would allow the Batwa to participate in a meaningful way in all stages of policy formulation, programme design and implementation of decisions that affect them. In this regard, the education of indigenous children can contribute both to their individuals and community development as well as to their participation in the wider society.[205] Therefore, good education will strengthen the ability of the Batwa children to exercise and enjoy civil

[202] Presidential Order No 54/01 OF 12/10/2006 determining the structure, the responsibilities, the functioning and the composition of land commissions.

[203] Xanthaki A (2007) 256.

[204] UN doc A/HRC/19/56/Add. (2010) 18.

[205] General comment No. 11, CRC/C/GC/11 (2009).

and political rights in order to influence political policy processes.[206] As a result of their marginalization and high levels of illiteracy, active participation in Rwanda's political life is currently inconceivable for many Batwa.[207]

4. Protection of Batwa from non-displacement from their traditional lands

The protection of rights to land and natural resources is fundamental for the survival of the Batwa community. Similarly, the rights of the Batwa to maintain their various relationships to their traditional territories must be protected, and it is the existence of such relationships that gives rise to the rights of restitution or other remedies.

The Constitution, under Article 29, states that, '[e]very person has a right to private property, whether personal or owned in association with others. Private property, whether individually or collectively owned, is inviolable. The right to property may not be interfered with except in public interest, in circumstances and procedures determined by law and subject to fair and prior compensation.' Generally, the Rwandan laws protect the private ownership of land, and other rights related to land[208] but fail to recognise and protect Batwa's collective traditional land ownership.

While the Organic Land Law provides legal status for some kinds of customary land ownership,[209] there are no specific references to the Batwa's traditional land. This means that the Batwa's collective rights to traditional lands are not recognised under the law. This may be one of the reasons why the Batwa have been pushed out of their traditional areas to give way for the economic interests of other more dominant groups and large-scale development initiatives that tend to destroy their traditional lives rather than improve the Batwa situation.[210]

In addition, the Land Law should settle the land challenges of the Batwa by granting collective rights on their traditional lands. However, the law seems to support land disenfranchisement. Articles 75 to

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[206] Art15 of UNDRIP. See also Art 30 of ILO Convention No 169.

[207] UNPO Mission Report, Investigating the situation of the Batwa People of Rwanda, The Hague, the Netherlands, (1995) 41.

[208] See Law N° 18/2007 of19/04/2007 relating to Expropriation in the Public Interest.

[209] Art 7 of 2005 Organic Land Law.

[210] Des Forges A *Land in Rwanda: Winnowing Out the Chaff. L 'Afrique des grands lacs*, Annuaire 2005–2006, (2006).

77 of the Land Law provide for the possibility of confiscation of land temporarily at first but with the potential for permanent confiscation if land is not utilised productively and if measures are not put in place to ensure environmental protection. No compensation is offered when such land is confiscated. This may make the Batwa more vulnerable.

There are various examples of land disenfranchisement among the Batwa. In the early 19th century, due to the combination of deforestation for agriculture, development projects or the creation of conservation areas, many in the Batwa community were displaced from their forest habitats.[211] In 1998, the Batwa inhabitants of the Volcanoes National Park were driven out by conservation projects to make a sanctuary for the mountain Gorillas.[212] Finally, the remaining forest-dwelling Batwa were evicted from forests such as the Nyungwe Forest Reserve and the Gishwati Forest.[213]

Despite of the provisions on expropriation, the Batwa have been forcibly removed from their traditional lands and dispossessed of their traditional livelihoods without consent or compensation.[214] Many are living in extreme hardship and poverty on the margins of mainstream society. Irreversible damage has been caused to their distinct lifestyles, livelihoods, cultures and traditional practices. As a result, most Batwa live under deplorable conditions.[215] Many Batwa see their rights in terms of collective rights. However, communal property rights are not recognized under the law and are usually ignored. Therefore, access to forests, clay groves and wetlands are often lost to farmers claiming the land for cultivation.[216] Batwa have been forced into slavery-like conditions and begging to make a living, often working forced labour on farmland of other Rwandans in exchange for food.

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[211] Des Forges A (2006). See also Maquet J and Naigiziki S 'Les Droits Fonciers dans le Rwanda Ancien' (1957) 4.

[212] ACHPR (2005) 22.

[213] Jackson D (2003) 6. See also ACHPR (2005) 22.

[214] Republic of Rwanda (2007) Law N° 18/2007 of19/04/2007 relating to Expropriation in the Public Interest.

[215] Civil society, Alternative Report on the Universal Periodic Review of Rwanda, (2011) at *http://lib.ohchr.org/HRBodies/UPR/Documents/Session10/RW/JS1_JointSubmission1_eng.pdf* (accessed12 June 2013).

[216] IWGIA, The Indigenous World, *Rwanda*, 2011, at *http://www.iwgia.org/images/stories/sections/regions/africa/documents/IW2011/rwanda_the_indigenous_world 2011. p d f* (accessed 20 June 2013).

The arbitrary displacement of the Batwa and appropriation of their traditional lands without appropriate restitution or compensation constitute a serious violation of various international and regional legal provisions that are binding on Rwanda, including Article 21 of the African Charter, Articles 10 and 17 of the UNDRIP, as well as its Articles 25 and 26. The Batwa have legitimate claims under Article 1 of the ICCPR. Even so, due to the lack of primitive forest in Rwanda, it is highly unlikely that areas similar to their traditional lands can be found. Restitution of their rights to occupy and use their traditional forest territories is arguably the only appropriate form of compensation. [217] Thus, the state and the Batwa people can negotiate specific management issues as part of the restitution process.

5. Protection of the Batwa's rights to culture, tradition and institutions

The right to culture is one of the core claims of indigenous peoples. Although most of the Batwa traditions and institutions structures have collapsed, their culture has been kept alive. Their traditional culture was respected for its sophisticated knowledge of the forest ecosystem, the uses of different plants for food and medicine, hunting, pottery and orientation skills, which are unique to the Batwa. Their great talent for the performing articles, acrobats, clowns, as singers and dancers, was unsurpassed in the region and widely appreciated.[218] The question is whether these cultural practices receive protection under the Constitution.

Article 51 of the Constitution provides protection for cultural traditions and practices. This clause can be interpreted to guarantee the rights of the Batwa to practice cultural traditions such as those which involve particular natural resources and territorial affiliation, such as hunting and gathering activities. Unfortunately, provisions in the Constitution, which bind the Government to protect the rights of the Batwa, have not been implemented.

By contrast, the culture of Batwa has been treated as a nuisance, and successive governments sought in different ways to weaken and ultimately eliminate the institutions in which these non-dominant cultures are embedded.[219] This governmental concern appears to be adopting a policy of forced

[217] Huggins C Land rights and the forest peoples of Africa (2009) 15-16.

[218] Lewis J (2006) 3.

[219] UNPO (2011).

assimilation and the loss of cultures.[220] Today in Rwanda, it said that all three ethnic groups have the same culture and speak the same language because these cultural and linguistic ethnic differences between the Batwa and other groups in the country have somehow disappeared.[221] This is not true because the Batwa can be distinguished by their dialect, *urutwatwa.*[222] Therefore, the government policy to eliminating these distinctive identities of Batwa is against the provisions of Article 2 and 8 of UNDRIP that indigenous peoples have the right not to be subjected to forced assimilation or destruction of their culture and institutions.

Furthermore, the HRC has affirmed that if any activity is an essential element in the culture of an ethnic community, as pottery, hunting and gathering activities are for the Batwa, criminalization of these activities represents a violation of Article 27 of the ICCPR, which guarantees minorities or indigenous peoples the right to enjoy their own culture.[223] Nevertheless, the government continue to impose a ban on hunting and collecting in those traditional forests and anyone entering the forest without prior approval is regarded as a poacher and charged accordingly.[224]

4. CONCLUSION

Rwanda has a history of ethnically-based discrimination promoted by governments that favour specific ethnic group to the exclusion of others. To reverse this situation, one of the proclaimed projects of the current government is the elimination of ethnicity and seeks for unity and reconciliation. However, the Institute of Research and Dialogue for Peace, a Kigali-based social research institution, concluded in its research that 'it would be nonsense to declare that there are no ethnic groups in Rwanda…[while] every Rwandan is able to tell you his/her ethnic group but on the other side, everybody hesitates to discuss the ethnic issues except within the ethnic group where he/she belongs.'[225]

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[220] NEPAD *Country Review Report of the Republic of Rwanda* (June 2006) 51.

[221] Huggins C (2009) 2.

[222] Urutwatwa is an accent of Batwa which considered as 'language of Batwa', but in reality is a different accent from *Kinyarwanda*.

[223] Xantheki A (2007). See also Art 30 of the UNCRC.

[224] AWGIP (2010) 38-39.

[225] The IRDP, 'Ethnic identity and social cohesion in Rwanda: Critical analysis of political, social and economic challenges' (2010) 10.

Although unity and reconciliation can, indeed, be an important issue in Rwandan society due to the country's historical background, ethnicity and self-identify cannot be ignored. It has been also mentioned by the African Commission that 'finding ways to protect the human rights of particularly discriminated groups should not be seen as tribalism and trouble of the unity of African states'.[226] In the same way, 'giving recognition to all groups, respecting their differences and allowing them all to flourish in a truly democratic spirit does not lead to conflict, it prevents conflict'.[227]

It is difficult, therefore, to say that one can promote a category of people while denying the status of that category. Unity and reconciliation can only be achieved when legal recognition, equality and favourable inter-ethnic relations have been achieved. Otherwise, it will be a case of fighting the symptoms rather than addressing the root causes. The government may need to be explicit in demonstrating that all people are equal regardless of ethnicity by deliberately including the Batwa in every government decision-making body.

Nevertheless, Rwanda has not ratified ILO Convention No.169. Yet, Rwanda is party to many other international and regional legal instruments that are also applicable to indigenous peoples. Therefore, the lack of recognition of their existence means that the effective implementation of minority or indigenous peoples' rights provided in both Covenants, CERD, CBD, UNDRIP, African Charter and other many important regional and international instruments has been ignored. This situation left the Batwa community with non-recognition, marginalization and discrimination.

In this regard, it is only after the Batwa people are guaranteed true recognition with specific protection that they can enjoy all fundamental human rights on an equal footing with other members of society. This recognition and protection of the Batwa community is not intended to create a special class of citizens but rather to address historical and present-day injustices and inequalities. Therefore, projects and programs should be developed to help the Batwa and to assist them to fully participate in the construction of Rwanda and its future society.

[226] ACHPR (2006) 12.

[227] ACHPR (2005) 88.

CHAPTER FOUR: CONCLUSION AND RECOMMENDATIONS

1. CONCLUSION

The paper focused on the situation of indigenous peoples in Africa and particularly in Rwanda. On the one hand, the study examined the question of indigenous peoples by promoting an inclusive concept of 'indigenous people' to the establishment of a truly universal regime in which it guarantees possible legal recognition and specific protection. On the other hand, after revealing marginalisation and various forms of injustice that face indigenous peoples through the case of Batwa in Rwanda, the study suggested effective protection and recommendations that can be used to serve indigenous peoples in Africa.

One of the leading questions was to investigate whether different international and regional instruments relevant to indigenous peoples are sufficient for the protection of the Batwa from discrimination and marginalisation. The provisions embodied in the ILO Convention, UNDRIP, African Charter and other international and regional instruments protecting human rights are very important to protect indigenous peoples in Africa. Hence, in order to promote equality and equal treatment of all citizens, individuals belonging to indigenous groups in Africa should be recognised in accordance with the internationally accepted standards of human rights law.

However, while the normative content of the indigenous rights regime had been largely defined, the creation of an effective regime specific for protection of indigenous peoples is far to be completed. On one hand, the UNDRIP, while is voted by many African countries, does not have any binding legal force. The (ILO) Convention No. 169, on the other hand, has not been ratified by many countries. The poor ratification record had inevitably undermined the global impact of that Convention.

In Africa, the African Charter has been widely ratified and regarded as providing a new ground for the protection of human rights and peoples' rights. It offers indigenous peoples a significant legal framework that is potentially capable of protecting their rights. The fact that it recognizes 'peoples' goes to the root of indigenous peoples' protection via various individuals and collective rights. In addition, the African Commission's WGIP made an important contribution in clarifying the true meaning of the concept 'indigenous peoples' in Africa. In particular, it provides legal recognition to a modern conception of 'indigenous people', notably one that had evolved from a narrow understanding, bound to the ideas of historical precedence and colonial subjugation towards a modern, more flexible

and practical understanding. Actually, indigenousness is associated with both the negative experience of discrimination and marginalisation from governance, as well as the positive aspects of being holders of unique knowledge, culture, which has emerged through the long-term management of some areas. Within their territories, indigenous peoples had political, social and economic structures around which they were well organised.

From this perspective, one can say that the issue of recognition and protection of indigenous peoples in Africa, including the Batwa in Rwanda, is not irreconcilable with the demand and concerns of other ethnic groups. It is also not intended to give indigenous peoples special rights, beyond the rights of all other groups within the state. It is rather a way of adequately responding to the peculiarities of their suffering. Therefore, Rwandan government's refusal to recognise the Batwa as indigenous people deprives the Batwa of their specific rights associated with the concept of indigenous peoples. This means that no official data is collected, and the government does not have the relevant information to develop appropriate strategies suitable to promote the Batwa community.

2. RECOMMENDATIONS

This study proposes steps that have to be followed in order to ensure that the policies and programmes that are aimed at promoting and protecting the rights of indigenous peoples are fully realised. It is in this context that the following recommendations are suggested. The recommendations are generally directed to African governments, and in particular to the Rwanda government.

The effective protection of indigenous peoples in Africa should be achieved by recognizing their legal status and not by attempting to assimilate them with the rest of the population. The African Commission recommended the Government of Rwanda to recognise Batwa as an indigenous people and take steps to protect their identity, culture and way of life[228]. This applies to any other African country which has indigenous peoples. Therefore, Rwanda, and other African countries should adopt 'policies and laws including affirmative action measures to extend special protection and ensure the continued participation of the indigenous peoples in all aspects of life'.[229]

[228] ACHPR/Rwanda (2010) para 43.

[229] ACHPR/Rwanda (2010) para 44.

The African states should recognise and respect the land and property rights of indigenous peoples, and their special attachment to natural resources. Special plans for the resettlement and rehabilitation of all indigenous peoples that were evicted from their ancestral lands should be made. Indigenous peoples should also be given adequate compensation. The government has a duty to commence effective consultation with these communities, develop initiatives to restore them to their ancestral habitats and cultural practices, develop programmes that value and preserve the traditional practices, which should, as much as possible, minimize interrupting their lifestyle.

As this study primarily concerned with the protection of the Batwa in Rwanda, a number of recommendations are directed to the government of Rwanda. Equality between Rwanda's different ethnic groups needs to be *de facto* and *de jure* equality. Rwanda should legally recognise the Batwa as indigenous people by considering the international and regional criteria for their identification to pave the way for effective protection. As citizens of Rwanda, the Batwa should be actors in their own socio-cultural and economic development. That is why measures should be taken to ensure the effective consultation and complete representation of the Batwa in government and other important political decision-making bodies.

Most of the Batwa are potters, and their children, by force of tradition, see their future in pottery. This should not *a priori* be discouraged, but traditional Batwa pottery should be developed into professional modern small pottery industries. With respect to the limited access of the Batwa to employment other than pottery, the government should create and promote the diversification of employment opportunities among the Batwa. For instance, the Batwa tradition of dance and songs should be promoted and supported by the creation of commercial cultural groups. However, the combination of educational and vocational training is required.

The Government needs to take measures to make education more accessible to the Batwa children. The aim of this education must not be a policy for assimilating them into dominant society and thereby contributing to the extinction of their cultures, traditions and ways of life. According to Article 14 (2) of the UNDRIP, effective measures should be taken in order to ensure access, when possible, to an education in their own culture and their home language. It is not enough to provide free primary education, but it is also necessary to provide the Batwa parents with adequate means to support their

children's study. [230] However, a serious effort must be made by the Batwa themselves and their organizations to promote their education and vocational training. The training must meet their needs and be based on their culture, social and economic environment.

There is also an urgent need for COPORWA members and other Batwa organizations to build strong institution, in order to establish confidence and support among the Batwa families and community. Batwa organizations should invest in developing and maintaining good relations with the government of Rwanda, and co-operate with it to develop programs and projects on their behalf. The organizations will help the Batwa to nurture leaders, who can represent them at the national, regional and international revel.

Rwanda, like any other African state, should ratify ILO Convention 169, which, at the moment, stands out as the most authoritative international treaty defining the regime of indigenous peoples' rights and the obligations of states towards them. In relation to this, ILO Convention 169 protects indigenous peoples from manipulation, used for denying their identity, assimilation of their culture, collapsing their economic, social and political institutions or appropriating their land. This instrument should not only be ratified but also domesticated to be given legal effect.

Likewise, the African Charter is a regional treaty that is legally binding on all African States except Morocco which is not part of AU. On becoming a party, States automatically accept the right of individuals to submit complaints to the ACHPR. Therefore, if marginalisation and discrimination against Batwa continue, a legal case should be filed before the ACHPR as well as other national, regional and international courts.

Word count: 18000

[230] General comment No. 11, CRC/C/GC/11, (2009).

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