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Protecting indigenous peoples in Africa: An analysis of the approach of the African Commission on Human and Peoples' Rights

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Summary

In 2003, the African Commission established a Working Group of Experts on Indigenous Populations/ Communities in Africa. This development has been heralded as a recognition of the existence of particular marginalised groups in Africa identifying themselves as indigenous peoples whose rights are protected by the African Charter. The establishment of the African Commission's Working Group was largely a regional manifestation of the developments taking place at international law. This article discusses the concept of indigenous peoples as it is developing at international law and under the African human rights system. It also explores the extent to which the African Charter, according to the African Commission's Working Group, accommodates the rights of indigenous peoples.

1 Introduction

The adoption of the African Charter on Human and Peoples' Rights (African Charter)[1] and the subsequent establishment of the African

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1 African Charter on Human and Peoples' Rights, adopted 27 June 1981 in Nairobi, Kenya, OAU Doc CAB/LEG/67/3 Rev 5, entered into force 21 October 1986.

Commission on Human and Peoples' Rights (African Commission),[2] more than two decades ago, heralded a new dawn for a continent ravaged by civil wars, dictatorships and notorious human rights violations.[3] The African Charter has been hailed as an innovative document that seeks to address the peculiarities of African human rights problems, particularly of the 'exemplification of group rights'.[4] However, neither the African Charter, nor its implementing institution, the African Commission, has escaped criticism; the African Charter particularly for its extensive claw-back clauses,[5] and the African Commission for its apparent lack of 'teeth'.[6] The scope of this paper is, however, limited to tracing the African Charter's and the African Commission's approach towards the rights of indigenous peoples.

While there is no express reference to indigenous peoples in the African Charter, its embodiment of group or peoples' rights could be read as addressing their rights.[7] However, while the African Commission's jurisprudence on 'peoples' rights' has undoubtedly paved the way for the protection of indigenous peoples, we argue that the African

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2 The African Commission (established under art 30 of the African Charter) was inaugurated on 2 November 1987 in Addis Ababa, Ethiopia and is based in Banjul, The Gambia; Information Sheet 1 http://www.achpr.org/english/information_sheets/ACHPR%20inf.%20sheet%20no.1.doc (accessed 20 July 2006).

3 See J Oloka-Onyango 'Reinforcing marginalised rights in an age of globalisation: International mechanisms, non-state actors and the struggle for peoples' rights in Africa' (2003) 18 *American University International Law Review* 912.

4 n 3 above, 857. Some other cited unique innovative examples include setting out individual duties in addition to the traditional individual rights. See M Mutua 'The Banjul Charter and the African cultural fingerprint: An evaluation of the language of duties' (1995) 35 *Virginia Journal of International Law* 339. It also includes in the same treaty economic, social and cultural rights without distinction as to implementation (arts 14-17 African Charter).

5 Mutua (n 4 above) 7. For further critique, see C Flinterman & E Ankumah 'The African Charter on Human and Peoples' Rights' in H Hannum (ed) *Guide to international human rights practice* (1992) 159; O Ojo & A Sessay 'The OAU and human rights: Prospects for the 1980s and beyond' (1994) 8 *Human. Rights Quarterly* 89; R Gittleman 'The African Charter on Human and Peoples' Rights: A legal analysis' (1982) 22 *Virginia Journal of International Law* 667; J Oloka-Onyango 'Beyond the rhetoric: Reinvigorating the struggle for social and economic rights in Africa' (1995) 35 *California Western International Law Journal* 1; C Heyns 'The African human rights system: In need of reform?' (2001) 1 *African Human Rights Law Journal* 155-174.

6 As above. See also F Viljoen 'A Human Rights Court for Africa, and Africans' (2004) 30 *Brooklyn Journal of International Law* 13-22.

7 See generally *Report of the African Commission's Working Group of Experts on Indigenous Populations/Communities* submitted in accordance with the Resolution on the Rights of Indigenous Populations/Communities in Africa and adopted by the African Commission at its 28th ordinary session in Cotonou, Benin, ACHPR & IWGIA 2005; RN Kiwanuka 'The meaning of ''people'' in the African Charter on Human and Peoples' Rights' (1988) 82 *American Journal of International Law* 82; P Alston 'Peoples' rights: Their rise and fall' in P Alston (ed) *Peoples' rights* (2000) 266; F Ouguergouz *The African Charter on Human and Peoples' Rights: A comprehensive agenda for human rights and sustainable democracy in Africa* (2003) 203; P Nobel 'The concept of ''peoples'' in the African Charter on Human and Peoples' Rights' in P Nobel (ed) *Refugees and development in Africa* (1987) 15.

Commission's jurisprudence thus far has not always interpreted indigenous peoples' rights favourably.[8] Indeed, we argue that the concept of indigenous peoples' rights as developing internationally finds home in the African human rights system with the establishment of the African Commissions' Working Group of Experts on Indigenous Populations Communities (African Commission's Working Group)[9] and the subsequent adoption of its report.[10]

The paper commences by briefly highlighting the international development of indigenous peoples' rights in a bid to etch out how the concept reached the African human rights system. Next it discusses the issue of indigenous peoples within the African human rights system prior to and after the establishment of the African Commission's Working Group. Finally, the paper analyses the report of the African Commission's Working Group in an attempt to identify its potential in protecting indigenous peoples on the continent.

2 The development of indigenous peoples' rights

The concept of indigenous peoples and the concern for the rights of groups who regard themselves as indigenous peoples have enjoyed extensive scholarly,[11] judicial[12] and political attention in recent years.

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8 *Katangese Peoples' Congress v Zaire* (2000) AHRLR 72 (ACHPR 1995). This is notwithstanding the fact that some commentators contend that an attempt by the African Commission to address indigenous peoples' rights could be seen in its decision in *Social and Economic Rights Action Centre & Another v Nigeria* (2001) AHRLR 60 (ACHPR 2001). See Oloka-Onyango (n 3 above) 856.

9 See ACHPR /Res 51 (XXVIII) 00 Resolution on the Rights of Indigenous Peoples' Communities in Africa (2000), adopted by the African Commission at its 28th ordinary session held in Cotonou, Benin in October 2000 http://www.achpr.org/english/resolutions/resolution70_en.html (accessed 29 May 2006).

10 See ACHPR/Res 65 (XXXIV) 03 Resolution on the Adoption of the Report of the African Commission's Working Group on Indigenous Populations/ Communities (Resolution on the Adoption of the Report) http://www.achpr.org/english/resolutions/resolution70_en.html (accessed 29 May 2006). The report titled *Report of the African Commission's Working Group of Experts on Indigenous Populations/Communities, Submitted in accordance with the Resolution on the Rights of Indigenous Populations/ Communities in Africa* adopted by the African Commission at its 28th ordinary session held in Cotonou, Benin in October 2000, IWGIA & ACHPR, 87 (2005).

11 See generally SJ Anaya *Indigenous peoples in international law* (2004); D Sanders 'The re-emergence of the indigenous question in international law' (1983) 1 *Canadian Human Rights Year Book* 3; C Tennant 'Indigenous peoples, international institutions, and international legal literature from 1945-1993' (1994) 16 *Human Rights Quarterly* 1; B Kingsbury '"Indigenous peoples" in international law: A constructivist approach to the Asian controversy' (1998) 92 *American Journal of International Law* 414; R Torres 'The rights of indigenous populations: The emerging international norm' (1991) 16 *Yale Journal of International Law* 127.

12 For the practice of international political bodies, see generally SC Perkins 'Indigenous peoples and international organisations: Issues and responses' 1995 23 *International Journal of Legal Information* 217; J Debeljak 'Indigenous rights: Recent developments in international law' (2000) 28 *International Journal of Legal Information* 266.

However, the issue of indigenous peoples is not a new phenomenon. Philosophers and jurists have grappled with the problem of indigenous peoples from the moment Spanish incursions into the Western hemisphere brought European explorers into contact with the native peoples of the Americas (Indians). Debates ensued amongst Western scholars with respect to the legality of Spanish activities in the Americas and the propriety of the treatment meted out to the Indians.[13] These debates are closely associated with the development of international law.[14] To be sure, the debates pertaining to indigenous peoples during the period under consideration 'did not arise in consequence of indigenous assertions of rights, but rather centred on the nature, scope and justification which others claimed over them'.[15]

Put simply, the debates conducted within the framework of international law had little to do with interrogating the 'rights' indigenous peoples had or claimed, but more with the 'position' they occupied within international law. The position of indigenous peoples within international law was assumed to have, and did have, relevance to the rights that the European 'others' had over indigenous peoples. Despite the debates, European incursions into the Western hemisphere, and indeed the rest of the world, continued unabated and the extent to which early international law recognised and respected the rights of indigenous peoples is highly controversial.[16] Be that as it may, in recent years the issue of indigenous peoples has been featuring prominently within international law.

Modern international law's concern for indigenous peoples was kick-started by the International Labour Organisation (ILO) in the early 1920s, and culminated in the adoption of ILO Convention 107 of 1957.[17] For a very long time, this was the only international instrument that provided for the rights of indigenous peoples. However, in time, ILO Convention 107 came under fire, as it was regarded as assimilationist and out of tune with modern international law, which tended to

[13] See generally GC Marks 'Indigenous peoples and international law: The significance of Francisco de Vitoria and Bartolome de las Casas' (1992) 2 *Australian Yearbook of International Law* 13; P Keal *European conquest and the rights of indigenous peoples: The moral backwardness of international society* (2003).

[14] Anaya (n 11 above) 9.

[15] P Thornberry *Indigenous peoples and human rights* (2002) 64; see also generally PG McHugh *Aboriginal societies and the common law: A history of sovereignty, status and self-determination* (2004).

[16] See eg J Ngugi 'The decolonisation-modernisation interface and the plight of indigenous peoples in post-colonial development discourse in Africa' (2002) 20 *Wisconsin International Law Journal* 298.

[17] See United Nations *The ILO and the indigenous and tribal peoples* Leaflet 8, 2. For a useful exposé of the formation of ILO and indigenous peoples, see L Swepston 'The Indigenous and Tribal Peoples Convention (No 169): Eight years after adoption' in C Cohen *Human rights of indigenous peoples* (1998).

emphasise respect for cultural integrity.[18] Accordingly, ILO Convention 107 was replaced by Indigenous and Tribal Populations Convention 169 in 1989, hailed as the 'most concrete manifestation at the international level of the growing responsiveness to indigenous peoples' demands'.[19] The new Convention represented a major paradigm shift on the subject because, unlike its predecessor, it 'adopted an attitude of respect for cultures and ways of life of these peoples'.[20]

In the interim, the United Nations (UN) had also taken on board the issue of indigenous peoples.[21] A study that it commissioned in 1970 culminated in the establishment of the Woking Group on Indigenous Populations (WGIP) in 1982.[22] Subsequently, the WGIP commenced drafting a Declaration on the Rights of Indigenous Peoples.[23] The Draft Declaration was adopted by new UN Human Rights Council[24] and awaits final adoption by the UN General Assembly.[25] Other

[18] L Swepston 'A new step in the international law on indigenous and tribal peoples: ILO Convention No 169 of 1989' (1990) 15 *Oklahoma City University Law Review* 677.

[19] SJ Anaya 'Indigenous rights norms in contemporary international law' (1991) 8 *Arizona Journal of International and Comparative Law* 1 5. In fact, Anaya argues that the Convention expressed norms of customary international law. Interestingly, at the time it had been ratified by only four states. It has been said that the significance of Convention 169 will depend not only on ratification but 'on whether aggressive use of the Convention by indigenous peoples themselves can give it a relatively more progressive effect as its novelty fades'. R Barsh 'An advocate's guide to the Convention on Indigenous and Tribal Peoples' (1990) 15 *Oklahoma City University Law Review* 211.

[20] Swepston (n 17 above) 23; see eg ILO Convention, art 4 (measures to safeguard property, cultures, labour and environment of indigenous peoples), art 5 (respect for cultural and religious values of indigenous peoples), art 6 (right to consultation in relation to legislative or administrative measures affecting indigenous peoples).

[21] J Burger 'The United Nations Draft Declaration on the Rights of Indigenous Peoples' (1996) 9 *St Thomas Law Review* 209; I Washinatok 'International emergence: Twenty-one years at the United Nations' (1998) 3 *New York City Law Review* 41.

[22] See *Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People* E/CN.4/2002/97 para 6 and ECOSOC Resolution ESC Res 1589, 21 May 1971, UNESCOR, 50thh sess, Supp 1, 16 UN Doc/E/5044 (1971). The WGIP, whose members are from the sub-commission, has a double-pronged mandate. The first is to review the developments pertaining to the promotion and protection of indigenous peoples and the second is to give special attention to the evolution of standards on the subject.

[23] Draft Declaration on the Rights of Indigenous Peoples UN Doc E/CN.4/Sub 2/1994/2/Add 1 (1993). See also *Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People* E/CN 4/2002/97 para 7; J Burger 'Indigenous peoples and the United Nations' in Cohen (n 17 above) 6.

[24] See *Report to the General Assembly on the First Session of the Human Rights Council* (A/HRC/1/L 10, 30 June 2006 (56-58), A Resolution on the Declaration on the Rights of Indigenous Peoples, adopted on 29 June 2006 by the Human Rights Council by a roll-call vote of 30 in favour to two against and 12 abstentions.

[25] The Draft Declaration has now been forwarded to the UN General Assembly for adoption, hopefully before the end of 2006.

developments with respect to indigenous peoples within the UN include the establishment of a Permanent Forum[26] and the appointment of a Special Rapporteur.[27] It was only a matter of time before these developments percolated through to the African human rights system. What follows next is a discussion of the developments with regard to indigenous peoples within the African human rights system.

3 The issue of indigenous peoples within the African human rights system

The African Charter is the main treaty in the African human rights system,[28] while the African Commission has been its main implementing institution.[29] Since its inception in 1987, the African Commission has sought to execute its mandate as stipulated in article 45 of the African Charter, which includes promoting and protecting human and peoples' rights and interpreting the African Charter.

The African Commission meets twice a year (for 15 days per session) in ordinary sessions,[30] and can hold extraordinary sessions to execute its mandate, which includes considering state reports, communications, adopting resolutions, deliberating on its relationship with civil society and national human rights institutions and discussing current human rights concerns on the continent. During the ordinary sessions, the

[26] United Nations *The Permanent Forum on Indigenous Issues* Leaflet No 6, 1; See ECOSOC Resolution 2000/22, 28 July 2000. For a thorough exposition of the establishment of the Permanent Forum, see Debeljak (n 12 above) 299-310.

[27] Commission on Human Rights Resolution E/CN.4/RES/2001/57.

[28] It is worth noting that there are other human rights instruments adopted by the OAU/AU to promote and protect specific human rights on the continent, such as the Convention Governing the Specific Aspects of Refugee Problems in Africa, 1001 UNTS 45, entered into force 20 June 1974; the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, adopted by the 2nd ordinary session of the AU Assembly in Maputo, CAB/LEG/66.6 (13 September 2000) entered into force 25 Nov 2005; the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, 9 June 1998, OAU Doc OAU/LEG/EXP/AFCHPR/PROT (III) entered into force 25 January 2005; the African Charter on the Rights and Welfare of the Child, OAU Doc CAB/LEG/24 9/49 (1990), entered into force 29 November 1999.

[29] The African Court Protocol was adopted by the Assembly of Heads of State and Government of the OAU in Ougoadougou, Burkina Faso, on 9 June 1998 and came into force on 25 January 2004. However, the 3rd ordinary session of the Assembly of Heads of State and Government of the AU decided to integrate it with the Court of Justice of the AU (Protocol of the Court of Justice adopted by the 2nd ordinary session of the Assembly of the AU in Maputo, 11 July 2003) Assembly/AU/Dec 45 (111). The first judges of the Court were sworn in on 2 July 2006 at the 7th AU Summit, and the Court is expected to take off in the near future and will complement the African Commission.

[30] This is in accordance with Rule 1 of its Rules of Procedure. The African Commission has had 39 ordinary session since its establishment in 1987. The 39th ordinary session was held in Banjul, The Gambia, 11- 25 May 2006.

African Commission holds sittings where its members, states, organisations having observer or affiliate status and other stakeholders engage in dialogue on pertinent human rights issues on the continent.[31] It is at these sittings that issues such as the rights of indigenous peoples on the continent have been raised by their representatives and international and national organisations concerned about their welfare and rights. The International Work Group for Indigenous Affairs (IWGIA) has been at the forefront and indeed elicited interest through raising awareness and supporting the participation of indigenous peoples at the African Commission's sessions.[32] The organisation has also facilitated and funded the African Commission's Working Group and its activities, including the publication of a report, the contents of which we will revisit shortly.[33]

The protective mandate of the African Commission mainly encompasses the consideration of complaints alleging human rights violations (commonly referred to as communications) from individuals, non-governmental organisations (NGOs) or state parties.[34] Under this mandate, the African Commission also undertakes fact-finding missions to investigate allegations of massive human rights violations within member states.[35] The African Commission has considered communications from groups considered indigenous peoples, albeit with little, if any,

[31] See ACHPR /Res.33(XXV)99 Resolution on the Criteria for Granting and Enjoying Observer Status to Non-Governmental Organisations Working in the Field of Human and Peoples' Rights (1999). By the 39th ordinary session of the African Commission held in Banjul, The Gambia from 11-25 May 2006, more than 300 NGOs had been granted observer status before the Commission. These NGOs can participate in the sessions of the Commission and indeed before each ordinary session of the Africa Commission, NGOs organise an 'NGO Forum' to discuss pertinent human rights issues on the continent and propose relevant recommendations and resolutions to the African Commission for consideration. See also ACHPR /Res 31(XXIV)98 Resolution on the Granting of Affiliate Status to National Human Rights Institutions in Africa (1998). At least seven national human rights institutions by the same period had been granted affiliate status before the Commission. These organisations attend and address the Commission. See the African Commission's Rules of Procedure Rules 75 & 76.

[32] Sourced from IWGIA's official website http://www.iwgia.org/sw249.asp (accessed 30 July 2006).

[33] See *Report of African Commission's Working Group* (n 10 above) 10.

[34] See F Viljoen 'Admissibility under the African Charter' in M Evans & R Murray (eds) *The African Charter on Human and Peoples' Rights. The system in practice, 1986-2000* (2002) 61-99 for a detailed discussion on admissibility under the African Charter. The inter-state communications are envisaged under arts 47-54 of the African Charter. However, apart from a communication brought by the Democratic Republic of Congo against Rwanda and Uganda, there has not been any other inter- state communication to-date.

[35] The African Commission has undertaken such fact-finding missions in Ethiopia, Nigeria and Zimbabwe. Apart from the report of Zimbabwe, which was published as part of the Seventeenth Annual Activity Report of the Commission, the reports of Ethiopia and Nigeria have never seen the light of day.

substantive results, at least in the practical realisation of their rights.[36] Some of the African Commission's jurisprudence in this regard is considered in the report of the African Commission's Working Group, which is discussed in the next section.

States have generally been unco-operative with regard to their obligation to report under article 62, since there are many states that are yet to even submit their initial reports and very few who are up to date with their submissions. However, the process could potentially be a key forum to address and highlight indigenous peoples' rights.[37] The state reporting mechanism has so far not been employed effectively to raise the concerns and discuss the situation of indigenous peoples on the continent.[38] Recently, however, the African Commission has taken to raising issues related to indigenous peoples during the examination of state reports. During the 39th ordinary session, for example, the Commission sought further information on the measures being taken to protect the rights of indigenous peoples during the examination of the periodic state reports of Cameroon, the Central African Republic and Libya.[39] Some of the questions raised revolved around the measures taken to ensure that the economic, social, cultural and political rights of minorities were respected.[40] While the state representatives responded generally and did not have the statistical evidence that was sought, the fact that the African Commission has started to raise indigenous peoples' issues during the examination of state reports is commendable and will hopefully ensure that states give regard to indigenous peoples in their territories. There is still, however, a need for follow-up on the questions raised on state reports to ensure that it is not an academic exercise. This may possibly be done during promotional missions, making sure that states do indeed respond and implement

[36] See eg the *Katangese* and *SERAC* cases (n 8 above) and currently still under consideration Communication 276/2003, *CEMIRIDE (on behalf of the Endorois Community) v Kenya* http://www.minorityrights.org/news_detail.asp?ID=342 (accessed 22 May 2006).

[37] See generally FD Gaer 'First fruits: Reporting by states under the African Charter on Human and Peoples' Rights' (1992) 10 *Netherlands Human Rights Quarterly* 29 for an evaluation of the initial state reporting under the African Charter; M Evans *et al* 'The reporting mechanism of the African Charter on Human and Peoples' Rights' in Evans & Murray (n 34 above) 36-60.

[38] Eg, during the consideration of the state report of the Republic of Rwanda during the 36th ordinary session of the African Commission in Dakar, Senegal, in December 2004, the state delegates from the Republic of Rwanda insisted that the concept of indigenous peoples does not exist in Rwanda and the Batwa people (who are widely considered indigenous, even in the African Commission Working Group Report 15) could not be regarded as such. (One of the authors participated in this session and was a member of the Secretariat of the African Commission.)

[39] See IWGIA Report, *39th ordinary session of the African Commission*, Banjul, The Gambia, 11-25 May 2006 11 (copy with authors).

[40] As above.

suggestions and concluding observations adopted with respect to indigenous peoples.

In executing its promotional mandate, the African Commission conducts promotional missions whereby commissioners[41] visit states to disseminate information about the African Charter and the African Commission. It has also established special mechanisms such as Special Rapporteurs and Working Groups[42] to undertake specific activities on various thematic human rights issues of concern on the continent. The promotional mandate of the African Commission envisages, among others, research and documentation, dissemination of information through workshops, seminars and symposia, and the formulation of principles to address legal problems of human rights.[43]

Individuals, groups and communities identified as indigenous peoples, with support from international and national organisations participating in the African Commission's activities, lobbied for recognition and protection from the African Commission.[44] The intensive lobbying process is actually traceable to 1999, when IWGIA held a conference on the situation of indigenous peoples in Africa in co-operation with a local NGO, named Pastoralists Indigenous NGO Forum in Tanzania.[45]

The conference 'recommended that the African Commission on Human and Peoples' Rights should be encouraged to address the human rights situation of indigenous peoples in Africa, which it had so far never done before'.[46] In the words of IWGIA:

> [O]ne of the then members of the African Commission, Commissioner Barney Pityana from South Africa, participated in the Tanzania conference and, during the following sessions of the African Commission in Rwanda and Algeria respectively, he brought up the issue.

Initially, the African Commission tended to reject the issue, as it did not find the term 'indigenous peoples' applicable to African conditions. The main argument was that all Africans are indigenous to Africa and that

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41 In terms of art 31 of the African Charter, the African Commission shall be composed of 11 members drawn from among African personalities with the highest reputation and integrity serving in their personal capacities. The first members of the Commission were elected at the 23rd ordinary session of the Assembly of Heads of State and Government of the OAU held in July 1987.

42 Some of the Rapporteurs currently in existence are the Special Rapporteur on the Rights of Women in Africa; the Special Rapporteur on Prisons and Conditions of Detention in Africa; the Special Rapporteur on Human Rights Defenders in Africa; and the Special Rapporteur on Refugees and Displaced Persons in Africa, Special Rapporteur on the Freedom of Expression in Africa and Working Group on Economic, Social and Cultural Rights in Africa; Working Group on Specific Issues Relevant to the Work of the African Commission; Working Group on the Death Penalty; Working Group on the Implementation of the Robben Island Guidelines; Working Group on the Situation of Indigenous Peoples/Communities in Africa.

43 Art 45(1) African Charter.

44 *Report of the African Commission's Working Group* (n 10 above) 10.

45 IWGIA *Indigenous world* (2001-2002) 453.

46 As above.

no particular group can claim indigenous status.[47] With skilful interventions, plodding and convincing, members of the African Commission, seized with more information on the situation of peoples identified as indigenous peoples in Africa, 'saw the light'. As they say, the rest is now history, and in 2000, on the basis of article 45(1) of the African Charter, the African Commission adopted a resolution establishing a Working Group of Experts on the Rights of Indigenous Populations/Communities in Africa to study the issue of indigenous peoples on the continent.[48]

3.1 The African Commission's Working Group of Experts on Indigenous Populations

The African Commission opted for the Working Group model which, as stated above, is one of the established mechanisms available to the African Commission for analysing a mosaic of human rights issues in Africa. It has to be pointed out that the African Commission's Working Group is dissimilar in its mandate and mode of operation from the WGIP. Unlike the latter, the African Commissions' Working Group is a small task force whose members are appointed by the African Commission in their personal capacities as experts.[49] The mandate of the African Commission's Working Group is as follows:[50]

(1) to examine the concept of indigenous people and communities in Africa;
(2) to study the implications of the African Charter on the human rights and well-being of indigenous communities; and
(3) to consider appropriate recommendations for the monitoring and protection of the rights of indigenous communities.

The first meeting of the African Commission's Working Group was convened on 12 October 2001 in The Gambia.[51] This meeting preceded the 30th session of the African Commission, which was similarly held in The Gambia from 13 to 27 October 2001.[52] At this pioneering meeting, the African Commission's Working Group took upon itself the task of developing a conceptual framework paper as a point of departure. This

47 As above.
48 Resolution on the Rights of Indigenous Peoples' Communities in Africa (2000) (n 9 above).
49 n 45 above, 454. Eg, unlike the UNWGIP, the African Commission's Working Group does not hold periodic public sessions where indigenous peoples, governments and interested parties meet to exchange ideas and share experiences. The current members of the Working Group are Commissioner Rezag-Bara (Chairperson), Commissioner Musa Ngary Bitaye, Dr Naomi Kipuri, Mohammed Khattali, Marianne Jensen and Zephryn Kalimba.
50 n 9 above, paras 1-5.
51 n 45 above.
52 As above.

paper, it was agreed, would form the basis of a report that was to be submitted to the African Commission, encapsulating the findings of the African Commission's Working Group in the discharge of its mandate.[53] It was agreed that this paper would, in the main, briefly discuss the characteristics of indigenous peoples in Africa and highlight their specific human rights problems.[54] This would shed light on the types of groups being discussed.

A draft of the conceptual framework paper was discussed at a roundtable meeting held prior to the 31st session of the African Commission, which was held in Pretoria, South Africa from 1 to 16 May 2002.[55] The roundtable meeting, which was attended by members of the African Commission's Working Group and four invited experts, generally endorsed the approach adopted by the African Commission's Working Group and this paved the way for the drafting of the report to be submitted to the African Commission.[56] The African Commission's Working Group, after extensive consultations with human rights experts and indigenous peoples' organisations, prepared a report which was submitted to and adopted by the African Commission in 2003.[57]

Apart from the report, which is analysed in detail in the next section, the African Commission's Working Group has undertaken other research projects and country information visits in Burundi, Congo Brazzaville, Libya and Uganda.[58] Mainly these visits have been undertaken with a view to gathering information about the human rights situation of indigenous peoples in the countries visited and to provide information on the work of the African Commission's Working Group. It has also conducted country visits to Botswana,[59]

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53 As above.

54 n 45 above, 455.

55 As above.

56 n 45 above, 456.

57 Resolution on the Adoption of the Report of the African Commission's Working Group (n 10 above).

58 See generally IWGIA *The indigenous world* (2006) and IWGIA *The 38th ordinary session of the African Commission on Human and Peoples' Rights, Banjul, The Gambia*, 21 November to 5 December 2005. See also The African Commission on Human and Peoples' Rights Working Group of Experts on Indigenous Populations/Communities *Report of a Research and Information Mission to Burundi from 27 March to 9 April 2005* and The African Commission on Human and Peoples' Rights Working Group of Experts on Indigenous Populations/Communities *Report of a Research and Information Mission to the Republic of Congo*, 5-19 September 2005. Reports of Research and Information Missions to the Republic of Congo and Burundi are available at http://www.iwgia.org (accessed 1 August 2006).

59 See IWGIA 'Press Conference by Commissioner Andrew R Chigovera, Chairperson of the African Commission's Working Group on Indigenous Populations and Communities in Africa on the Mission to the Republic of Botswana' (15-23 June 2005) http://www.iwgia/graphics/Synkron-Libarary/Documents/InternationalProcesses/A (accessed 26 July 2006).

Namibia[60] and Niger[61] in order to lay a foundation and work with all stakeholders to enhance the human rights situation of the indigenous communities in those countries.

3.2 The report of the African Commission's Working Group

The report of the African Commission's Working Group is divided into three main sections. It commences by analysing the human rights situation of indigenous peoples in Africa. In this section the report identifies certain groups regarded as indigenous peoples in Africa. The section also draws attention to their specific human rights concerns. The next section discusses the jurisprudence of the African Commission with specific reference to the rights of indigenous peoples. The African Commission's Working Group concludes that the African Charter protects the rights of groups identifying themselves as indigenous peoples and that the concept of peoples in the African Charter may be interpreted to include groups within independent states. The report then discusses the criteria for identifying indigenous peoples in Africa and concludes by making recommendations to the African Commission for the protection of indigenous peoples' rights in Africa.

In this paper we adopt a slightly different sequence from that of the report of the African Commission's Working Group. We first discuss the concept of indigenous peoples and the criteria for identifying such groups as adopted by the African Commission's Working Group. We next discuss the specific human rights situations of groups identified as indigenous peoples in Africa. We then discuss the jurisprudence of the African Commission and the implications of the African Charter with respect to indigenous peoples. In our view, it makes more sense to first discuss the concept of indigenous peoples and the criteria for identifying such groups before discussing the human rights situations of such groups.

3.2.1 The concept of 'indigenous peoples' in Africa

As noted above, the concept and the rights of indigenous peoples have been the subject of intense scholarly attention in recent years.[62] Despite this attention and the enormous strides that have been made at international law, at least with respect to drawing world attention to the

[60] IWGIA 'Press Conference by Commissioner Andrew Ranganayi Chigovera, Chairperson and Head of Delegation of the African Commission's Working Group on Indigenous Populations/Communications in Africa on the Mission to the Republic of Namibia' (26 July to 6 August 2005) http://www.iwgia/graphics/Synkron-Libarary/Documents/InternationalProcesses/A (accessed 26 July 2006).

[61] IWGIA Report (n 39 above) 6.

[62] See generally various writings (n 11 above).

plight of groups that identify themselves as indigenous peoples, there is controversy regarding its applicability to certain parts of the world.[63] Perhaps this explains why there is presently no universal definition of the concept of indigenous peoples. In Africa the concept is even more controversial. The African Commission itself did not initially embrace the concept of indigenous peoples in Africa with enthusiasm. In fact, the African Commission had to be cajoled into action by civil society to consider the rights of indigenous peoples in Africa. This was because the African Commission initially 'did not find the term indigenous peoples applicable to African conditions'. The argument was that all Africans are indigenous to Africa and that no particular group can claim indigenous status.[64]

Even when the African Commission adopted the resolution establishing the African Commission's Working Group, its decision was not unanimous, evident from the resolution which reflects the ambiguity felt within the African Commission about this initiative. It also reflects a divergence of conceptual thought between French- and English-speaking members. The expression 'indigenous' had long been problematic within the African Commission and the report attempts to deal with the matter. The term 'populations/communities' reveals a residual consideration of indigenous people as 'minorities' or as a cohesive population in their own right. The resolution avoided direct reference to 'peoples' due to the divergence of views within the African Commission itself about its value and meaning within the African Charter.[65]

This uncertainty within the African Commission perhaps mirrors the general attitudes of African governments with respect to the issue.[66] Hitchcock and Vinding point out that most African governments maintain that all their citizens are indigenous.[67] Yet other countries have denied citizenship to groups that identify themselves as indigenous.[68] In light of this controversy on the subject, the African Commission left it to the experts to examine the concept of indigenous peoples in Africa.

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63 Eg the applicability of the concept of indigenous peoples is disputed in Asia. For a thorough exposition of the Asian controversy, see generally B Kingsbury 'The applicability of the international legal concept of ''indigenous peoples'' in Asia' in JR Bauer & DA Bell *East Asian challenge* (1999) 336; Kingsbury (n 11 above).

64 n 45 above, 453.

65 *Report of the African Commission's Working Group* (n 10 above) 11-12.

66 Even after adoption of the report, some states are still reluctant to embrace the concept, as evidenced during the 39th ordinary session of the African Commission. See IWGIA Report (n 39 above).

67 RK Hitchcock & D Vinding 'Introduction' in RK Hitchcock & D Vinding (eds) *Indigenous peoples' rights in Southern Africa* (2004) 8. See also *Report on the Third Workshop on Multiculturalism in Africa: Peaceful and Constructive Group Accommodation in Situations Involving Minorities and Indigenous Peoples* para 9 and generally *Report of the African Commission's Working Group* (n 10 above).

68 Eg the government of Zambia is said to have maintained that the small number of the San in Zambia are not Zambian citizens but are refugees from Angola who fled from Angola during the civil war in that country; Hitchcock & Vinding (n 67 above) 8.

In examining the concept of indigenous peoples in Africa, the African Commission's Working Group was not oblivious to the controversy surrounding the concept of indigenous peoples in Africa. In particular, it was alive to the common argument that all Africans are indigenous to Africa. In terms of this argument, the term indigenous is seen as synonymous with aboriginality.[69] The African Commission's Working Group therefore had to adopt an approach to the concept that circumvented reference to aboriginality or prior occupation.

The African Commission's Working Group commenced by noting that a 'strict definition of indigenous peoples is neither necessary nor desirable'.[70] In this way, the Working Group was merely echoing widely held sentiments.[71] As a result, the Working Group, instead of defining the concept of indigenous peoples, considered the criteria for identifying indigenous peoples in Africa. In our view the end result is the same, which is to shed light on the types of groups under consideration. The African Commission's Working Group observed that 'all Africans are indigenous to Africa'.[72] However, there are certain groups in Africa that 'have, due to past and continuing processes, become marginalised in their own countries' and now 'need recognition and protection of their rights'.[73] As a result of their marginalisation, these groups decided to join the international movement for the rights of indigenous peoples since the 'kind of human rights protection they urgently need is reflected in the international law regime on the rights of indigenous peoples'.[74] In a move clearly intended to distance itself from the association of indigenous with aboriginality, the African Commission's Working Group expressed the opinion that the term 'indigenous peoples' has[75]

> become a much wider internationally recognised term by which to understand and analyse certain forms of inequalities and suppression such as the ones suffered by many pastoralists and hunter-gather groups and others in Africa today and by which to address their human rights sufferings. 'Indigenous peoples' has come to have connotations that are much wider than the question of 'who came first'. It is today a term and a global movement fighting for rights and justice for those particular groups who have been left on the margins of development and who are perceived negatively by dominating mainstream development paradigms, whose cultures and ways of life

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69 See eg K Lehman 'Aboriginal title, indigenous rights and the right to culture' (2004) 20 *South African Journal on Human Rights* 86 91, where she opines that '[a]ll aboriginal peoples are indigenous peoples, and *vice versa*'.

70 *Report of the African Commission's Working Group* (n 10 above) 87.

71 See eg E Daes 'Standard-setting activities: Evolution of standards concerning the rights of indigenous people: The concept of ''indigenous''' UN Doc E/CN 4/Sub 2/AC 4/1996/2/Add1 para 1.

72 *Report of the African Commission's Working Group* (n 10 above) 86.

73 As above.

74 As above.

75 n 10 above, 87.

> are subject to discrimination and contempt and whose very existence is under threat of extinction.

From the foregoing, the following characteristics can be distilled from the report of the African Commission's Working Group as distinguishing indigenous peoples from other groups in Africa. The first characteristic is that of marginalisation, discrimination and exclusion from developmental processes. The second is cultural distinctiveness. This characteristic acknowledges that, whilst most African states contain culturally diverse groups within their borders, there are certain groups whose cultures are markedly different from the cultures of other groups within African states. In fact, their cultural distinctiveness is their bane, as their cultures are regarded as primitive.[76] The African Commission's formulation of this characteristic is stated as follows:[77]

> They suffer from discrimination as they are being regarded as less developed and less advanced than other more dominant sectors of society . . .They are subject to domination and exploitation within national political and economic structures that are commonly designed to reflect the interests and activities of the national majority. This discrimination, domination and marginalisation . . . threatens the continuation of their cultures and ways of life and prevents them from being able to genuinely participate in deciding on their own future and forms of development.

The third characteristic is that of self-identification. The African Commission's Working Group regards this third characteristic as crucial and criticises other approaches for not emphasising it.[78] In this regard, the Working Group endorses the approach adopted by the WGIP.[79] The Working Group also draws from ILO Convention 169.[80] Article 1(2) of the ILO Convention provides that self-identification 'as indigenous or tribal shall be regarded as a fundamental criterion for determining the groups to which this concept of this Convention apply'.

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76 n 10 above, 89.

77 As above.

78 Eg it criticises the approach proposed by Mr Jose R Martinez Cobo, the Special Rapporteur of the UN Sub-Commission on the Prevention of Discrimination and Protection of Minorities (later renamed the Sub-Commission on the Promotion and Protection of Human Rights) who was commissioned to conduct the study. See UN Sub-Commission on Prevention of Discrimination and Protection of Minorities, Study of the Problems of Discrimination Against Indigenous Population, UN ESCOR, 1986 UN Doc E/CN4 Sub2 1986/7/Adds 1-4; see also *Report of the African Commission's Working Group*, 91.

79 The WGIP proposes four criteria that may be used to identify indigenous peoples: (1) The occupation and use of territory; (2) the voluntary perpetuation of cultural distinctiveness, which may include the aspects of language, social organisation, religion and spiritual values, modes of production, laws and institutions; (3) self-identification, as well as recognition by other groups, as a distinct collectivity; (4) an experience of subjugation, marginalisation, dispossession, exclusion or discrimination. See E/CN4/Sub2/AC4/1996/2.

80 ILO Convention 169 of 1989.

It is important to note that, according to WGIP, self-identification must be accompanied by recognition by other groups as a distinct group. This is important, if only to curtail the proliferation of spurious claims. However, the African Commission's Working Group does not appear to expressly require the added precondition of recognition by other groups.

We submit that the self-identification criterion is not on its own decisive as that which would otherwise lead to preposterous results. For example, a group of South Africa's Afrikaner nationalists in 1996 attended a session of the WGIP claiming that they were indigenous people.[81] Although their claim was then dismissed by the UNWGIP, the issue was reignited during the visit by the UN Special Rapporteur during his mission to South Africa in 2005. He also dismissed their claim on the basis that they are not marginalised.[82] The self-identification criterion therefore cannot be applied in isolation and would involve a combination of the other elements of marginalisation and cultural distinctiveness.

While the approach by the African Commission's Working Group represents a commendable effort to address a controversial issue, it may be criticised on some fronts. Firstly, it is true that the concept of indigenous peoples ought to be stripped of its association with colonialism and prior occupation if it is to have global resonance. For this reason, the approach of the Working Group would be a development of international law with respect to indigenous peoples. The problem is that the Working Group presents its formulation of the concept of indigenous peoples not as a suggestion of how it should be understood at international law, but of how it is actually understood.[83] However, a careful reading of the works of leading commentators on the subject reveals the tendency to associate the concept of indigenous peoples with prior occupation, conquest and colonialism.[84] Even ILO Conven-

[81] ILO *Indigenous peoples of South Africa: Current trends* (1999) 11.

[82] See E/CN4/2006/78/Add2.

[83] *Report of the African Commission's Working Group* (n 10 above) 101-103.

[84] See, for examples, Torres (n 11 above) 133, where she refers to the common problems of indigenous peoples as resulting from a relationship between the conquered and the colonisers; Anaya (n 11 above) 4, where he argues that the category of indigenous peoples is 'generally understood to include not only the native tribes of the American continents but also other culturally distinctive non-state groupings, such as the Australian aboriginal communities and tribal peoples of Southern Asia, that similarly are threatened by the legacies of colonialism'; C Oguamanam 'Indigenous peoples and international law' (2004) 30 *Queen's Law Journal* 348 353, where he notes that 'from the onset of colonialism in the 15th century, the law of nations has grappled with the question of the appropriate treatment of indigenous peoples by colonising powers'; ME Turpel 'Indigenous peoples' rights of political participation and self-determination: Recent international legal developments and the continuing' (1992) 25 *Cornell International Law Journal* 580, where the author notes that indigenous peoples 'find themselves caught up in the confines of a subsuming, and frequently hostile, state political apparatus imposed

tion 169, on which much reliance is placed by the African Commission's Working Group, suffers from the same deficiency. Article 1 of the Convention provides that the Convention applies to, among others, peoples in independent countries who are regarded as indigenous on account of their descent from the populations which inhabited the country, or a geographical region to which the country belongs, at the time of conquest or colonisation or the establishment of present state boundaries and who, irrespective of their legal status, retain some or all of their own social, economic, cultural and political institutions.

It is this association with colonialism, prior occupation and conquest that most African states find unacceptable. It is important that the African Commission's Working Group stresses that the concept of indigenous peoples *ought* to be understood in a way that eschews reference to prior occupation and colonialism in the African context, as opposed to how it actually is understood. In this way, the Working Group would be making a profound contribution to the development of international law with respect to indigenous peoples.

Secondly, the reliance on the ILO Convention may subject the formulation of the African Commission's Working Group to criticism. Firstly, whereas it is true that ILO Convention 169 is part of international law, it is important not to lose sight of the fact that it has not been ratified by a single African state.[85] Secondly, and most importantly, it must be borne in mind that ILO Convention 169 also applies to 'tribal peoples in independent countries whose social, cultural and economic conditions distinguish them from other sections of the national community, and whose status is regulated wholly or partially by their own customs or traditions or by special laws or regulations'.[86] ILO Convention 169 therefore draws a distinction between tribal and indigenous peoples to whom it applies with equal force.

The reason for the distinction between the two groups was to bring out the limitations of the term 'indigenous'. The term 'indigenous', which denotes occupation of a particular territory before other groups arrived, may be suitable to North and South America and some parts of

by an immigrant or settler society following colonisation'; EA Daes 'Equality of indigenous peoples under the auspices of the United Nations: Draft Declaration on the Rights of Indigenous Peoples' (1995) 7 *St Thomas Law Review* 497, where she observes that indigenous peoples 'have defined historical territories — even within the borders of existing states — and the right to keep these territories physically intact, environmentally sound and economically sustainable in their own ways'.

85 In fact, it has only been ratified by 14 countries, mostly from Latin America, where the concept of indigenous peoples is hardly controversial. So far this Convention has not been ratified by a single African country.

86 ILO Convention 169, art 1.

the pacific with European settler communities, but not to some parts of the world.[87] With respect to some regions[88]

> there is very little distinction between the time at which tribal and other traditional peoples arrived in the region and the time at which other populations arrived. In Africa . . . there is no evidence to indicate that the Masai, the Pygmies or the San . . . namely peoples who have distinct social, economic and cultural features, arrived in the region . . . before other African populations. The same is true in some parts of Asia.

Two observations may be made from this statement. The first is that ILO Convention 169 is intended to be wider in its scope of application because of its avoidance of confining its application to descendants of prior occupants of a particular territory (indigenous peoples), thus extending it to people who are not necessarily descendants of prior occupiers but who have distinct cultural, economic and social conditions (tribal peoples).[89] The second is the appreciation that the term 'indigenous' is bound up with first or prior occupation, an assertion that the African Commissions' Working Group seeks to dispute. The point being made here is that reliance on ILO Convention 169 may draw the African Commission's Working Group into the undesirable situation of having to draw distinctions between indigenous peoples and tribal peoples.

3.2.2 The groups that identify themselves as 'indigenous peoples' in Africa

The African Commission's Working Group lists some people in Africa 'who are applying the term ''indigenous'' in their efforts to address their particular human rights violations', asserting that 'they cut across various economic systems and embrace hunter gatherers, pastoralists as well as small scale farmers'.[90] Hunter/gatherer communities cited include the Batwa/Pygmy people (Baka, Yaka, Babendjelle, Bagyeli, Bambuti and Medzan) of the Great Lakes region and Central Africa; the San (Xu, Khwe, Nama, Naro, Qgoon) of Southern Africa, the Hadzabe of Tanzania and the Ogiek of Kenya. Examples of pastoralist communities regarded as indigenous are the Pokot of Kenya and Uganda, Somalis, Oromos, Samburu, Turkana, Rendile, Orma and Borana of

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87 M Tomei & L Swepston *Indigenous and tribal peoples: A guide to ILO Convention No 169* (1996). Swepston and Tomei were merely stating the reasons for making a distinction between tribal peoples and indigenous peoples under ILO Convention 169, being that in other parts of the world it is unclear which group came first. Be that as it may, there seems to be evidence that the San are the prior inhabitants of large parts of Southern Africa.

88 Tomei & Swepston (n 87 above) 5.

89 For this reason, Convention 169 has been criticised for being over-inclusive. See eg S Wiessner 'Rights and status of indigenous peoples: A global comparative and international legal analysis' (1999) 12 *Harvard Human Rights Law Journal* 112.

90 *African Commission's Working Group Report* (n 10 above) 15.

Kenya and Ethiopia, Masai of Kenya and Tanzania, Karamojong of Uganda, Barabaig of Tanzania the Mbororo who are spread over Cameroon and other West African countries, the Himba of Namibia and the Fulanis, Tuareg/Berbers of West and North Africa. Other groups are small-scale farmers such as the Ogoni of Nigeria.[91]

The identification and listing of these groups by the African Commission's Working Group are, however, not without controversy. For instance, at the launch of the Working Group's report, during the African Commission's 36th ordinary session, a state delegate of the Republic of Ethiopia in his contribution queried the authenticity of the statistics and identification of certain groups as being indigenous peoples in Ethiopia.[92] He averred that, to the best of his knowledge, there were no official statistics relied upon to make conclusions about groups who could be identified as indigenous in the country. While such a query could be dismissed as the states' continued denial in Africa of the existence or categorisation of certain peoples as being indigenous in their territories, it does raise some important issues for debate. Although the report does not claim to have done an empirical data sourcing and analysis, it would help if the sources of such key statistics were revealed, if only to rest valid concerns related to the question of who is indigenous in Africa.

The report, however, is quick to point out that the list enumerated, while not comprehensive or exhaustive, is only meant to give a general idea about some of the groups that could be considered indigenous on the continent. It does seem to suggest therefore that what is important is articulating 'the concrete human rights concerns of these peoples whose problems resemble those of indigenous people all over the world'.[93]

3.2.3 The African Charter on Human and Peoples' Rights and the rights of indigenous peoples

As stated earlier, the second mandate of the African Commission's Working Group was to study the implications of the African Charter and the wellbeing of indigenous populations/communities with regard to specific articles.[94] The African Commission's Working Group, therefore, analysed these provisions and the jurisprudence of the African

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91 n 10 above, 15-19.

92 One of the authors participated in this session as a member of the Secretariat of the African Commission.

93 *African Commission's Working Group Report* (n 10 above) 19.

94 See Resolution on the Rights of Indigenous Peoples' Communities in Africa (2000) (n 9 above) paras 1-5. The African Charter articles are: arts 2 and 3, which provide for the right to equality; art 5, which provides for the right to dignity; art 19, which provides for protection against domination; art 20, which provides the right of self-determination; and art 22, which provides for the promotion of cultural development and identity.

Commission with regard to the concept of 'peoples'. This analysis would then guide the African Commission's Working Group in deciding whether the African Charter protects the rights of indigenous peoples. It is to be noted that articles 2 and 3 (the right to equality) and article 5 (the right to dignity) are individual rights. The Working Group had no difficulty in finding that members of groups that identify themselves as indigenous peoples are entitled to the enjoyment and protection of these rights. Thus, for example, the Working Group found that the rampant discrimination that the Batwa or Pigmies of Central Africa and the Khoisan of Southern Africa are subjected to is in violation of the above provisions.[95] The entitlement of the members of groups that identify themselves as indigenous peoples to these rights, as indeed to all individual rights, is hardly contested and nothing more need be said about the position of the African Commission's Working Group.

Articles 19, 20 and 22 are all rights of 'peoples'. In order for the groups that identify themselves as indigenous peoples to be entitled to them, they must qualify as 'peoples' under the African Charter. This is what the African Commission's Working Group had to consider. In doing so, the Working Group commenced by noting that the African Charter expressly recognises and protects collective rights.[96] This express recognition of collective rights served as a clear intention to draw a distinction between traditional individual rights from the rights that can only be enjoyed in a collective manner.[97] The Working Group noted that despite the use of the term 'peoples', the African Charter does not define the concept of 'peoples'.[98] Furthermore, the African Commission 'initially shied away from interpreting the concept of peoples.[99] However, the African Commission has in recent years considered communications in which a specific sector or group of the population has invoked collective rights against the state.

The right of self-determination

One communication which, according to the African Commission's Working Group, manifests the African Commission's willingness to consider cases of violations of peoples' rights brought by a section of the population is *Katangese Peoples' Congress v Zaire*.[100] This was a communication brought by the President of the Katangese Peoples' Congress on behalf of the Katangese people. The communication alleged violations of the right to self-determination under article 20(1) of the African Charter. The communication was dismissed for want of evi-

[95] n 10 above, 34.
[96] n 10 above, 72.
[97] n 10 above, 73.
[98] n 10 above, 72.
[99] As above.
[100] n 8 above.

dence that demonstrated that the people of Katanga were denied the right to participate in government. The African Commission has been criticised from missing the opportunity to determine whether or not it is competent to review claims rooted in self-determination.[101] Nevertheless, the African Commission's Working Group interpreted the *Katangese* communication in a positive manner. It noted that[102]

> by recognising the right of a section of a population to claim protection when their rights are being violated, either by the state or by others, the African Commission has paved the way for indigenous people to claim similar protection.

Interestingly, in *Jawara v The Gambia*,[103] the African Commission seemed to interpret article 20(1) as providing for a right that accrues to the entire population.

The African Commission's Working Group has stressed that the right of self-determination must be exercised within the national boundaries of the states within which they are located.[104] To be sure, this interpretation of the right to self-determination seems to find support from the OAU Charter, which places emphasis on territorial integrity of states and respect for national boundaries.[105] If this is true, the challenge for groups that identify themselves as indigenous peoples in Africa is to claim the right of self-determination in a manner that does not pose a threat to the territorial integrity of states. This is a crucial challenge for indigenous peoples because states have tended to interpret self-determination in a manner that equates it to self-determination.[106] In our view, it is not enough for the African Commissions' Working Group to find in the abstract that indigenous peoples in Africa are entitled to the right to self-determination without clearly elaborating how that right could be exercised in a manner that poses no threat to the territorial integrity of states.[107] In other words, it failed to elaborate what the nature of the right to self-determination under the African Charter is and how states may ensure the enjoyment and protection of such right with respect to indigenous peoples.

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[101] E Ankumah *The African Commission on Human and Peoples' Rights: Practice and procedures* (1997) 164.

[102] n 10 above, 79.

[103] (2000) AHRLR 107 (ACHPR 2000). In this communication, the African Commission held that the military *coup d'état* was a violation of art 20(1) of the African Charter. This was because the *coup* had the effect of imposing a government on the people of The Gambia against their will.

[104] n 10 above, 75.

[105] See particularly art II(1)(C) of the Charter of the OAU. See also NB Pityana 'The challenge of culture for human rights' in Evans & Murray (n 34 above) 231.

[106] See eg Anaya (n 11 above).

[107] n 10 above, 75.

Prohibition against domination of a people by another: Article 19

In a series of communications brought against Mauritania,[108] there were allegations of the violation of the right to equality and the prohibition against domination of a people by another under article 19 of the African Charter. In those communications, there were allegations of systematic discrimination, domination and brutality against black Mauritanians by the ruling Arab group. The African Commission found that such discrimination and domination went against the central principle of equality under the African Charter and was in violation of the article 19. According to the African Commission's Working Group, this finding by the African Commission is indicative of its willingness to consider collective rights brought by a section of a population. In turn, this willingness provides an opening for interpreting the concept of 'peoples' under the African Charter as including groups within African states that identify themselves as indigenous peoples.

In our view, the interpretation of the practice of the African Commission by the African Commission's Working Group appears sound. However, it has been observed that 'these cases do not provide evidence of the Commission seriously examining the significance of 'peoples' in the Charter. Neither does the Commission describe the nature and content of their rights, especially as these sets of cases are the only occasions where the Commission has ventured into the application of collective rights or the rights of 'peoples'.[109] This is a valid observation, since the African Commission did not in those communications proffer a definition of the term 'peoples'. In other words, it is still unclear which groups within states would be regarded as 'peoples' under the African Charter.

Be that as it may, it is important to note that in *Social and Economic Rights Action Centre and Another v Nigeria,*[110] the African Commission held that the act of the Nigerian military government of allowing oil consortiums to exploit oil reserves in Ogoniland without their involvement was a violation of article 21 of the African Charter. In this communication, the African Commission seems to imply that the Ogoni were 'peoples' in terms of article 21. Similarly, the African Commission found that the Nigerian military government violated the right of 'peoples' to a satisfactory environment in terms of article 24 of the African Charter. What is interesting in this communication is the African Commission's indiscriminate and interchangeable use of the terms 'persons' and 'peoples'. It is important to note that, although the African Commission's Working Group recognises the Ogoni as one of the indigenous peoples in Africa, no such suggestion was made in the *SERAC* communication.

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[108] *Malawi African Association & Others v Mauritania* (2000) AHRLR 149 (ACHPR 2000).

[109] Pityana (n 105 above) 233.

[110] *SERAC* case (n 8 above). For a discussion of this communication, see generally Oloka-Onyango (n 3 above). See also GO Odongo 'Making non-state actors accountable for study of translational corporations in the African context' unpublished LLM dissertation, University of Pretoria, 2002.

The right of peoples to freely dispose of their wealth and natural resources and the right of peoples to economic, social and cultural development: Articles 21 and 22

The African Commission's Working Group, having found that groups identifying themselves as indigenous peoples may claim collective rights under the African Charter, had no difficulty in finding that such groups are entitled to economic, social and cultural development. The African Commission's Working Group referred to the Guidelines for National Periodic Reports to the African Commission which state that these rights[111]

> consist in ensuring that the material wealth of the countries are not exploited by aliens to no or little benefit to the African countries. Establishment of the machinery which would monitor the exploitation of natural resources by foreign companies and strictly contrasted to the economic and material benefit accruing to the country.

The African Commission's Working Group observed that the guidelines seem to be hinged on the assumption that the threat of exploitation and the threat to development come from foreign companies and therefore there is a need to protect African countries from exploitation.[112] On this basis, the right of a people is equated with that of the state itself.[113] This theme was echoed in the *SERAC* communication, where the African Commission noted as follows:[114]

> The origin of this provision may be traced to colonialism, during which the human and material resources were largely exploited for the benefit of outside powers, creating tragedy for Africans themselves, depriving them of their birthright and alienating them from the land. The aftermath of colonial exploitation has left Africa's precious resources and people still vulnerable to foreign misappropriation.

Nevertheless, as noted above, the African Commission in the *SERAC* communication held that article 21 of the African Charter also accrued to the Ogoni, a section of the population of Nigeria. It is on this basis that the African Commission's Working Group is of the opinion that the rights provided for under articles 21 and 22 accrue to groups identifying themselves as indigenous peoples. The Working Group emphasised that the protection of the right to their land is fundamental for the survival of groups that identify themselves as indigenous peoples in Africa. It found that groups that identify themselves as indigenous peoples have traditionally occupied lands rich in natural resources.[115] It found that the incremental dispossession of indigenous peoples of their traditional lands is a violation of the rights under articles 21 and 22 of the African Charter.

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[111] African Commission Second Annual Activity Report Annex XII para II.6.
[112] n 10 above, 76.
[113] As above.
[114] *SERAC* case (n 8 above) para 56.
[115] n 10 above, 21.

3.2.4 Recommendations of the African Commissions' Working Group to the African Commission

It will be recalled that the African Commission's Working Group was also mandated to 'consider appropriate recommendations for the monitoring and protection of the rights of indigenous communities'.[116] The Working Group made several recommendations to the African Commission. The first recommendation was the establishment of 'a focal point on indigenous issues within the African Commission'.[117] The Working Group recommends that that this focal point could be a Special Rapporteur.[118] There is no suggestion what the mandate of the Special Rapporteur would be, but it can be assumed that the Special Rapporteur would have the usual broad mandate of conducting investigations into and receiving reports of human rights abuses.[119]

The second recommendation is the establishment of a forum which would bring together indigenous participants and other stakeholders to meet regularly to consider developments with respect to indigenous peoples and also to provide indigenous peoples with a forum to express their concerns and experiences.[120] The third recommendation is that the elaboration of the concept of 'peoples' in light of collective rights of indigenous peoples should be maintained.[121] This is a clear indication that the uncertainty surrounding the meaning of 'peoples' under the African Charter is not over. The rest of the recommendations include the continuance of the function of the African Commission's Working Group as a focal point on indigenous issues until such time as another focal point is established, and that the issue of indigenous populations in Africa should remain an agenda item at all ordinary sessions of the African Commission.[122]

Although the African Commission has not established a Special Rapporteur mechanism towards this end, the African Commission's Working Group's mandate has been extended for a further two years.[123] The Working Group meets twice every year before each ordinary session of the African Commission to deliberate on issues arising in the protection of indigenous peoples in Africa. The activities of the Working Group at present include the publication and distribution of the Working Group's

[116] See Resolution on the Rights of Indigenous Peoples' Communities in Africa (2000) (n 9 above) paras 1-5.

[117] n 10 above, 114.

[118] As above.

[119] For a discussion of the nature and mandate of the African Commission Special Rapporteurs, see generally M Evans & R Murray 'The Special Rapporteurs in the African system' in Evans & Murray (n 34 above) 280.

[120] n 10 above, 115.

[121] As above.

[122] As above.

[123] African Commission Resolution on the Composition and Renewal of the Mandate of the Working Group on Indigenous Populations/Communities in Africa adopted during the 38th ordinary session of the African Commission in Banjul, December 2005.

report; country visits to Botswana, Namibia and Niger; research and information country visits to Uganda, Burundi, Libya and the Republic of Congo (Brazzaville); the establishment of an advisory network of experts; the compilation of a database of indigenous organisations; preparations for a regional sensitisation seminar in Cameroon; the current undertaking of a research project in co-operation with the ILO; co-ordination with UN human rights mechanisms; and the bi-annual meetings of the Working Group.[124]

4 Conclusion

A number of groups across the African continent have been, and continue to be, subjected to gross human rights violations. In particular, they have been dispossessed of lands they consider their traditional homes and with which they have a special attachment. These groups have also been, and continue to be, subjected to discrimination and marginalisation. This marginalisation and discrimination largely stems from their perceptively inferior and outdated cultural practices. In recent years, these groups have joined the burgeoning international movement of indigenous peoples. International law has, in recent years, been responsive to the plight and concerns of indigenous peoples worldwide. This responsiveness has found expression in the development of a specific corpus of law for the promotion and protection of the rights of indigenous peoples. African governments have always maintained that the concept of indigenous peoples is irrelevant in Africa since all Africans are indigenous to Africa. However, developments at international law, particularly under the African human rights system, challenge this view. The adoption of a report by the African Commission that recognises certain groups as indigenous peoples is a milestone in so far as the protection of the rights of these groups is concerned. The report may be criticised on some fronts, but it is commendable for at least two reasons. Firstly, it has succeeded in drawing attention to the plight of the groups it identifies as indigenous peoples. Secondly, and perhaps entwined with the first, it adopts a pragmatic approach and focuses on finding a way of protecting these groups as opposed to fixating on conceptual issues.

[124] See African Commission's Working Group on Indigenous Populations/Communities, Activity Report 2005 (April 2006); see also IWGIA Report, 39th ordinary session of the African Commission on Human and Peoples' Rights, Banjul, The Gambia, 11 to 25 May 2006 (copy with authors).