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Land Rights and the Forest Peoples of Africa



Forest Peoples
Programme

Historical, Legal and Anthropological Perspectives

O. Overview: Analysis & Context 1. Burundi
2. Cameroon 3. DRC 4. Rwanda 5. Uganda



Land rights and the forest peoples of Africa
Historical, legal and anthropological perspectives
Overview: analysis & context



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This report forms an introduction to a series of five country studies examining indigenous peoples' land rights in the forested countries of Africa. The other reports are:

- 1 Burundi
Historical developments in Burundi's land law and impacts on Batwa land ownership
Jean-Pierre Amani
- 2 Cameroon
Historical and contemporary land laws and their impact on indigenous peoples' land rights in Cameroon
Samuel Nguiffo, Pierre Étienne Kenfack and Nadine Mballa
- 3 Democratic Republic of Congo
The dispossession of indigenous land rights in the DRC: A history and future prospects
Prosper Nobirabo Musafiri
- 4 Rwanda
Historical and contemporary land laws and their impact on indigenous peoples' land rights in Rwanda
Chris Huggins
- 5 Uganda
Historical and contemporary land laws and their impact on indigenous peoples' land rights in Uganda: The case of the Batwa
Rose Nakayi

The reports are also available in French.



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Contents

Introduction

The study on land rights of the forest peoples of Africa, its purpose and findings	1
--	---

Part I

The forest peoples of Africa: land rights in context Christopher Kidd and Justin Kenrick	4
---	---

1 Indigenous peoples in the Central African context	4
A Indigenous peoples or marginalised minorities?	4
B 'Pygmies' or forest peoples?	6
2 The role of egalitarian social and environmental relations	7
A Nature–culture divide	8
B Hunter–gatherer perceptions of the environment	12
C Discrimination against forest peoples by their neighbours	14
D Forest peoples' landownership systems	16
3 Current situation of forest peoples in Central Africa	19
A Forest peoples still living in the forest	19
B Forest peoples marginalised from the forest	22
C Forest peoples whose forest has been destroyed	23
4 Conclusion	25

Part II

Land Rights under international law: historical and contemporary Issues Valérie Couillard and Jérémie Gilbert	28
--	----

1 International law and colonisation	28
A International law's 'civilising' mission	29
B The principle of 'effective occupation'	32
2 Contemporary African and international human rights law	35
A The right to land	35
B A matter of equality and non-discrimination	38
C Conservation practices and customary use of land and natural resources	40
D Participation and consent	42
E The right to reparation	43
3 Conclusion: the way forward	46
A Implementation	46
B Reparation	47
C Consultation and participation	47

Map of Central Africa c 1879	26
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Map of Africa c 1910	27
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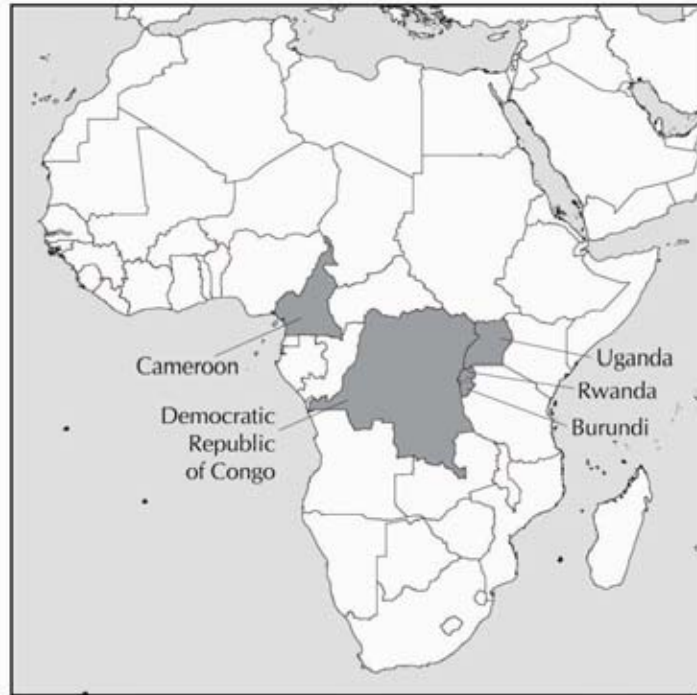
Acronyms

ACHPR	African Commission for Human and Peoples' Rights
CAR	Central African Republic
CBD	Convention on Biological Diversity
ICCPR	International Covenant on Civil and Political Rights
DRC	Democratic Republic of the Congo
FPIC	Free, prior and informed consent
IACHR	Inter-American Commission on Human Rights
IFC	International Finance Corporation
ILO	International Labour Organization
ILO 107	ILO Convention 107
ILO 169	ILO Convention 169
OAU	Organisation of African Unity
UN	United Nations
UNDRIP	United Nations Declaration on the Rights of Indigenous Peoples

Introduction

The study on land rights of the forest peoples of Africa, its purpose and findings

This composite publication¹ presents and complements a study conducted on the land rights of indigenous peoples in five countries of the forested region of Africa, namely Burundi, Cameroon, Democratic Republic of Congo (DRC), Rwanda and Uganda. Building on historical facts and legal developments, the study highlights indigenous peoples' loss of resources and land to colonists, commercial enterprises and conservation initiatives. It also describes how, having been dispossessed of their ancestral lands and, in many cases, not allocated alternative land, indigenous forest peoples in Africa today live in extremely vulnerable conditions and experience marginalisation and poverty.



Research in the five countries took place in 2008 and was published in 2009. The authors analysed the main legal developments since the pre-colonial period that have affected indigenous property and access to land.² The findings have been discussed with field-based organisations working to promote indigenous rights, and in some cases these organisations have contributed considerably to their content. The studies retrace in history the manner in which territory was acquired by the state according to international law and the consequences for traditional 'Pygmy' forest-dwelling hunter-gatherer peoples (Batwa, Bacwa, Bambutu, Bagyeli, Baka, Ba'Aka, Baaka), hereafter referred to as 'indigenous peoples'. They thus reveal the manner in which the territory was acquired under the law of the coloniser, and the consequences of this for indigenous peoples. Specific attention was paid to the incorporation or non-incorporation of customary law as a source of law. Post-colonial and independence law was also examined with a view to tracing any legislation that can amount to a plain and clear intent to extinguish prior rights of first/previous occupants and/or rights arising by virtue of customary law. Post-independence and contemporary law and jurisprudence as well as international human rights law also fell within the scope of the research.

¹ The study of land rights and the forest peoples of Africa is a composite publication of five country studies booklets. This document is an addition to the studies, providing context through describing the indigenous peoples of Central Africa and the international human rights law standards applicable to land rights.

² The authors of the five country studies are: Jean-Pierre Amani – Burundi; Samuel Nguiffo, Nadine Mballa and Pierre Etienne Kenfack – Cameroon; Prosper Nobirabo – DRC; Chris Huggins – Rwanda; and Rose Nkayi – Uganda. Their studies are published in separate booklets.

The country studies show that legislative evolution has had, and continues to have, tremendous discriminatory consequences for indigenous peoples. They explain how tenure regimes implemented since the pre-colonial era have ignored customary ownership, and how new conditions for land acquisition were imposed after the land was unilaterally declared state property. The findings common to all five countries include the following:

- Colonial and then independence laws have slowly dispossessed indigenous peoples of their customary rights. There is a long-standing denial of customary tenure rights, coupled with the enactment of official (written) law transferring property to states, notably through imported legal concepts such as 'terra nullius' ('nobody's land').
- Indigenous peoples have experienced displacement for the purpose of creating protected areas and environmental norms. They were evicted without compensation and without being given alternative land.
 - In Rwanda, the Batwa were dispossessed of their land in the Nyungwe Forest and out of the Parc des Volcans, which became a national park and a sanctuary for gorillas;
 - In Uganda, the Batwa had to leave their ancestral lands in the forests of Bwindi, Mgahinga and Echuya, which were established as conservation areas;
 - In DRC, Batwa families were evicted from the Kahuzi–Biega Forest in order to create a gorilla reserve;
 - In Cameroon, the Baka's community rights have been abolished as a result of the establishment of the Dja Reserve;
 - In Burundi, the creation of the forest reserve on the Congo–Nile watershed, which today corresponds to the Kibira, the Bururi forest reserve and the Kigwena forest reserve, have also involved the displacement of indigenous peoples.
- Landlessness of indigenous communities is reported as a common denominator throughout the region. This situation has not been redressed. Many families squat on land to which they have no legal right, and suffer permanent risk of eviction. In some cases, indigenous people are allowed to remain on land owned by non-indigenous communities in exchange for agricultural work; others are allowed to stay on land owned by charitable organisations.
- Indigenous peoples have no, or very restricted, access to their ancestral lands, which have become protected areas and/or national parks.
- Marginalisation and exclusion of indigenous peoples from ownership and administration of forest resources is widely reported.
- Processes for acquisition of land titles are barely available to indigenous peoples because the procedures and costs are not accessible to them.
- Governments of the five countries are committed to international and regional treaties guaranteeing the rights of indigenous peoples, and some have also been extensively

guided by treaty bodies on the implications of international and regional standards. But there is a blatant lack of implementation of human rights treaties.

- The content and structure of colonial, independence and contemporary laws pertaining to tenure and forests have clashed with pre-existing customary laws and practices. Contradictory and conflicting legal norms have stemmed from the mixture of codified and customary systems.

Overall, the five country studies demonstrate that historical tenure regimes have amounted to blatant violations of indigenous peoples' right to equality and non-discrimination. In doing so they assert solidly the need for reparation. It is hoped that the country studies will become useful advocacy tools to incite change and inform reparation processes.

This report accompanies the composite publication that forms the land rights study; it aims to provide context to the country studies. It does not repeat or synthesise the country studies, but seeks to complete them. The first chapter describes indigenous forest peoples in Africa from an anthropological point of view. The second chapter highlights both historical principles of international law that have affected the situation of indigenous peoples and contemporary human rights standards. The report then ends with suggestions for the way forward.

Part I

The forest peoples of Africa: land rights in context

Christopher Kidd & Justin Kenrick

1 Indigenous peoples in the Central African context

A Indigenous peoples or marginalised minorities?

The concept of indigenous identity is highly contested in sub-Saharan Africa,¹ though this attitude may be changing.² Since this concept is absolutely central to the studies of land laws that follow, it is important to clarify both the debate over 'indigenous peoples' in the African context, and our position within this debate.

On the one hand a dominant perspective amongst many sub-Saharan Governments and their majority populations is that since all Africans were colonised by European powers, and subsequently fought for their independence from those powers, all Africans should be considered to be indigenous. For example, in keeping with a number of other African countries, Article 10 of the constitution of Uganda states that any group existing and residing within the borders of Uganda before 1926 is indigenous.³ In Botswana, home to more than half of all San peoples of Africa, the government 'refused to participate in the 1993–2003 UN Decade of the Indigenous People, on the grounds that in their country everyone was indigenous'.⁴ But this view of indigenous identity in Africa fails to recognise the internal colonisation that Africa has experienced, and it is a view contradicted also by the way in which many African governments (those of Cameroon, Uganda, Central African Republic [CAR], Democratic Republic of the Congo [DRC], Kenya, Tanzania, for example) routinely go along with, say, World Bank and International Finance Corporation (IFC) directives on the issue of indigenous peoples (such as Operational Directive [OD] 4.20 or Operational Policy [OP] 4.10). This acknowledgement by African governments that parts of their populations constitute indigenous peoples for the purposes of international policies and projects is enshrined in bilateral international treaties between the country and international financial institutions. In law this is persuasive evidence of at least a state of mind, and in this case more: of international relations and legal opinion.

¹ See, for example, A Barnard and J Kenrick (eds) (2001) *Africa's Indigenous Peoples: 'First Peoples' or 'Marginalised Minorities'?*, Centre of African Studies, University of Edinburgh.

² See, for example, the Khomani San and Richtersveld cases in South Africa, and the Republic of Congo's recent report to the UN Committee on the Elimination of Racial Discrimination (CERD), Reports submitted by States parties under article 9 of the Convention: International Convention on the Elimination of All Forms of Racial Discrimination: 9th periodic report: addendum: Republic of the Congo, 20 October 2008. CERD/C/COG/9; online, UNHCR Refworld, available at: <http://www.unhcr.org/refworld/docid/49c0e1c42.html> (accessed 1 April 2009).

³ Republic of Uganda (1995) *Constitution of the Republic of Uganda*, The Law Development Centre, Kampala.

⁴ R B Lee (2006) 'Twenty-first century indigenism', in *Anthropological Theory*, vol. 6, no. 4, p 459; emphasis in original.

So, although there may be a dominant rhetoric, such governments' position is far from uniform on whether there are indigenous peoples. The international agreements they sign up to imply support for the other perspective on the question of indigenous peoples in Africa, one held by the international human rights community, which is that the concept of indigenous peoples should be applied only to certain sections of African society to reflect the internal colonisation that has taken place.

Rather than choosing between these positions, we aim to integrate the most useful aspects of them by proposing that while in relation to colonial or neo-colonial powers all Africans are indigenous, in relation to most of their African neighbours, Central African forest people are seen— by their neighbours and by themselves – as being distinctly indigenous, the first peoples, who truly belong to the forest. As a result, while all Africans are clearly indigenous to a continent that was colonised by European powers, we use the term 'indigenous peoples' to refer to those people who see themselves, and are seen by their neighbours, as indigenous to the forests of Central Africa. Where their neighbours' origin myths speak of migration and arrival from elsewhere, the origin myths of the hunter–gatherer or former hunter–gatherer communities that inhabit the forest region of Central Africa speak of emergence from – and belonging to – their forests. These peoples are known by their particular names – such as the Baka, Batwa, Mbuti or Bagyéli – but share much in terms of their relationship with place, with each other and with their more dominant farming neighbours. They have often been collectively referred to by the term 'Pygmy' or by the term 'forest peoples'.

In addition to the idea that the term 'indigenous peoples' reflects both their self-identification and the way they are perceived by their neighbours, and in addition to the fact that the use of the term reflects the historical internal colonisation that took place in Africa, the term is also usefully employed in relation to more current issues. The African Commission for Human and Peoples' Rights (ACHPR), for example, states that:

'Indigenous Peoples' has come to have connotations and meanings that are much wider than the question of 'who came first'. It is today a term and a global movement fighting for rights and justice for those particular groups who have been left on the margins of development and who are perceived negatively by dominating mainstream development paradigms, whose cultures and ways of life are subject to discrimination and contempt and whose very existence is under threat of extinction.⁵

Given the current marginalised status that many indigenous peoples in Africa endure, some have asked whether it might not be more useful for them to frame their claims for equal treatment in terms of 'human rights' instead of 'indigenous rights', in terms of their being 'marginalised minorities' instead of 'indigenous peoples'. It has been argued that sub-Saharan African governments may well respond more favourably to these terms, since they may feel that if they accept such peoples' right to indigenous status then this might put them in the uncomfortable position of being seen as colonisers in relation to these minorities. For such governments, the difference between the two ways of framing these peoples' rights could signify a difference between divisiveness and something 'more in tune with the rhetoric of

⁵ ACHPR and IWGIA (2005) Report of the African Commission's Working Group of Experts on Indigenous Populations/Communities, ACHPR, Banjul, Gambia and IWGIA, Copenhagen, Denmark.

nation building'.⁶ This reframing would simply translate such peoples' demands into terms that may be more acceptable to those who have historically marginalised them, and thereby demonstrates precisely why it is unlikely that such an approach will be able to bring about the paradigm shift that is needed: one that acknowledges the different forms of landownership, resource use and social organisation through which such indigenous peoples engage with the world. These forms are often completely at odds with the dominant majority populations and are often used to justify their marginalisation. A response to indigenous peoples' rights which neglects their specific social, political and cultural position would lack the insight needed to understand fully the generative processes which create the structures of impoverishment that marginalise them.⁷

B 'Pygmies' or forest peoples?

A further question is raised by our discussing a range of peoples who have very different languages and who live thousands of miles apart. Some of these people use the term 'Pygmy' to describe themselves' most, however, use names which reflect their own local shared languages and forest area and hear the word 'Pygmy' as an insult hurled at them by others. Probably all Central African forest people use the term 'forest peoples' as a way of describing themselves and other hunter-gatherers they know of, in contrast to those they describe as 'village people' or 'farmers'. As 'Pygmy' peoples rarely refer to themselves as 'Pygmies', we will use the identities they themselves favour when possible, such as Batwa, Bagyéli, Baka, Mbuti.

These people more often than not self-identify, and are described by their neighbours, as people of the forest, or forest people. Early European explorers described them as such, and Colin Turnbull,⁸ uncomfortable using the term 'Pygmy', followed the Mbuti who described themselves as being 'children of the forest'. The use of 'forest people' by Turnbull and subsequent anthropologists therefore follows these peoples and their neighbours who, for positive or negative reasons, describe them as having an embodied relationship with their forests.

Our use of the term 'forest peoples' is not intended to suggest that these people ought to be living in the forest, but to assert that they have a right to their way of life, however they define it, and that they have the right to decide what happens to their environment; multinational companies, national governments and their more powerful neighbours have a legal obligation to respect these rights. If they choose to farm or to work for logging companies or conservationists, it should be their choice, not the only option they are left with as their forest is destroyed or made unavailable to them. To take as our starting point the intimate knowledge that these peoples have of their environment, and their identification with the forest, is not to deny them the right to other contexts, nor to deny that their farming

⁶ J Suzman (2001) 'Indigenous Wrongs and Human Rights: National Policy International Resolutions and the Status of the San in Southern Africa', in A Barnard and J Kenrick (eds) *Africa's Indigenous Minorities*, p 293.

⁷ S Saugestad (2000) *Dilemmas in Norwegian Development Assistance to Indigenous Peoples: A Case Study from Botswana*, <http://se1.isn.ch/serviceengine/FileContent?serviceID=7&fileid=895E0E8D-CC2C-0FB0-CEC8-3FC5432051A9&lng=en> (accessed 3 April 2008).

⁸ C Turnbull (1962) *The Forest People: A study of the pygmies of the Congo*, Touchstone, New York;
C Turnbull (1983) *The Mbuti Pygmies: Change and Adaptation*, Holt, Rinehart and Winston, New York;
C M Turnbull (1963) *The Forest People*, The Reprint Society, London.

neighbours may also have such knowledge and have an equal right to determine the future of their forests; it is to acknowledge that they are in a politically weak position in relation to multinationals, national governments and their farming neighbours. It is to assert that they should have a clear say in their future and the future of their forest; and it is to acknowledge the difficulty of making space for their voices to be heard, given that their egalitarian political structures and particular context makes it less likely that they will find the place or reason to speak out for their future in national or international contexts.

Finally, and with specific reference to the issues raised in this chapter, it is important to clarify the use of the term 'nomadic', and how it relates to Central African forest people. It is often suggested that forest people do not have rights to the forest they inhabit because they are nomadic, and therefore do not comply with the permanent residence and domestication of the land that is deemed necessary in order to hold property rights. The use of this term in this way is pejorative and has been employed by colonial and post-independence governments, and dominant neighbours, to deny forest peoples their basic rights. This manipulation of the term shows, at best, a misunderstanding of the term itself and the customary tenure of forest people, and, at worst, is a misrepresentation designed specifically to deny such people rights to their land. The term 'nomadic' should refer to communities who have temporary or semi-permanent dwellings and who regularly move location as part of their livelihood strategies. The term describes a particular pattern of movement and habituation and does not suggest that nomadic peoples have no territories. In fact nomadic peoples, including Central African forest peoples, have elaborate understandings of their territories which are socially regulated through shared values, and they practise complex resource management to ensure the health of such territories. Our use of the word 'nomadic' should not be taken as in any way denying indigenous peoples their rights to their lands; in fact, we specifically acknowledge that nomadic people have fundamental inalienable rights to the lands they live in (see also International Labour Organization Convention 169).

2 The role of egalitarian social and environmental relations

Many critical issues affecting indigenous peoples in Central Africa derive from those seeking to extract resources from the region without thought for the long-term well-being of local people and their environment. The contrast between these extractive forces⁹ – evident historically in the actions of European traders, colonial authorities, post-independence governments, and many multinational corporations – and the attempts by local peoples to maintain their livelihoods, is reflected in (and expressive of) the contrasting perceptions of the environment held by those who seek to extract wealth from it and those, such as these indigenous peoples themselves, who seek to maintain sustainable livelihoods.

This issue is absolutely central to understanding the land problems that indigenous peoples face, since – as will become evident – many of the laws that currently affect indigenous peoples can be traced directly back to colonial policies and attitudes to both the environment and indigenous peoples. To bring this issue centre-stage, it is worth presenting some of the

⁹ J Lewis (2000) *The Batwa Pygmies of the Great Lakes Region: The Problem of Discrimination, A Report for Minority Rights Groups* [Final Draft].

themes that have helped to foster these conditions and that have caused such conflict between those holding such different ways of perceiving the forests of Central Africa.

A Nature–culture divide

And God said unto them,
Be fruitful, and multiply, and replenish the earth,
And subdue it: and have dominion
Over the fish of the sea, and over the fowl of the air,
And over every living thing that moveth upon the earth¹⁰

In the West, historically through dominant aspects of Judaeo-Christian and Greek traditions, and further developed through the Enlightenment and Darwinism, Western thought has evolved an ideology which dictates that humans and nature are (or have become) mutually exclusive categories, humans being civilised and nature being wild.¹¹ As a result ‘nature’ was ‘to be mastered, tamed, brought under “man’s” control, bent to his will, forced to reveal her secrets, compelled to satisfy his needs and minister to his happiness’.¹² It was within this paradigm that 18th-century writers such as Adam Smith theorised the development of mankind out of nature and into modernity. For Smith, human economic activity evolved through a series of four stages, commencing with hunting and gathering, which he described as ‘the lowest and rudest state of society’.¹³ Economic activity was seen to progress through pastoralism and settled agriculture, culminating in manufacturing and commerce.¹⁴ Prior to this, John Locke had famously recounted his theories of property in *Two Treatises of Government*.¹⁵ It is here that Locke justifies the private ownership of land and goods through the application of labour:

Though the earth and all inferior creatures be common to all men, yet every man has a ‘property’ in his own ‘person.’ This nobody has any right to but himself. The ‘labour’ of his body and the ‘work’ of his hands, we may say, are properly his. Whatsoever, then, he removes out of the state that Nature hath provided and left it in, he hath mixed his labour with it, and joined to it something that is his own, and thereby makes it his property. It being by him removed from the common state Nature placed it in, it hath by this labour something annexed to it that excludes the common right of other men. For this ‘labour’ being the unquestionable property of the labourer, no man but he can have a right to

¹⁰ Genesis 1: 28.

¹¹ M Colchester (1994) *Salvaging Nature: Indigenous Peoples, Protected Areas and Biodiversity Conservation*, United Nations Research Institute for Social Development Discussion Paper 55; K. Thomas (1983) *Man and the natural world: changing attitudes in England 1500-1800*, London, Allen Lane, pp 17–50.

¹² V Argyrou (2005) *The logic of environmentalism: Anthropology, Ecology and Postcoloniality*, Berghahn Books, Oxford and New York, p vii.

¹³ A Smith (1776) *An Inquiry into the Nature And Causes of the Wealth of Nations*, Book V, Chapter 1, Part 1. <http://www.adamsmith.org/smith/won/won-index.html> (accessed 14 January 2007).

¹⁴ *Ibid.*; see also M Cowen and R Shenton (1995) ‘The invention of development’, in J S Crush (ed.) *Power of development*, Routledge, London; A Barnard (2004) ‘Hunting-and-Gathering Society: an Eighteenth-Century Scottish Invention’, in A Barnard (ed.) *Hunter–gatherers in history, archaeology and anthropology*, Berg, Oxford.

¹⁵ J Locke (1823) *The works of John Locke*, Thomas Tegg, London.

what that is once joined to, at least where there is enough, and as good left in common for others.¹⁶

Here Locke's theory of property ownership can be seen to rely on a distinction between land in a 'state of Nature' and domesticated land which has been adapted by the labours of 'men'. As Argyrou writes, 'mastery of nature came to be seen as the unmistakable mark of civilisation, the core characteristic not of European "man" but of "man" as such. To paraphrase Marx ... "man" makes himself only insofar as he remakes the world around him. The more he changes the world around him, the more he becomes his true self'.¹⁷

Locke's theories have had two fundamental impacts on indigenous peoples – whether his theories are understood as causing or rationalising European behaviour towards them. First, as will be elaborated below, Locke's theories deny indigenous peoples their rights of ownership, individually or collectively, of their ancestral lands. They legitimise the appropriation of these lands by colonial forces, a process of exploitation that continues today in the denial of indigenous peoples' rights to the protected areas that were formerly their homes. Specifically, Locke writes that the failure to apply ones labour denies individuals or groups the ability to call a good or piece of land their own: 'if either the grass of his enclosure rotted on the ground, or the fruit of his planting perished without gathering and laying up, this part of the earth, notwithstanding his enclosure, was still to be looked on as waste, and might be the possession of any other'.¹⁸

As Buchan and Heath write, 'Land use other than settled agriculture was declared "waste", rather than industrious and rational use, and incapable of forming the basis of property rights. This Eurocentric framework establishes indigenous social forms as inferior and reduces their distinctive features to a derisory comparison with European social forms'.¹⁹ This concept of ownership through the application of labour was joined by a second theory, derived from 19th-century evolutionary anthropology, which suggested that

indigenous peoples were seen to be extremely primitive insofar as they apparently did not have institutions or concepts related to sovereignty or jurisdiction. They could not, therefore, legally occupy their own lands. Since it could be presumed that the lands were 'vacant' from a legal point of view, the Crown could legitimately acquire sovereignty and jurisdiction merely through placing authorized colonists on the lands.²⁰

When these two theories were used together they enabled colonial forces to deny the customary land rights of indigenous peoples formalised through the legal concept of terra nullius in Australia and Canada, and vacant et sans maîtres (which literally means empty

¹⁶ *Ibid.*, p 116.

¹⁷ V Argyrou (2005) *The logic of environmentalism*, p 5.

¹⁸ J Locke (1823) *The works of John Locke*, p 121.

¹⁹ B Buchan and M Heath (2006) 'Savagery and Civilization: From Terra Nullius to the "Tide of History"', in *Ethnicities*, vol. 6, no. 1, p 8.

²⁰ M Asch (2005) 'Levi-Strauss and the Political: The Elementary Structures of Kinship and the Resolution of Relations between Indigenous Peoples and Settler States', in *Journal of the Royal Anthropological Institute*, vol. 11, no. 3, p 431.

[land] and without masters) in French Central Africa.²¹ Colonial powers also negotiated treaties of cession with some societies instead of employing the terra nullius doctrine. However, these negotiated treaties were made only with societies seen to have the social institutions that the colonials believed were necessary to hold rights to the land in the first place. As a result, hierarchical societies like kingdoms were often engaged in negotiations, whereas hunting and gathering societies were not negotiated with because colonial powers perceived their social structures as being unfit to hold rights to any property which they might wish to negotiate over. The use of these justifications for the appropriation of lands has not ended with colonialism but has continued to the present day, often by former colonial subjects.

Returning now to the second impact of Lockean thought, his theory of property compounds the distinction between culture and nature and creates the 'wild lands' and 'wildlife' needed to sustain the conservation projects that have had such a negative impact on many indigenous peoples in Central Africa. For Locke, the removal of goods and land from the state of Nature was achieved through the application of labour, and the purpose of this was the production of economic value. Of indigenous communities in America he wrote:

There cannot be a clearer demonstration of anything than several nations of the Americans are of this, who are rich in land and poor in all the comforts of life; whom Nature, having furnished as liberally as any other people with the materials of plenty ... for want of improving it by labour, have not one hundredth part of the conveniencies [sic] we enjoy, and a king of a large and fruitful territory there feeds, lodges, and is clad worse than a day labourer in England.²²

The distinction between 'wild' and 'domestic' lies at the heart of conservation initiatives and continues to structure the way it conceives of the landscapes it attempts to 'conserve'. More than this, the implication of Lockean thought regarding the status of the non-human animal world is that unless the environment is domesticated it cannot be owned by an individual but only by the state. Included in this implication is control of as the definition of 'domestication', and the promotion of largely Western concepts of domestication that do not fit with indigenous peoples' customary resource management practices. Colonial and post-independence governments, as well as recent conservation organisations, have been able to grasp this ideology and transform the non-human world into areas of wilderness and wildlife that they believed they could then lay claim to, specifically because they believed that no one else had the right to it because they had not 'transformed' it through their labour.

Conservation has long been marked by the idea that people are in direct conflict with nature, which is in part derived from the West's understanding of nature as a resource.²³ This has led to a position where protected areas are seen as necessitating the removal of people, because (by definition) they do not belong there and so, if they stay there, they will inevitably destroy it. This philosophy has almost universally created protected areas that have resulted in 'forced

²¹ J Nelson (2001) 'Sub-Saharan Africa', in M Colchester (ed.) *A survey of Indigenous Land Tenure, Forest Peoples Programme, Moreton-in-Marsh*, pp 56, 59.

²² J Locke (1823) *The works of John Locke*, p 122.

²³ K Milton (2002) *Loving Nature*, Routledge, London and New York, p 53.

relocation, impoverishment, cultural destruction and the undermining of traditional systems of natural resource management'.²⁴ In Central Africa, resettlement resulting from conservation projects has been increasing in the last 15 years with no evidence to suggest that any forest people have been compensated for their forced removal, nor that their rights have been taken into account.²⁵ That such conservation projects have largely failed in their own terms, while destroying local peoples' livelihoods, should suggest that their actual rationale is not conservation of 'nature' but the imposition of international control.

Lockean thought has influenced the way in which conservation in Central Africa has marginalised forest peoples' access to, and participation in the management of, their former forests in two main ways. First, the relationship of humans to the natural environment is understood within the framework of man subduing nature for his own ends. The result sees humans as a threat to conservation, sees their dependence on the Protected Areas being driven by consumption, and additionally derogates any form of relationship other than an economic or scientific one.

Secondly, in relation to Lockean thought, the concept of terra nullius discussed earlier has continued relevance to forest people in Central Africa, as their livelihood strategies have not been recognised as endowing rights to the forests. This has been represented most vividly in the denial of indigenous peoples' self-determination and control of their territories, and also in the fact that free, prior and informed consent is not sought from them in relation to developments carried out on their lands. In addition, there has been widespread dislocation of indigenous peoples from their lands partly because they have not been seen to have applied any transformative labour to the forest, and so were stripped of their property rights to it. In brief, the majority of land laws in Central Africa have been made by those in colonial and post-independence power without consideration for the rights of forest people. As a result the benefits have fallen to those with power in the state, while forest people have lost out almost entirely. As Plato suggests,

in every case the laws are made by the ruling party in its own interest; a democracy makes democratic laws, a despot autocratic ones, and so on. By making these laws they define as 'right' for their subjects whatever is for their own interest, and they call anyone who breaks them a 'wrongdoer' and punish him accordingly.²⁶

The denial of their rights to land and self-determination happens not just through the actions of often distant national governments, whether colonial or post-independence. For forest people throughout Central Africa, the issues that crystallise around resources and rights to those resources can be framed at a very local level. This is discussed in later sections where we cover some of the issues that pertain to the local context of forest peoples.

²⁴ M Colchester (1994) *Salvaging Nature*, p i.

²⁵ M M Cernea and K Schmidt-Soltau (2006) 'Poverty Risks and National Parks: Policy Issues in Conservation and Resettlement', in *World Development*, vol. 34, no. 10, pp 1808–30; K Schmidt-Soltau (2003) 'Conservation-related Resettlement in Central Africa: Environmental and Social Risks', in *Development and Change*, vol. 34, no. 3, pp 525–51; J Nelson and L Hossack (2003) *Indigenous peoples and protected areas in Africa: from principles to practice*, Forest Peoples Programme, Moreton-in-Marsh.

²⁶ Plato (1961) *The Republic*, Oxford University Press, p 18.

B Hunter–gatherer perceptions of the environment

From within the hall of mirrors it is almost impossible to imagine talking, thinking, writing, doing, smelling, imagining and realizing worlds without ‘law’, ‘spaces’, ‘places’, ‘time’, ‘scale’, ‘nature’ and ‘self’. However, local and indigenous communities are doing this as they construct processes, experiences, thoughts and actions.²⁷

What is missing from the previous (‘nature–culture divide’) account is the alternative discourses and perspectives of indigenous peoples. For example, indigenous peoples relate to their environments in ways manifestly different to the dualistic approach outlined above, as their environment is not simply something inhabited but something experienced in a relational way. It is this very concept that leads the Mbuti of the Ituri forest, for example, to relate to the forest as their ‘father’ and ‘mother’, ‘sibling’ and ‘lover’ and to describe themselves as ‘children’ and ‘people of the forest’.²⁸ In these contexts it should be argued that any attempt to separate culture and nature can be done only through an imposed distinction.²⁹

The anthropologist Tim Ingold argues that in ‘Western’ ontology, culture and nature are represented as two distinct entities, where nature is representative of what might be called scientific nature. Culture has also become divided to form the culture that the western world creates and the culturally perceived world of nature.³⁰ By this Ingold means that each individual or society is understood as having the capacity to ascribe meaning to the environment it occupies, which may be completely different to the representation created by another person. These different representations are created culturally and are distinctly different from the ‘real’ nature to which science is understood as having access. In the ‘West’ we see nature as something to which we have to ascribe meaning, something that we stand outside of, as opposed to something that we dwell within. Ingold argues that hunter–gatherers perceive themselves as acting within an undivided world and as engaging with its constituent parts, which are already inherently meaningful: ‘(the western ontology) may be characterised as the construction of a view, that is, as a process of mental representation. As for the other, apprehending the world is not a matter of construction but of engagement, not of building but of dwelling, not of making a view of the world but of taking up a view in it’.³¹

How does this dwelling manifest itself for hunter–gatherers? Turnbull³² and later Mosko³³ have shown how Mbuti forest people relate to the forest as their ‘father’ and ‘mother’, ‘sibling’

²⁷ R Howitt and S Suchet-Pearson (2003) ‘Ontological Pluralism in Contested Cultural Landscapes’, in K Anderson, M Domosh, S Pile and N Thrift (eds), *Handbook of cultural geography*, Sage, London and Thousand Oaks, California, p 566.

²⁸ See M S Mosko (1987) ‘The Symbols of “Forest”: A Structural Analysis of Mbuti Culture and Social Organisation’, in *American Anthropologist*, vol. 89, no. 4, pp 896–913; C Turnbull (1983) *The Mbuti Pygmies*; C Turnbull (1962) *The Forest People*; T Ingold (2000) *The Perception of the Environment: Essays in Livelihood, dwelling and skill*, Routledge, London, pp 43–7.

²⁹ T Ingold (2000) *The Perception of the Environment*, pp 40–43.

³⁰ *Ibid.*, p 41.

³¹ *Ibid.*, p 42, emphasis in original.

³² C Turnbull (1962) *The Forest People*; C Turnbull (1983) *The Mbuti Pygmies*.

³³ M S Mosko (1987) ‘The Symbols of “Forest” ’.

and 'lover' and describe themselves as 'children' and 'people of the forest'. As Bird-David demonstrates, this account shows remarkable similarities to her study of Nayaka hunter-gatherers from India who refer to their forest environment as 'big father' or 'big mother' and themselves as 'son' or 'daughter' in that context.³⁴ In this way the Mbuti and Nayaka understand their environment as something which they are able to interact with on a daily basis, so that there is not a fundamental differentiation between relations with human and non-human constituents of the environment. As Ingold remarks, 'one gets to know the forest, and the plants and animals that dwell therein, in just the same way that one becomes familiar with other people, by spending time with them, investing in one's relations with them the same qualities of care, feeling and attention'.³⁵ Kohler³⁶ describes similar experiences with regard to Baka forest peoples' relationships with elephants, so that for all of these groups 'hunting itself comes to be regarded not as a technical manipulation of the natural world but as a kind of interpersonal dialogue, integral to the total process of social life wherein both human and animal persons are constituted with their identities and purposes'.³⁷

'Western', or as Bird-David refers to them, 'modernist' beliefs hold that knowledge of our environment is socially constructed when mental representations are attributed to it through religion, education and scientific theories. The problem with this belief is that it creates a barrier between humans and the environment and denies the 'role of the environment itself ... in the production of knowledge'.³⁸ While knowledge is capable of being constructed through social experience, the belief that nature does not have the capacity for its own knowledge ignores the fact 'that human beings are as capable as any other animal of picking up information directly from their environment'.³⁹ This so-called relational epistemology highlights the capacity of humans to understand that non-human objects are able to relate to them – as such it differs from dominant Eurocentric thought which sees the converse as the case. The dualistic ontology of the West has positioned humans as the only possessors of personhood, whereas a relational epistemology does not see personhood as 'part of what something is, an individual ... [but instead] ... personhood emerges out of what something does in relation to others'.⁴⁰

Through examining the way in which the nature/culture divide has played out in dominant understandings, and distinguishing these from the very different relational understandings of these indigenous peoples, we have attempted to demonstrate how such differing concepts have created the foundation for very different relationships to the environment and for very different ways of governing or enabling such relationships. What this importantly offers us is the understanding that indigenous peoples in Central Africa have manifestly different relationships to their environment from those who – wittingly or unwittingly – marginalise

³⁴ N Bird-David (1990) 'The giving environment: Another perspective on the economic system of gatherer-hunters', in *Current Anthropology*, vol. 31, no. 2, p 190.

³⁵ T Ingold (2000) *The Perception of the Environment*, p 47.

³⁶ A Kohler (2000) 'Half-man, half-elephant: Shapeshifting among the Baka of Congo', in J Knight (ed.), *Natural enemies: people-wildlife conflicts in anthropological perspective*, Routledge, London.

³⁷ T Ingold (2000) *The Perception of the Environment*, p 49.

³⁸ K Milton (2002) *Loving Nature*, p 41.

³⁹ *Ibid.*

⁴⁰ *Ibid.*, p 47, emphasis in original.

them, and that the current national laws that have been created by the colonial and post-independence governments to govern their citizens' relationships to land have rarely taken into account indigenous peoples' relationships to land or governance. As a result governments have ignored such communities' rights to their land and livelihood systems, and have marginalised and diminished their ability to pursue sustainable relationships.

C Discrimination against forest peoples by their neighbours

Woodburn⁴¹ summarises the historic forms of discrimination experienced by Central African forest peoples and other Central African hunter–gatherers as involving negative stereotyping, a denial of their rights, and segregation. He argues that all over sub-Saharan Africa there is a tendency for differences in modes of subsistence to be represented as ethnic differences and, conversely, that people who consider themselves ethnically distinct often present this as a difference in mode of subsistence. Thus, in Burundi or Rwanda for instance, Tutsi and Hutu may both be mixed agriculturalists and pastoralists yet will identify themselves as one or the other. Likewise, even where hunter–gatherers are no longer hunting and gathering and are effectively excluded from their forests (as with the Batwa in Uganda), they continue to view themselves, and are seen by others, as primarily hunter–gatherers.

Woodburn points out that ethnic identity in Africa is very flexible; people of different groups expect to eat together, drink together, intermarry; 'in total contrast to India, group identities for most Africans are not rigid and exclusive but tend to stress the mixed origins of groups'.⁴² He points out that the situation of hunter–gatherers in Central Africa is very unusual for Africa with people such as the Batwa of Rwanda not enjoying this flexibility in ethnic identity. They are numerically a small minority, posing no political threat to anybody, and yet rigid barriers have been drawn up against them excluding them from normal dealings with other people. The severe consequences that can result from such discrimination are evident in the numbers of Batwa killed during the 1994 Genocide in Rwanda. Whilst 14% of the total Rwandan population was killed, 30% of the Batwa were killed, despite making up only between 0.3 and 0.4% of the population.⁴³

Woodburn's description is equally applicable to much of the discrimination suffered by other forest people throughout the Central African rainforest region. He describes the negative stereotyping as involving open and publicly asserted stigmatising characterisations of hunter–gatherers as ignorant, stupid, primitive, lacking in proper culture and not fully human. From this perspective, any denial of hunter–gatherers' rights by non hunter–gatherers is justified since they are seen as neither properly human nor living as people should. This denial of rights, widely contested by forest peoples themselves, often takes the form of claiming that forest people should not have control over their own labour, their lands or their marriages. They are denied rights to the land they hunt and gather on, and 'are freely, even casually, dispossessed of the land by agricultural and pastoral people'.⁴⁴

⁴¹ J Woodburn (1997) 'Indigenous discrimination: The ideological basis for local discrimination against hunter–gatherer minorities in sub-Saharan Africa', in *Ethnic and Racial Studies*, vol. 20, no. 2, pp 345–61.

⁴² *Ibid.*, p 348.

⁴³ J Lewis and J Knight (1995) *The Twa of Rwanda: assessment of the situation of the Twa and promotion of Twa rights in post-war Rwanda*, World Rainforest Movement and IWGIA, Chadlington, p 93.

⁴⁴ J Woodburn (1997) 'Indigenous discrimination', p 350.

Actions like these are based on the highly discriminatory notion, often supported by national governments and international agencies, and justified by reference to the Lockean ideology outlined above, that agriculture constitutes legitimate land use and confers some level of rights to land, whereas hunter–gatherer usage confers no such rights. This can easily lead to hunter–gatherers being denied the right to hunt and gather and to their being excluded from their forests without adequate consultation or compensation, if any is even offered (see for example, the case of the Batwa of Uganda below). If compensation is offered, forest people are given much less than their farming neighbours. Forest people are also frequently not granted any rights or sustained support by governments, missionaries or development agencies, unless they are willing to give up their way of life, settle by the road, engage in agriculture and send their children to village schools.

When such changes are carried out forcibly, they continue to embody a fundamentally discriminatory attitude that denies, and can potentially destroy, a people's way of life in a similar manner to the way in which Europeans sought to destroy indigenous cultures in North America and Australasia. Similarly, the agencies and people engaged in such fundamentally discriminatory activities towards the forest people of Central Africa often believe that their assimilationist attitudes and practices are generous and paternal, rather than a denial of hunter–gatherers' fundamental human rights.

In looking at the reasons for this discrimination by their neighbours, Woodburn suggests that these hunter–gatherers are politically weak since, more than in any other human societies, they stress egalitarianism and work hard to minimise social differentiation of power, wealth and status. Their lack of property and wealth accumulation means that they appear poor by the standards of their farming neighbours, whose security lies in accumulating resources. For forest people, their security has relied on high mobility and a rich natural environment, and a social system where people share with others what they have hunted, gathered or bartered for. Such sharing is grounded in ideology and ritual forms through which forest people ensure that relationships between themselves, and with their forest environment, are based on co-operation, harmony and abundance. The processes that ensure equality – demand sharing,⁴⁵ nomadism, the high valuation of personal autonomy, equalising rituals and practices which can involve much hilarity, ridicule, shouting and improvised singing, story-telling and music – are in sharp contrast to dominant farmers' values of authority, politeness and deference to seniors. This can lead to farmers being unable to understand the values and strengths of forest peoples' cultures, seeing them instead as uncivilised or threatening.⁴⁶ Yet forest peoples' equalising processes are not just one more reason for agriculturalists' discriminatory attitudes and actions but are also, paradoxically, effective processes for including others (such as villagers) and subverting these very processes of discrimination.

⁴⁵ Demand sharing is the term given to a set of social norms where A has the right to demand of B that B gives A something that A needs that B has an excess of. Anybody might fulfil either role. Its effect is to distribute resources within a community and maintain egalitarian relations. The onus is on those without to demand their share, rather than on those with to give resources away, but it is sharply distinct from begging, to which it is often compared. Whereas begging involves people with little or nothing pleading for a fragment of what others may permanently have more of, demand sharing involves both parties acknowledging a mutual responsibility. Ensuring that no one can build up relationships of debt, it is the norm in egalitarian contexts, and impossible in contexts of structured inequality.

⁴⁶ *Ibid.*, pp 352–3.

In relation to processes of discrimination, however, forest people can be willing to participate in (everyday and ritual) relations with their farming neighbours in which they appear to be destitute, subservient or clients. Forest people do this partly in order to gain access to goods that farmers have, and often describe such behaviour in idioms normally used in hunting. The difficulty and suffering they may experience as a consequence of discrimination during interaction with farmers can be equated with the hardships of the hunt. However, wherever forest people retain their forests and sufficient wild resources, they have little difficulty in maintaining their autonomy and, from their own point of view, maintaining relationships of equality with their neighbours.⁴⁷ However, the supposed gulf between villager and hunter–gatherer rituals and values may not, at least from an Mbuti point of view, be so unbridgeable (Kenrick, 2005); in fact the dynamic of inclusiveness at the heart of forest peoples' egalitarianism is focused precisely on bridging the divide those (especially villagers) who are seeking to assert their power (especially over forest peoples) attempt to create.

Forest peoples see themselves, and are seen by their neighbours, as the autochthons or 'first people' of the Central African forests. Their neighbours commonly see them as the custodians of fertility, whether it is to make crops grow, animals multiply or women conceive and give birth.⁴⁸ These widely recognised aspects of their identity are today becoming a potent way for forest people to assert their rights through the international indigenous peoples' movement. However, unless those in the West who are supporting forest peoples' participation in such a movement can recognise that forest people have not simply been victims of their more powerful village neighbours but have also participated enthusiastically in social and ritual relations with them as a way of maintaining their autonomy, we will remain focused on discrimination in a way which fails to engage with and support forest peoples' processes of inclusiveness. If support focuses only on forest peoples' fight against the discrimination perpetrated by their neighbours, then the fight will be in terms of what Jerome Lewis has called 'white and black "village people"',⁴⁹ involving structures of representation and leadership that will undermine the very equalising processes at the heart of forest peoples' social worlds.

D Forest peoples' landownership systems

Focusing on one example: contrasting Bagyéli and neighbouring farmers' systems

In this section, through exploring the contrast between exclusionary systems of landownership and more egalitarian inclusive systems of relating to the environment, we hope to convey the way in which this simple dynamic creates a complex social reality which those working for indigenous peoples' rights in Central Africa need to be aware of if they are to support, rather than undermine, forest peoples' attempts to secure their futures.

⁴⁷ Contra C Turnbull (1966) *Wayward servants. The two worlds of the African pygmies*, Eyre & Spottiswoode, London; J Kenrick (1999) 'Reflections in the Molimo Pool: Gender, Ritual, Economics and the Mbuti of Central Africa', in K Biesbrouck, S Elders and G Rossell (eds) *Hunter–Gatherers in a Multidisciplinary Perspective: Challenging Elusiveness*, CNWS, Leiden.

⁴⁸ J Woodburn (1997) 'Indigenous discrimination', pp. 345–61; J Kagabo and V Mudandagizi (1974) 'Ballad of Claypeople – Batwa of Rwanda', in *Cahiers D Etudes Africaines*, vol. 14, no. 53, p 77.

⁴⁹ J Lewis (2001) 'Forest People or Village People: Whose voice will be heard?', in A Barnard and J Kenrick (eds) *Africa's Indigenous Peoples*, p 76.

The Bagyéli in south-west Cameroon live mainly in the forest at some distance from roads, and form a small minority amongst their Bantu farming neighbours, the Bulu, Ngoumba and Fang villagers, who live along the roads that run through the forest.⁵⁰ The anthropologist Karen Biesbrouck sometimes appears to describe the Bagyéli as incorporated within Bantu land tenure arrangements, and sometimes describes the Bagyéli as having a very different system of tenure.⁵¹ In principle, villagers and Bagyéli may use the same forest space and resources, although in practice the Bantu tend to use secondary forest, fallow land and cacao plantations more, rather than the high [primary] forest that Bagyéli tend to use. For the Bantu the whole of the non-forest cultivated area is considered common property to which native villagers have priority of access. Again, from a Bantu perspective, each of the different Bagyéli base camps associated with one village has rights only to specific areas of high forest associated with that base camp, not to the whole forest area, and all Bagyéli are incorporated into the clans of their Bantu ‘patrons’.

In practice, the Bagyéli operate a completely different but parallel system of land tenure. In situations where the Bantu are enabled to dominate – for example, through the imposition of the World-Bank-backed and Exxon-funded Chad–Cameroon oil pipeline – then the Bantu system prevails, otherwise the Bagyéli retain their own system. Interestingly, the Bagyéli system and the Bantu system appear not to be in conflict, because to the Bantu the explicit Bagyéli system can appear to conform to the Bantu system of residence and lineage; in everyday practice, however, the Bagyéli retain a freedom of movement and access that is very different from the Bantu system.

This is because for the Bagyéli the basic principles governing access to natural resources in the high forest are ‘residence, kinship and “good relations”’.⁵² Bagyéli customary law allocates collective access to forest resources through residential units (the base camp or village) and kinship relations (being a blood relative, or a friend, client or other follower of a particular lineage clan). These two entities overlap, but not completely, resulting in a complex network of mutual rights stretching over considerable distances.⁵³ It will appear that being part of a Bagyéli residential unit will mean that you have rights only to a particular area – a system mirroring the Bantu emphasis on exclusive rights – but in fact Bagyéli rely on kinship relations and ‘good relations’ to enable them to move to very distant areas of forest. So although in theory Bagyéli can appear to conform to Bantu ideas of having rights only to forest associated with their base-camp, which is itself associated with a particular Bantu village, in practice they have ways of establishing rights wherever they are on good terms with other Bagyéli. Thus their rights are not based on exclusively owned property but flow from good relations; their focus is on maintaining good relations rather than firm boundaries.

It is possible for the Bagyéli to have access to all the high forest, as long as they are able to ‘be on good terms’ with others, and so maintain their right to use neighbouring areas of the forest. Boundaries in the high forest enable rights-holders to exclude people belonging to

⁵⁰ J Berg and K Biesbrouck (2000) *The social dimension of rainforest management in Cameroon: Issues for co-management.*, Tropenbos–Cameroon Programme, Kribi, Cameroon, p 5.

⁵¹ *Ibid.*, p 29.

⁵² *Ibid.*, p 25.

⁵³ *Ibid.*

other residential units. Rights may be extended to outsiders, such as distant relatives, or friends who live in another village, provided gifts are given, forest yield is shared and the conditions of use respected. Conflicts over resources among the Bagyéli are dealt with by the Bagyéli themselves. Bagyéli find it inconceivable that a complete stranger or outsider would come to exploit a forest without prior permission of the rights-holders. This is partly because the approval of those with rights to an area 'is generally considered a precondition for having good luck during the hunt, and a protection against "accidents"'.⁵⁴ Conflicts between Bagyéli and villagers over food crops and agricultural land are frequent. The village chief or the weekly tribunal coutumier de justice intervenes in Bantu–Bagyéli conflicts, a system weighted overwhelmingly in favour of the Bantu.⁵⁵

Thus there are two completely different ways of perceiving the situation. From the Bantu perspective, Bagyéli are incorporated into their world with clear categories of ownership and a clear limitation and demarcation of Bagyéli rights, even to the forest. For them, any dispute between Bagyéli and Bantu is settled by the Bantu tribunal, and so control of the Bagyéli is assured. In practice, however, there is a very different system in place for the Bagyéli, one which eludes Bantu control and enables forest access based on 'good relations'; unsurprisingly it never involves Bantu tribunals in resolving conflicts over natural resources.

Bagyéli ability to share far broader access to forest resources and to move between different communities, in a way which is invisible to Bantu systems of land tenure, is made possible partly by their very different experience of the forest. Bagyéli are at ease in the forest; it is a place where their ancestors live: 'These spirits are believed to rule forest space. A hunter who, through rituals, keeps up his contact with these spirits will be guided by them throughout the hunt, and he will not return empty handed'.⁵⁶

Although village farmers (whether Bulu in Cameroon, or Bila and Lese in the Ituri Forest, DRC) often experience themselves as being against the forest, this picture should not be oversimplified.⁵⁷ This is because some villagers, such as many Bila in the Ituri, and many Ngoumba in Cameroon, are able to enter into inclusive processes and feel at home in the forest. Conversely some Bagyéli and Mbuti can themselves become caught up in – and so come to embody – systems of opposition and control.⁵⁸

Forest peoples continually use demand-sharing, ritual, humour, and subsistence and residence strategies to undermine the categories that those who see themselves as being in positions of power and control seek to impose on them.⁵⁹ In seeking to work with forest

⁵⁴ Ibid.

⁵⁵ Ibid.

⁵⁶ Ibid., p 11.

⁵⁷ R R Grinker (1994) *Houses in the rainforest: ethnicity and inequality among farmers and foragers in Central Africa*, University of California Press, Berkeley and London; J Berg and K Biesbrouck (2000) *The social dimension of rainforest management in Cameroon*, p 11.

⁵⁸ See for example J Kenrick (2005) 'Equalising Processes, Processes of Discrimination and the Forest People of Central Africa', in T Widlock and W G Tadesse (eds) *Property and Equality: Vol 2 Encapsulation, Commercialization, Discrimination*, Berghahn, Oxford.

⁵⁹ See J Kenrick (2000) 'The Forest People of Africa in the 21st Century', in *Indigenous Affairs*, vol. 2000, no. 2, pp 10–25.

peoples in Central Africa we need to understand their societies as neither essentially isolated from their neighbours nor as essentially dominated by them. Their relational approach to their social, political and physical environment means that to support them in making their own futures we have to support their processes of inclusivity, rather than set them up as people who primarily wish to exclude others from their territory. However, while forest peoples are guided by complex and dynamic customary land tenure systems, and while their culture is, in general, excellent at undermining and resisting attempts to dominate it, they are none the less politically weak when it comes to direct conflict with outsiders, and their egalitarian strategies can only deal with assault only up to a certain level. The final section of this chapter will focus on the current situation of Central Africa's forest peoples and will attest to the severe conditions some forest peoples are living in as a result of such sustained attacks on their livelihoods and ways of living.

3 Current situation of forest peoples in Central Africa⁶⁰

The forest provides the environmental, social, economic and political resource base that gives forest peoples room for manoeuvre, enabling them to negotiate with others and, to a great extent, determine their own future. The immediate threat to them comes from the destruction of the forest itself. After first examining the predicament of the different peoples who maintain livelihoods based inside the forests, we will look at the predicament of those whose forest has been destroyed or who have been excluded from it.

A Forest peoples still living in the forest

To varying degrees, groups such as the Mbuti (Bambuti) and Efe, the Aka (Ba-Aka), the Baka, and the Bakola continue as hunter-gatherers. The Mbuti and Efe of the Ituri Forest, DRC, are thought to number 35–40,000; the Aka of northern Congo (including the Mbendjelle) and southern CAR 25–30,000; the Baka of south-eastern Cameroon 35–50,000; the Bagyéli of south-western Cameroon 3–4,000. While there is tremendous variation within each group – with some people mostly sedentarised and engaged in agriculture, and many working for long or short periods for outsiders such as logging companies, meat traders and conservationists – most of these people spend some of the year moving through the forest between hunting camps and some of the year living close to their farming neighbours and working in their fields.

As Bantu cultivators and fishers moved into the forest from central Cameroon (from 5,000 years ago onwards), ancestors of present-day hunter-gatherers exchanged forest produce with the farming peoples in exchange for iron and pottery artefacts, as well as for agricultural produce. This evolved into a system of economic and cultural exchange which continues to this day: in some places more in the form of exchange relations freely entered into, in others more in the form of domination by the farmers.

Where the forest is not destroyed and where hunter-gatherers to varying degrees maintain traditional exchange relations with their farming neighbours, the Baka, the Aka, the Efe and

⁶⁰ The following section has relied heavily upon the 2006, 2007 and 2008 editions of *The Indigenous World*, IWGIA, Copenhagen.

the Mbuti, for example, spend long periods in the forest. They perceive their environment to be plentiful and benevolent. They live in bands of 15–60, hunting for meat, gathering plant foods, and collecting honey. Everything they own has to be carried when they move to a new hunting camp, so there is advantage in having few possessions. What they do have in abundance is an intimate knowledge of the forest: of animal tracks, of the flowering and fruiting cycles of plants, of how to locate a bees' nest from the flight of a bee. They know the individual properties of thousands of plants and make use of them to eat, to make poisons, to dull pain, to heal wounds, and to cure fever. Invariably these hunter–gatherers spend much of the year near a village, where they work in the villagers' gardens. Most of them engage in rituals which involve asserting their relationship with the forest and with the spirits of the forest. Song is central to these rituals, and may last all night with the intention of establishing a peaceful state of mind and co-operation among the whole camp, and re-establishing a good relationship with the forest, all of which is necessary for the hunt to be successful.

Mbuti and Efe of the Ituri Forest, DR Congo

While many of the Mbuti and Efe have managed to maintain forest-based livelihoods, the biggest threat that they currently face is the continued appropriation of their lands by both logging companies and conservation projects. In 2002, the government established a Forest Code, with 40% being zoned for commercial exploitation and 15% zoned for conservation. The remaining 45% is available for concessions. Forest peoples' customary tenure has not been included, however, and none of the forest is being zoned to reflect and protect forest peoples' own land tenure systems.

Despite a range of forest policies that have attempted to halt the exploitation of the DRC's forest resources, the government has admitted that logging continues in the country, with the granting of 103 concessions since the 2002 moratorium was put in place (equivalent to 147,426 sq km of forest).

Baka and Bagyéli of southern Cameroon

The Bagyéli and Baka around Campo Ma'an National Park, Dja Reserve and Boumba Bek National Park have benefited from the use of global positioning system mapping to create land-use maps. These maps have been used to advocate for the rights of the Bagyéli to have access to Campo Ma'an, and while it hasn't brought about a recognition of their rights to own and control their territories, it has enabled them to secure an agreement with protected area authorities regarding continued access to the park.

Evidence collected during consultations with Bagyéli communities in south-western Cameroon in 2001 showed that Exxon's World-Bank-backed Chad–Cameroon oil pipeline route was having severe impacts on Bagyéli communities.⁶¹ For example, the pipeline crossed Bagyéli land at least five times in the Bipindi area, required some Bagyéli to move their camps, and threatened sacred sites. At the time, however, no Bagyéli had received individual compensation since, it was claimed, they were not affected.

⁶¹ J Nelson, J Kenrick and D Jackson (2001) Report on a Consultation with Bagyeli Pygmy Communities Impacted by the Chad–Cameroon Oil Pipeline Project, (accessed 14 September 2007)
http://www.forestpeoples.org/documents/ifi_igo/ccp_bagyeli_consult_may01_eng.shtml.

The oil company's compensation programme had led directly to increased pressure against Bagyéli from neighbouring Bantu communities, who claimed ownership of the lands the Bagyéli occupied and used. The oil company gave compensation based upon those claims to these neighbouring communities instead. The original development process for the Indigenous Peoples Plan (IPP) stipulated by World Bank policy had failed to provide politically or culturally meaningful space to enable Bagyéli participation in the design of the IPP. This meant that it did not address Bagyéli 's main priorities – securing their access to agricultural land, and protecting their customary rights in forests. Instead the IPP focused solely on supporting Bagyéli agriculture, health and education, but without any meaningful participation by them.

Now, 20 indigenous Bagyéli communities in the Chad–Cameroon pipeline zone have secured formal recognition for their land rights, after six years of effort through a project coordinated by FPP, working with the Cameroon NGOs the Centre for Environment and Development, and Planet Survey Sustainable Environment and Development.⁶² Whether this simply involves the lowest level of local government recognising these particular communities' rights to small areas unwanted by their farming neighbours, or amounts to something far more substantial than this, is yet to be determined.

Aka of northern Congo and southern CAR

The forest people of Congo and CAR consist of two broad groups: the Babongo and the Bambenga, which includes various smaller sub-groups: the Batswa, Baaka, Babi, Babongo, Bagyéli , Bakola, Baluma, Bangombe, Mbendjele and Mikaya. Interestingly the governments of Congo and CAR are taking great strides towards recognising and enshrining the rights of forest peoples within the domestic legislation of each country. The Republic of Congo has seen the emergence of several laws that aim to protect the rights of forest peoples, and the recently adopted land law restores and recognises customary land rights. The Republic of Congo's draft law is largely consistent with the United Nations Declaration on the Rights of Indigenous Peoples.⁶³ In addition, CAR has embarked on ratifying ILO Convention 169 which, if completed, would make it the first country in Africa to do so.

Gabon

Approximately 20,000 forest people – the Baka, Babongo, Bakoya, Baghame, Barimba, Akoula and Akwoa – are located throughout Gabon in urban and forest-based contexts. As elsewhere in the region, Gabonese communities are marginalised and experience relative poverty and discrimination. Current threats and challenges in Gabon include severe environmental damage to ancestral lands and resources, infrastructural transformations (roads, dams and railways), large-scale commercial bush-meat hunting, insecurity of land tenure and encroachment through logging and extractive activities. In addition they are

⁶² J Nelson (2007) An overview of Community Mapping with FPP in Cameroon, Forest Peoples Programme, Moreton-in-Marsh.

⁶³ UN Committee on the Elimination of Racial Discrimination (CERD), Reports submitted by States parties under article 9 of the Convention: International Convention on the Elimination of All Forms of Racial Discrimination: 9th periodic report: addendum: Republic of the Congo, 20 October 2008. CERD/C/COG/9. Online. UNHCR Refworld, available at: <http://www.unhcr.org/refworld/docid/49c0e1c42.html> (accessed 1 April 2009).

adversely affected by conservation developments and regulations, resettlement and integration plans, insufficient representation in community land claims and a lack of sufficient funding and support for indigenous organisations.

B Forest peoples marginalised from the forest

Of the estimated 70–87,000 Batwa in the Great Lakes region, probably less than 7,000 have direct, regular access to forest today. Forest-based Batwa refer to themselves as Impunyu. A smaller second group of Batwa in the region are the fisherfolk who live mostly on the shores of Lake Kivu. The third and largest group – of 60–76,000 Batwa – are referred to as ‘potters’; for this latter group the forest has long since been destroyed and their sense of identity is focused on their occupation as potters rather than on their identification as forest peoples. In addition to these 60–76,000 Batwa in the Great Lakes region, there are up to 100,000 Batwa (or Batua) further west, mostly in DRC, whose forest has been destroyed and who are now almost entirely dependent on their neighbours for their meagre livelihoods.

Forest-based Batwa in Rwanda

Many who no longer have access to forest remain on the farms that have taken over their traditional land, where they are often described as squatters despite the fact that the land has always been theirs. Other areas formerly inhabited by them have been taken over by conservation projects, and forest administrators often see Batwa access to the forest as illegal, despite the fact that they have lived in and relied on these forests since long before agriculturalist and pastoralist peoples, and conservation programmes, arrived in the area. As a result, more now ‘live on the borders of forest and agricultural areas but use the forest on a daily basis’.⁶⁴ In Rwanda this is primarily in the north, in the areas bordering on Gishwati forest and near the Parc des Volcans, and in Nyungwe forest in the south. There has been no effective consideration of the needs of the Batwa in the creation of these parks and forest reserve areas.

Forest-based Batwa in Kivu, DR Congo

Forest Batwa live in many areas of Kivu province, DRC, especially around the Kahuzi–Biega National Park. Between the late 1960s and the mid-1970s, the roughly 3,000 Batwa living inside the Kahuzi–Biega National Park in Kivu were expelled and have subsequently received brutal treatment when found hunting in the park. As a consequence their way of life and livelihoods were destroyed, and no provision was made to help them.⁶⁵

As in Rwanda and Burundi, the Batwa in Kivu, DRC, are particularly vulnerable in times of violence because they live in the remote areas where armed groups hide out. Most Batwa here have fled their villages, and they are caught helplessly between different armed groups, often being forced to act as guides and trackers for one group and then having revenge wreaked upon them by another for doing so.⁶⁶

⁶⁴ J Lewis (2000) *The Batwa of the Great Lakes Region*, p 13.

⁶⁵ A K Barume (2000) *Heading towards extinction? Indigenous rights in Africa: the case of the Twa of the Kahuzi–Biega National Park, Democratic Republic of Congo*, IWGIA, Copenhagen.

⁶⁶ Réseau des Associations Autochtones Pygmées (2004) *Erasing the board*, Minority Rights Group, London.

Forest-based Batwa in Uganda

The Bwindi, Mgahinga and Echuya forests in south-western Uganda were gazetted as forest reserves by the British in the 1930s. This effectively protected them from being destroyed by the agriculturalists who had moved into the area formerly inhabited only by the Batwa, while allowing the Batwa to continue to make use of them. However, since Bwindi and Mgahinga became national parks in 1991, Batwa exclusion has been



Community meeting, Murubindi, Uganda. Photo: Valérie Couillard

enforced and so their forest-based role in the local economy has been completely destroyed. A few Batwa received compensation; most received nothing. Meanwhile farmers received most of the available compensation, because they had been the ones turning the forest into agricultural lands and, by destroying it, were therefore recognised as having land rights. Only since the evictions have efforts been made by those responsible for the parks, but the implementation of revenue-sharing programmes has fallen well short of the expectations, demands and needs of the Batwa. Additionally there has been little or no Batwa involvement in management of their former ancestral lands, and only a handful of Batwa have access to the forest under a multiple use programme to collect valuable forest resources.⁶⁷

Despite this denial of their rights, persistent discrimination by their neighbours, and severe poverty, the Batwa have set up their own representative organisation. With the support of this organisation they have been able to lobby for resettlement, and to date approximately half of the Batwa in Uganda have been provided with some land to live on. In addition, the Batwa have been fighting to have their children included in local schools and health services and have been engaged in advocacy at local and national government levels. Despite these successes, however, just under half of all Batwa in Uganda are landless and forced into bonded labour agreements with their more dominant neighbours. As a result the full rights of the Batwa as citizens of Uganda are not being respected by their neighbours or by government institutions.

C Forest peoples whose forest has been destroyed

Batwa of DR Congo

There are a great many scattered groups of Batwa throughout this region who are now totally dependent on their neighbours for their livelihoods. In DR Congo and Congo-Brazzaville they are thought to number up to 100,000. The Batwa of Mbandaka and Equateur, DRC, provide

⁶⁷ Chris Kidd and Penninah Zaninka (2008) *Securing Indigenous Peoples' Rights in Conservation: A review of south-west Uganda, Forest Peoples Programme (FPP)*, Moreton-in-Marsh.

just one good example of what such Batwa are experiencing. In Mbandaka and Equateur, both Batwa and their neighbours farmers have in the past been exploited by the Lever Brothers' oil palm plantations, and the forests in these areas have been hunted out. As a result of both of these processes the 4,000 or so Batwa are dominated by the villagers both economically and ritually. The Batwa have to work in villager's fields at just the times of year when they should be planting or harvesting their own fields. As a result of this, relationships of debt are built up, since the Batwa then have to borrow food to survive and are then obliged to work villagers' fields when requested, so remaining a ready source of cheap labour to the villagers.

Batwa of Rwanda

The vast majority of Rwanda's approximately 33,000 Batwa⁶⁸ are referred to as 'potters' and have adapted to the incoming farmers' and pastoralists' colonisation and destruction of their forests by working as travelling craftsmen, labourers and potters. As the forest has been destroyed, and there is no longer a need for Batwa practical and ritual help to gain access to the forests; the Batwa have lost the autonomy the forest provides, and discrimination and exploitation have increased. Pottery became their only reliable source of income, and pottery rather than the forest became the symbol of Batwa identity. By the 1970s, as industrial substitutes began to flood the market, pottery became economically unrewarding, but selling pots allowed the reviled and despised Batwa to engage non-Batwa legitimately in conversation, which might result in a work opportunity or gift. Meanwhile, farmers began to reclaim clay marshes for cultivation, reducing many erstwhile potters to a dependence on casual day labour and begging.

Indigenous Batwa organisations in Rwanda have tended to focus on what they see as the immediate need to support, modernise and market pottery, rather than on restoring Batwa land rights and access to their forest and former forest land. In addition the 2005 Land Law in Rwanda transferred communal land – including land that the Batwa relied on for clay for their pottery – into state-owned land. This change is intended to promote land consolidation, justified by the view that small parcels of land are not commercially viable. Very few Twa individuals currently own land, and the majority of Twa landholders do not practise cultivation on their land. It is therefore a serious concern whether the land law allows for state expropriation of land that is not used 'in a productive way', which is deemed to include agriculture and animal husbandry. If this is the case it will continue the pattern of marginalisation that Central African forest peoples' modes of production have faced throughout the region at the hands of colonial and post-colonial governments.

The Batwa have been caught up in wars between other groups for generations; in the last decade, however, the conflicts have intensified, and the marginalised and powerless Rwandan Batwa suffered disproportionately.⁶⁹

The Batwa suffered at the hands of the Interhamwe Bahutu extremists during the genocide, during which time many sought to flee. Afterwards they suffered at the hands of the Batutsi

⁶⁸ CAURWA (2004) *Enquête sur les conditions de vie socio-économique des ménages bénéficiaires de la Communauté des Autochtones Rwandais*, CAURWA, Kigali.

⁶⁹ J Lewis (2000) *The Batwa Pygmies of the Great Lakes Region*, p 62.

authorities, who imprisoned the majority of returning Batwa men after accusing them of complicity in the killings. Certainly some Batwa will have become as embroiled in the mass killing as anyone else, since refusal to participate could mean being killed; but the disproportionate percentage of Batwa deaths points not to their complicity but to their persecution. With the death, disappearance and imprisonment of Batwa men, support networks and families have broken down, leaving poverty-stricken women and children. In response to the negative stereotyping of sections of Rwandan society, the government seeks to build national unity around national Rwandan identity. As a result all ethnic identities have been excluded from political and social realms, and while this initiative has helped to restore peace and unity in Rwanda this policy against identifying people ethnically fails to address the particular needs and discrimination experienced by the Batwa and leads to their further marginalisation.

Batwa of Burundi

Estimates suggest that 80–100,000 Batwa live in Burundi: 1.25% of the country's population. The Batwa here also experience extreme discrimination. 'The Bahutu or Batutsi may not enter a Batwa hut, share food or drink, or even sit and chat with Batwa, for fear of being ostracised by their own community.'⁷⁰ The vast majority are landless labourers suffering extreme discrimination, and have been caught up in the less intense but long-drawn-out cycles of violence between Bahutu and Batutsi in Burundi.

Burundi – uniquely in the Great Lakes Region – provides for three Batwa representatives to sit in both the National Assembly and the Senate. Batwa participation is actively sought in many government structures and processes. In 2006 a national land commission was established with the task of addressing the land issue in Burundi with particular reference to the many refugees and displaced persons in the country. The commission also has a provision to include one seat, out of 23, for a Mutwa. It is unclear at this stage how effective this participation will be in addressing the long-term land needs of the Batwa.

4 Conclusion

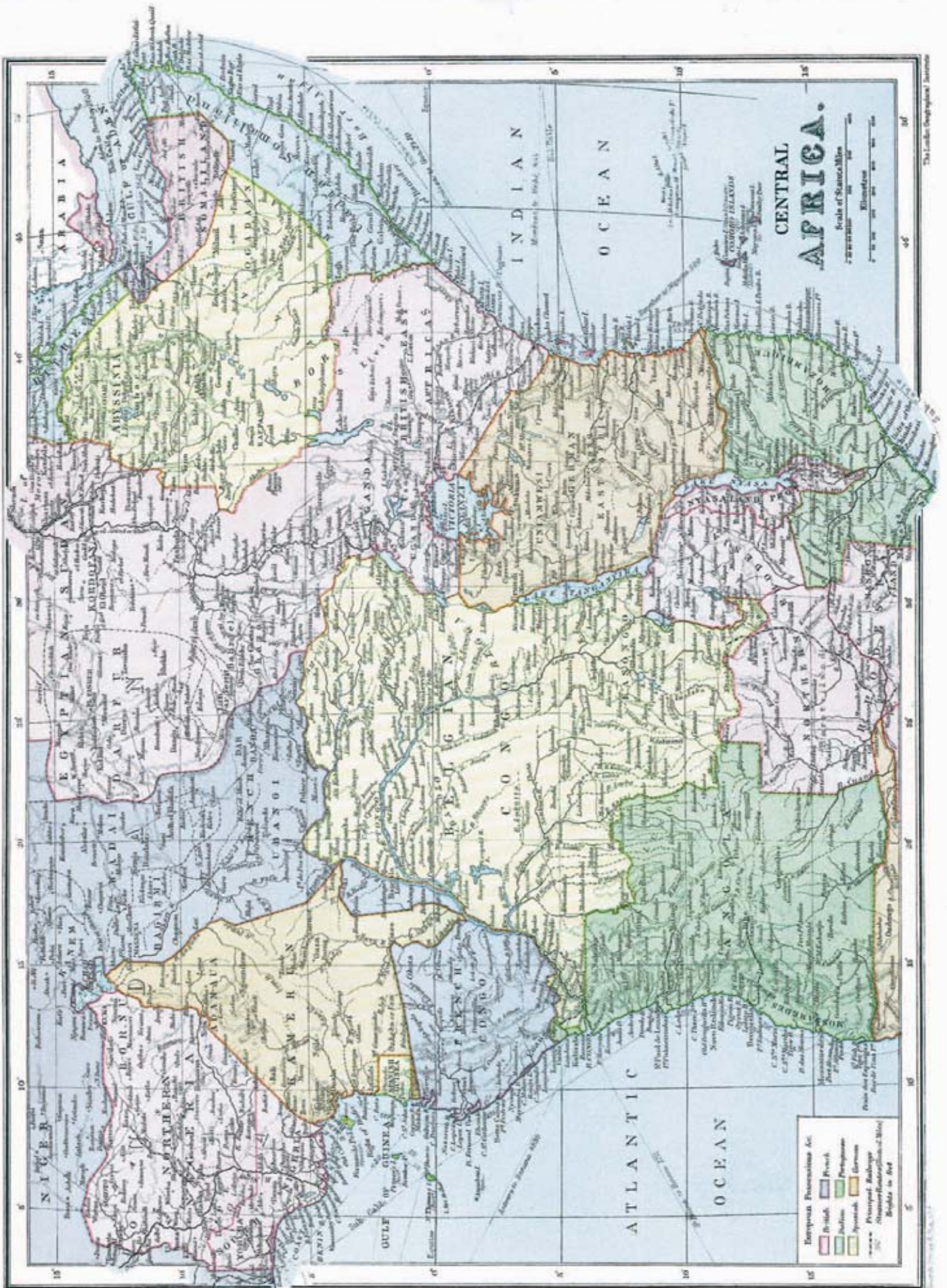
Through considering landownership and land rights in relation to the underlying issues of identity, power, discrimination and social and environmental relations, and through giving an overview of the situation of forest peoples in Central Africa, we have sought to contextualise the land law studies which follow.

In particular, by identifying the fundamental blocks to understanding the situation of the forest peoples of Central Africa, we hope to have conveyed not only why post-independence legislation tends to continue discriminating against forest peoples' land tenure systems, but also why forest peoples land-use systems, landownership systems and socio-environmental relations must be understood in their own right. Other societies and governments, particularly those globally and regionally dominant – in fact, all of us – would benefit hugely from learning from such systems and relations, if we are to avoid destroying the ecological basis of human existence.

⁷⁰ *Ibid.*, pp 70–71.



Africa c 1879, Bartholomew's *International Atlas*



Central Africa c 1910, Philips' *Comprehensive Atlas*

Part II

Land Rights under international law: historical and contemporary Issues

Jérémie Gilbert & Valérie Couillard

International law, and more particularly international human rights law, has for some time been seen as a positive tool to support indigenous peoples' rights; when it comes to land rights, however, such positivity is new. September 2007 marked the start of a new era for indigenous peoples, with the adoption of the United Nations Declaration on the Rights of Indigenous Peoples. Despite this recent development, international law has historically played a negative role regarding indigenous peoples' rights, and more especially their rights to land. An important tool in the hands of the colonial powers, international law has been a central vehicle in the dispossession of indigenous peoples. Most of the rules regarding title to territory under international law were aimed at justifying the dispossession of indigenous peoples of their lands. While various legal systems applied, during colonisation, to land rights for indigenous peoples – depending on which state was the coloniser – international law played the role of common denominator, ensuring that all powers adhered to the same legal doctrine. The rules governing title to territory under international law became the basis of the 'rules of the game' between the colonial powers, and as such had a direct impact on indigenous peoples' land rights. Because of this legacy, international law still plays a huge part in the contemporary situations faced by indigenous communities throughout the continent today. But this legacy is seriously challenged by recent development stemming from international human rights law. The first part of this chapter provides the historical background, setting out the complexity of contemporary indigenous land claims. Based on this analysis, the second part of the chapter examines the content of states' obligations regarding land rights for indigenous peoples under international human rights law.

1 International law and colonisation

Ironically, the universalisation of international law was principally a consequence of the imperial expansion that took place in past centuries, as the development of international law was primarily guided by the establishment of rules governing title to territory over newly colonised countries. For the African continent, these rules were crucial in defining land titles both for the colonial powers and for the native populations. In what is now referred to as the 'scramble for Africa',¹ colonial powers needed rules to divide the continent between themselves, but also to justify the colonial enterprise of taking lands from the 'natives' to transfer it to the colonial powers. Most of the rules regarding title to territory under international law were based on these two premises. As the following analysis shows, international law was used first as a set of rules to organise the partition between the colonial powers, and secondly as a way to justify morally, politically and legally the dispossession of the local peoples of their lands and natural resources.

¹ Thomas Pakenham (1991), *The Scramble for Africa*, Weidenfeld and Nicolson, London.

A International law's 'civilising' mission

The colonial enterprise, especially in the new imperialist period (1880–1914), found justifications under the banner of 'commerce, Christianity and civilisation'. While the primary goal of colonisation was undoubtedly trade expansion, the notion of 'civilisation' provided the colonial powers with a moral vindication; the equation became: 'commerce plus Christianity equals civilisation'. Especially in Africa, reference to a 'civilising mission' or 'mission civilisatrice' was put forward as the main justification for the colonial enterprise. Illustrations of this 'civilising mission' can be found in the Berlin Conference (1884–85), which played a huge role in the development of the international 'rules' regarding the colonisation of Africa. The background of the conference was the increased competitive interest over the Congo between Germany, France, and Belgium. However, the conference focused not only on the situation in the Congo but also on possibilities of finding common interest between the main colonial powers, all in the interest of common trade. Representatives not only from Germany, France and Belgium contributed to the conference but also from Portugal, Austria–Hungary, Denmark, the United Kingdom, Italy, the Netherlands, Russia, Spain, Sweden–Norway, and the Ottoman Empire. As such the Berlin Conference represented one of the first gatherings of the main colonial powers and the first formal recognition of their different 'spheres of influence'. In his opening remarks to the conference, Prince Bismarck noted that 'all governments invited share the wish to bring the natives of Africa within the pale of civilisation by opening up the interior of the continent to commerce.'² The common denominator of a civilising mission was made clear in the Final Act of the conference, often seen as the political and legal formalisation of the 'scramble for Africa'.³ Concomitant with the prevailing 'mission civilisatrice' governing that period, the Final Act refers to colonial states' mission to bring the 'blessings of civilisation' to the African continent. Reference to a civilising mission can be also found in the charter of the International African Society, which played a crucial role in the colonisation of Western Africa: the purpose of the society was 'researching' and 'civilising' the continent. These are only illustrations, as all the international documents of that period, including the League of Nations Covenant, made reference to a 'civilising mission'. Accordingly, the development of international law throughout that period is full of such references,⁴ testifying to the tremendous role it played providing colonial powers with a legal foundation to justify dispossessing Africans of their lands and natural resources.

One of the chief legal consequences of this reference to a 'civilising mission' regarding indigenous peoples' land rights can be found in the doctrine of trusteeship. Behind the notion of 'bringing civilisation' to Africa was the 'humanitarian' call to help the 'natives' (or 'primitives') to join the 'enlightenment' and stop their 'barbaric' traditions. As a result colonial powers (or 'civilised' powers) had to act in a spirit of trusteeship towards the non-civilised native populations. Trusteeship meant the 'obligation' to act as guardian and

² Parliamentary Papers, Africa, No. 4 (1885), Protocols and General Act of the West African Conference. For references and analysis, see H R Fox Bourne (1903), *Civilization In Congoland: A Story Of International Wrongdoing*, P S King & Son, London; reprinted by Kessinger Publishing, 2007.

³ The Final Act was signed by Great Britain, Germany, France, Austria–Hungary, Belgium, Denmark, Spain, United States (but not ratified), Italy, the Netherlands, Portugal, Russia, Sweden–Norway and Turkey.

⁴ See Martti Koskenniemi (2002) *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870-1960*, Cambridge University Press.

shepherd⁵ towards native peoples, to act for the promotion of their material and moral well-being, and for the social progress of the inhabitants of the territory who are 'not yet able to stand by themselves under the strenuous conditions of the modern world'.⁶ The nature of the trusteeship doctrine is summarised in the words of a 1919 decision from the UK Privy Council, which stated that: 'some tribes are so low in the scale of social organization that their usages and conceptions of rights and duties are not to be reconciled with institutions or the legal ideas of civilized society.'⁷ The consequence of being 'so low in the scale of social organisation' was that European states had not only a right but also a duty to 'protect' native peoples by exercising control over their lands. Hence, behind this veil of a 'civilising mission', European powers were taking control of the lands in the hands of indigenous communities not for their own interest but for the benefit of the indigenous peoples themselves. Practically it meant that lands were being held in trust for indigenous peoples by the colonial administration. This doctrine had enormous consequences for indigenous peoples' land rights, not only during the colonial era but also in contemporary Africa; it still echoes in some states' practice of reservation. This international doctrine of trusteeship was translated into state colonial laws, as most (if not all) colonial powers put in place a system of land control for the 'most uncivilised'. Illustration of this doctrine can be found in legislation in Africa up to the 1950s. A 1952 decree adopted in the Congo, for example, stated that to be able to register a right to land, native peoples had to prove their degree of education and civilisation.⁸ Another consequence of the trusteeship doctrine was the establishment of reservations or reserved lands. While the trusteeship doctrine assumed the territorial control by the colonial 'civilised' power, it also gave a 'duty' to the coloniser to act for the well-being of the 'uncivilised'. In practical terms this resulted in the establishment of reserved lands or reservations for indigenous communities. Such lands and territories were seen as giving a right of usage for native communities with a restriction on their ability to alienate such lands (as the aim was to 'protect' them). This is another long-lasting consequence of the doctrine of trusteeship developed under colonial rules, as still nowadays reserved lands for indigenous peoples share similar characteristics, being based on hypocritical humanitarian ground (to enable indigenous peoples to maintain a reasonable standard of existence) and on the absolute control of the government over such a right (the government holds the ultimate title to the land).

The colonialist distinction between 'civilised' and 'uncivilised' societies had another consequence regarding land rights for indigenous peoples through the notion of 'pre-existing rights'. When a colonial power took control of a territory, there was an obligation under colonial rules to recognise 'pre-existing rights', including land rights, in that territory. This is reflected in the Final Act of the Berlin Conference, which stipulated that colonial states had to exercise their authority in such a way as to protect existing rights within the territory (Article 35 of the Final Act). In theory, recognition of 'pre-existing rights' could have had some beneficial consequences for indigenous peoples: if their rights pre-existed the colonial legal

⁵ Note the Christian connotation of such usage.

⁶ See Article 22 of the Covenant of the League of Nations, 28 April 1919.

⁷ Privy Council, *In Re Southern Rhodesia* (1919) AC 211, 233–4.

⁸ A decree of 17 May 1952 on the registration of natives stated (in French) that all natives who had shown evidence, through their education and way of life, of a state of civilisation that implied an aptitude to enjoy rights and discharge the duties prescribed in written legislation were able to move from the customary system to the written law system.

regime, they might also survive it. However, in the words of John Westlake, a prominent 19th-century legal scholar: it is not the case that 'all rights are denied to such natives, but ... the appreciation of their rights is left to the conscience of the state within whose recognised territorial sovereignty they are comprised ...'⁹ Recognition of pre-existing land rights was solely at the discretion of the colonial power. Lindley, in his seminal work on the acquisition of territory, also highlighted the distinction made by the colonial states between the recognition of 'civilised' and 'uncivilised' pre-existing rights, with states rejecting the notion of 'uncivilised' rights to land such as customary indigenous peoples' laws.¹⁰ None the less, despite the power of the colonial state to recognise pre-existing rights or not, the rule still potentially provides indigenous peoples with grounds for claiming recognition of their rights to land.

Going back to the colonial rules governing the recognition of pre-existing rights shows that, when a conquest was made, two approaches to the effect of the acquisition of territory on pre-existing rights to land of the inhabitants were possible. The first was based on the doctrine of continuity, which favoured the continuation of pre-existing land rights, the idea being that the transfer of sovereignty did not adversely affect these rights unless there was an express legislative intent to do so. The second approach was based on the doctrine of recognition. This doctrine affirmed that rights to land had to be formally recognised by the new power; annexation otherwise resulted in the abolition of all pre-existing rights.¹¹ This distinction has important consequences for contemporary land claims, as some national courts (especially under the common law) have started to examine what pre-existing rights 'survived' the colonial rules.¹² The question as to whether pre-existing indigenous legal rights survived colonisation or were dependent upon recognition was only settled recently in favour of the continuing legality of indigenous peoples' rights in common law countries.¹³ In Africa, where colonial powers did not usually make clear statements specifically abolishing 'pre-existing' land rights, such rights could potentially have 'survived' the colonial legacy. Some courts have started to examine the extent to which indigenous peoples' 'pre-existing' laws could have survived colonisation, and what their impact could be in contemporary land claims. The Richtersveld decision of the Supreme Court of South Africa provides a recent illustration of such judicial review.¹⁴ While most of these cases are dealing with national laws, they are none the less based on the international legal principle of the recognition of pre-existing rights, which was affirmed under the Final Act of the Berlin Conference.

Another long-lasting consequence of the colonial era and its classification of societies in a scale of 'civilisation' is the perception of nomadic societies. Under the tenets of international

⁹ John Westlake (1894) *Chapters on the Principles of International Law*, Cambridge, University Press, p 136.

¹⁰ M F Lindley (1926) *The Acquisition and Government of Backward Territory in International Law*, Longmans, Green and Co., New York; reprinted New York, Negro Universities Press, 1969.

¹¹ See, for example, *Vajesingji Joravarsingji v. Secretary of State for India* (1924), LR 51 Ind App 357.

¹² See Jérémie Gilbert (2007) 'Historical Indigenous Peoples' Land Claims: A Comparative and International Approach to the Common Law Doctrine on Indigenous Title' in *International and Comparative Law Quarterly*, 56 (3), pp 538–611.

¹³ Kent McNeil (1989) *Common Law Aboriginal Title*, Clarendon, Oxford, p 196.

¹⁴ *Supreme Court of Appeal of South Africa, The Richtersveld Community and Others and Alexkor Limited and the Government of South Africa*, Case No. 488/2001 (24 March 2003).

legal standards, nomadic peoples were traditionally considered to be at the bottom of the scale. Nomadic peoples had even fewer land rights than other indigenous or native tribes, as one of the rules of territorial occupation under international law is the principle of effective use of the land. Only agricultural societies were deemed to use the lands effectively; nomadic peoples were considered only to wander across territories and therefore have no rights of occupation. The assumption was that nomadic peoples' territories were not used productively and therefore should be regarded as empty. Sir Charles Eliot, in his 1933 land report on Kenya, said: 'I cannot admit that wandering tribes have a right to keep other and superior races out of large tracts merely because they have acquired the habit of straggling over far more land than they can utilize.'¹⁵ That agricultural societies were held to be superior is another expression of the imperial bias at the roots of international law. Generally speaking, in international law nomadic peoples' lands were terra nullius, which means vacant land or land belonging to nobody, and open to colonisation. This assumption was partially challenged only in 1975, when the International Court of Justice, in its advisory opinion on the Western Sahara, recognised that nomadic peoples could also exercise some form of social and political organisation.¹⁶ This affirmation, however, fell short of recognising the capacity of nomadic peoples to exercise territorial sovereignty. As highlighted by Reisman, 'the Court formally acknowledged the existence of a theory of international land tenure based on a non-European conception of title as generative of "legal ties" [...]. But such "legal ties" were not enough to defeat title deriving from European colonial claim.'¹⁷ The view that only societies with a permanently settled population could exercise territorial control remained. All of this had a huge impact on land rights for nomadic communities. Colonial states felt that their 'civilising mission' was even more justified, as nomadic peoples were the remnant of 'primitive' societies that had to be brought to the enlightenment of 'civilisation'. This historical bias against nomadic communities still has some impact in contemporary land claims, as most nomadic communities throughout the continent have only very limited access to legal titles to their lands. The dominant assumption is still that they do not 'effectively' occupy their lands.

B The principle of 'effective occupation'

As stated earlier, the Berlin Conference had a great impact on the development of the rules governing title territory in Africa. Probably one of the most significant rules came under the Final Act, which put in place the 'principle of effective occupation'. This principle meant that colonial states could no longer merely put a flag on a territory and claim it as theirs, but needed to exercise effective control of it. In contrast to other instances of colonisation, where European colonial powers decided that the colonised territories were empty and therefore open to colonisation (Australia, the Americas), colonial powers in the case of Africa (at least following the Berlin Conference) had to establish formal legal ties with the local populations to establish their authority. Article 35 of the Final Act stated: 'The signatory powers of the present Act recognise the obligation to insure the establishment of authority in the regions occupied by them on the coasts of the African Continent sufficient to protect existing rights (droit acquis) and, as the case may be, freedom of trade and of transit under the conditions

¹⁵ Kenya Land Commission Report (1933) Government Printer, Nairobi, p 642.

¹⁶ International Court of Justice, Western Sahara, Advisory Opinion, 1 C J Reports, 1975.

¹⁷ M Reisman (1995) 'Protecting Indigenous Rights in International Adjudication' in American Journal of International Law, 89 (2), pp 354–5.

agreed upon.’¹⁸ While the Final Act remained extremely vague regarding the implementation of the principle of effective occupation, it had several long-lasting consequences regarding the development of the international rules regarding title to territory in Africa.

One of the first consequences was that colonial powers renewed their use of chartered companies as agents of the state. As in most situations, the effective control of huge territories was deemed too expensive for the administrative systems of the colonial states, so they granted rights to private companies over the colonised territories. These private companies, often referred to as ‘chartered companies’, were granted not only trading rights but also rights regarding the administration of the colonised territories, including territorial rights. Thus chartered companies became important players regarding land rights of local communities, sometimes over huge areas. The United Kingdom, for example, placed what is today Uganda under the charter of the British East Africa Company in 1888, and ruled it as a protectorate from 1894. At some stage, chartered companies were responsible for securing control of 75% of British territory in sub-Saharan Africa.¹⁹ Similar processes were put in place by the French, German and Dutch administrations. This arrangement allowed states to justify effective control of a territory that, while not under the administration of the colonial state itself, was none the less controlled by a company that had a chartered right to act on behalf of the state. In terms of land rights for African indigenous communities, it meant that a private trading company acted as the colonial power and apportioned rights over land and natural resources. Chartered companies were granted special privileges regarding not only trade but also exploitation of land, and powers and duties to establish rules regarding land rights.²⁰ Another important authority granted to chartered companies was the power to enter into treaty relationship with communities, such treaties often having territorial consequences.

The second consequence of the Berlin Conference, and its reference to the principle of effective occupation, was the renewal of treaty-making between colonial powers and indigenous peoples. While treaties with indigenous populations have always been part of the colonial enterprise, following the Berlin Conference colonial powers (mainly through their chartered companies) entered into a period of intense treaty-making with African leaders and communities. At the end of the 19th century, Africa (especially West and Central Africa) witnessed a wide-ranging ‘race’ between the main colonial powers in trying to sign as many treaties as possible with local chiefs.²¹ By signing treaties with local chiefs, European colonial powers wanted to ensure the transfer of the lands. While the forms of these treaties vary throughout the continent, they usually involved a notion of peaceful relationship and provided for the cession of landownership from the African communities.²² These treaties were then used by the colonial powers to ensure the transfer of sovereignty in their favour.

¹⁸ Note that the obligation of effective occupation was repeated in Article 10 of the 1919 Convention of Saint Germain.

¹⁹ J E Flint (1988) ‘Chartered Companies and the Transition from Informal Sway to Colonial Rule in Africa’, in S Forster et al. (eds), *Bismarck, Europe, and Africa*, Oxford University Press, pp 69–83.

²⁰ On the power of such companies, see Privy Council, *In Re Southern Rhodesia* (1919) AC 211, pp 233–4.

²¹ An account of such race for treaty-making is available in M F Lindley, *op. cit.* (see note 10), pp 34–6.

²² For detailed analysis of these treaties and the role of international law, see J Castellino and S Allen (2003) *Title to Territory in International Law*, Ashgate, Aldershot.

Another important consequence of the Berlin Conference came through the move towards a process of formal colonisation. While colonial powers had for centuries been colonising the continent in piecemeal fashion, it is only in the last part of the 19th century that a formal process of colonisation was put in place, due largely to increased competition between the colonial powers. Colonial powers had traditionally exercised absolute control over coastal regions and ports to guarantee commerce, while for the interior of the continent the legacy was based on protectorate or jurisdictional capitulations. But following increased competition and the reference to 'effective occupation', colonial powers increasingly moved to a more formal process of colonisation. One of the consequences of such formalisation was the establishment of boundaries throughout the continent. Colonisation played a huge role in the development of the present borders in Africa, as boundaries were mainly drawn by competing colonial powers. Before the arrival of the European colonisers, the social and ethnic structures throughout the African continent had some territorial basis, but there was no concept of frontiers in the European sense.²³ The drawing of the boundaries by the colonisers was mostly based on the logic of regulating 'spheres of influence' between the different colonial powers. The establishment of such borders had some direct implications for indigenous communities that were suddenly submitted to different rules depending on where the borders were drawn. In terms of land rights, it meant the application of different regimes by different states. International law played a crucial role in the period of transition to independence, as under the rules of international law states had to maintain these fictive borders. The rule governing such transition came through recycling the Roman law principle of *uti possidetis juris* (continue to rule that which you possess), which in practical terms entailed African states maintaining existing borders. In 1964 the Organisation of African Unity passed a resolution stating that the principle of stability of borders – the key principle of *uti possidetis* – would apply throughout Africa. For several indigenous communities divided across borders, such adoption of the principle of *uti possidetis* meant that the legal regime applicable to their rights to land was going to be different depending on which side of the border they were. As highlighted in a recent report by the Commission for Africa:

the demarcation of new colonial boundaries disrupted many existing clan, ethnic and religious boundaries. Land ownership was caught between customary and new statutory legal systems. The new systems were more often than not designed with a colonial wish in mind to 'divide and rule' local communities. This created both artificial divisions and new hierarchies within groups and sowed seeds for conflicts after the colonial leaders departed. The consequences of some of these divisions are very much alive today ...²⁴

²³ Romain Yakemtchouk (1970) 'Les Frontières Africaines' in *Revue Générale de Droit International Public*, Vol. 74, p 27; see also Marc Ferro (1996) *Histoire des Colonisations*, Seuil, Paris, p 252; Ian Brownlie (1979) *African Boundaries, A Legal and Diplomatic Encyclopedia*, C Hurst and University of California Press for the Royal Institute of International Affairs, London and Berkeley. More specifically, on the issue of boundaries and indigenous peoples, see Lynette Russell (ed) (2001) *Colonial Frontiers, Indigenous–European Encounters in Settler Societies*, Manchester University Press.

²⁴ Commission for Africa (2005) *Our Common Interest: Report of the Commission for Africa*, London, p 125.

2 Contemporary African and international human rights law

In contrast with the rationales behind lawmaking processes during the colonial era, human rights developments since the 1948 Universal Declaration of Human Rights have created legal norms that operate according to a different paradigm. While traditionally international law is concerned with the rights of states to claim title to territory, human rights law focuses on the rights both of the people and peoples living in those states. Hence international human rights law starts from a different perspective when it comes to land rights: it requires that indigenous peoples' ownership and other rights to their lands, territories and resources be legally recognised and respected. International human rights law protects extensively and specifically indigenous peoples' land rights and connects them to a variety of other rights, including the general prohibition against racial discrimination, the right to property, the right to cultural integrity and the right to self-determination.

This section explains some of the most relevant human rights standards pertaining to indigenous peoples' right to land, including provisions from the African Union's instruments, the United Nations system and the International Labour Organization. Both set of standards are applicable to African countries and the African Charter on Human and Peoples' Rights can be interpreted by reference to other international human rights instruments and decisions.²⁵ Analysis of those standards reveals an important gap between the human rights situation of indigenous peoples and the human rights protection provided by legal standards; their implementation remains challenging. Nevertheless they form the core guiding principles to which states have committed themselves as members of intergovernmental bodies through their ratification or adoption of these instruments.

A The right to land

In the African Charter on Human and Peoples' Rights of 1986, the right to property is guaranteed. However, this right can be 'encroached upon in the interest of the public need or in the General interest of the community and in accordance with the provisions of appropriate laws'.²⁶ This qualification to the property right created by the Charter has been taken to provide justification for evictions and displacements of indigenous peoples. The qualification should be read and interpreted, however, alongside other provisions of the African Charter and in the context of the work of the Working Group on Indigenous Peoples/Communities of the African Commission.

The Working Group on Indigenous Peoples/Communities is a special mechanism of the African Commission on Human and Peoples' Rights, the human rights organ of the regional inter-governmental African Union. It was established in 2001, and part of its role is to research the human rights situation of indigenous peoples in Africa and to formulate recommendations to prevent and provide remedy for violations of indigenous peoples' human rights. In an extensive report adopted in 2003, the working group explained that:

²⁵ African Charter, Article 60.

²⁶ *Ibid.*, Article 14.

The protection of rights to land and natural resources is fundamental for the survival of indigenous communities in Africa and such protection relates ... to Articles 20, 21, 22 and 24 of the African Charter²⁷

Respectively, Articles 20, 21, 22 and 24 provide the rights for all peoples to: existence and self determination; freely dispose of their wealth and resources and, in case of dispossession, the right to recover their property and be compensated; development and equal enjoyment of the common heritage; a general satisfactory environment favourable to their development. These provisions of the African Charter read together amount to a solid legal protection of indigenous peoples' land rights in Africa.

The report of the working group further emphasises that one of the major problems that led to the loss of indigenous peoples' land in Africa is that customary collective tenure was neither recognised nor secured. Instead, land occupied by pastoralists and hunter-gatherers was defined as terra nullius. Running alongside this problem is the fact that collective land titles are not granted by most national laws, whereas: 'Collective tenure is fundamental to most indigenous pastoralist and hunter gatherer communities, and one of the major requests of indigenous communities is therefore the recognition and protection of collective forms of land tenure'.²⁸

The African Commission, by endorsing the report of the working group, has acknowledged that the land rights of indigenous peoples have been critically violated:

The land alienation and dispossession and dismissal of their customary rights to land and other natural resources has led to an undermining of the knowledge systems through which indigenous peoples have sustained life for centuries and it has led to a negation of their livelihood systems and deprivation of their means. This is seriously threatening the continued existence of indigenous peoples and is rapidly turning them into the most destitute and poverty stricken. This is a serious violation of the African Charter (Article 20, 21 and 22), which states clearly that all peoples have the right to existence, the right to their natural resources and property, and the right to their economic, social and cultural development.²⁹

An important decision pertaining to indigenous peoples' land rights is awaited from the African Commission. In November 2006, the Commission examined the merits of a communication submitted by the Kenyan NGO the Centre for Minority Rights Development (CEMIRIDE) on behalf of the Endorois Community against the government of Kenya.³⁰ The complaint relates to the establishment of a nature reserve by the Kenyan government in the 1970s in the Lake Bogoria region on lands inhabited since time immemorial by the indigenous Endorois pastoralist communities. When the reserve was created the Endorois

²⁷ Report of the African Commission's Working Group of Experts on Indigenous Populations/Communities, adopted by the African Commission on Human and Peoples' Rights at its 28th ordinary session (May 2003), 2005, English edition p 21.

²⁸ *Ibid.*, p 22.

²⁹ *Ibid.*, p 108.

³⁰ CEMIRIDE (on behalf of the Endorois) v. Kenya, Communication 276/2003.

were evicted and relocated without compensation. They brought an action in the domestic courts but their claim was rejected. They have therefore submitted a complaint to the African Commission. The Commission has scheduled to adopt a decision on this case at its 45th Ordinary Session to be held in May 2009. The decision should thus be made public soon afterwards and is expected to set a precedent on this issue at the regional level.

At the international level, indigenous peoples' rights to land is clearly affirmed by the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) of 2007, which states that indigenous peoples have the 'right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired.'³¹ This also comprises 'the right to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired.'³² Furthermore, UNDRIP affirms that states' duty to guarantee the right to land must be realised in respect of tradition and land tenure systems of indigenous peoples. The UN declaration establishes guiding principles; the vast majority of UN member states voted in favour of its adoption, and no African country voted against it.³³ African indigenous peoples' right to land also stems from binding international treaties. The International Covenant on Civil and Political Rights (ICCPR) of 1966 protects the right of ethnic, religious and linguistic minorities to enjoy in community their own culture, practices, religion and language.³⁴ The Covenant also affirms the right of all peoples to self-determination and freely to dispose of their natural wealth.³⁵ This Covenant was ratified by 50 African Union member states, including Burundi, Cameroon, DRC, Uganda and Rwanda. The UN Human Rights Committee, the body monitoring the implementation of the ICCPR, linked cultural rights guaranteed in the Covenant to the right to land, and advised that measures be taken to restore their native lands to indigenous people.³⁶

Furthermore, the International Labour Organization has adopted two Conventions pertaining to indigenous peoples' rights: Convention 107 (ILO 107) of 1957 and Convention 169 (ILO 169) of 1989.³⁷ Their content is, however, only partially applicable in Africa, as African states have not yet broadly ratified these instruments.³⁸ Yet the two Conventions are part of the

³¹ UNDRIP, Article 26 (1).

³² *Ibid.*, Article 26 (2).

³³ The African Group submitted an 'Aide mémoire' to the United Nations session in November 2006 in New York. Namibia and Botswana led this group, which raised several concerns concerning the adoption of the Declaration. However, these concerns were responded to by expert NGOs and the African Commission' Working Group on Indigenous Peoples/Communities. The Declaration was adopted without any African vote against in 2007. See the Advisory Opinion of the African Commission on Human and Peoples Rights Concerning the United Nations Declaration on the Rights of Indigenous Peoples, adopted at the 40th Ordinary session of ACHPR, May 2007, Accra, Ghana.

³⁴ ICCPR, Article 27.

³⁵ *Ibid.*, Article 1.

³⁶ Concluding observations by the Committee on the Elimination of Racial Discrimination, Australia, 24 March 2000, CERD/C/56/Misc. 42/rev. 3.

³⁷ ILO 169 came into force in 1991.

³⁸ ILO 107 is ratified by only a few and ILO 169 by none. Angola, Egypt, Ghana, Guinea-Bissau, Malawi and Tunisia have ratified ILO 107. However, both the Central African Republic and Cameroon have actively started a process of negotiation towards the potential adoption of ILO 169; see ILO Programme to Promote ILO Convention No. 169 (PRO 169).

International Labour Organization's standards on indigenous land rights and represent the views of a major intergovernmental organisation.

While ILO 107 has been superseded and replaced by ILO 169, it remains in force for those countries which ratified it but have not ratified ILO 169. ILO 107 states that 'The right of ownership, collective or individual, of the members of the population concerned over the lands which these populations traditionally occupy shall be recognized'. The Committee of Experts stated that the fact that a people has some form of relationship with land currently occupied, even if only for a short time, was sufficient to form an interest and, therefore, rights to that land and the attendant resources.³⁹

ILO 169 contains a number of provisions on the territorial rights of indigenous peoples. It requires that governments recognise and respect the special spiritual, cultural and economic relationship that indigenous peoples have with their lands and territories, and especially the collective aspects of this relationship.⁴⁰ It further affirms that states shall recognise indigenous peoples' collective rights of ownership and possession over the lands which they traditionally occupy and take the necessary measures to identify these lands and to guarantee effective protection of indigenous peoples' rights of ownership and possession.⁴¹ Finally, it states that indigenous peoples may be relocated only as an exceptional measure and only with their free and informed consent. It also stipulates the measures to be taken in the event of relocation.⁴²

B A matter of equality and non-discrimination

When indigenous peoples claim their land rights, they claim the rights to equality and non-discrimination. Discrimination was both a catalyst in and a consequence of their loss of ancestral lands. Human rights standards pertaining to discrimination issues are thus fundamental to indigenous land rights. At the international level, the rights to equality and non-discrimination are guaranteed in numerous international instruments, including the Universal Declaration of Human Rights,⁴³ the International Covenant on Civil and Political Rights⁴⁴ and the Convention on the Elimination of all Forms of Racial Discrimination.

The United Nations Committee on the Elimination of Racial Discrimination, which is the body responsible for monitoring of the Convention on the Elimination of all Forms of Racial Discrimination of 1969, in its General Recommendation XXIII of 1997, affirms that it:

calls upon States parties to recognize and protect the rights of indigenous peoples to own, develop, control and use their communal lands, territories and resources and, where they have been deprived of their lands and territories traditionally owned or otherwise

³⁹ International Labour Conference (1988) Report of the Committee of Experts on the Application of Conventions and Recommendations, Report III (4A), 75th Session, Geneva, p 287.

⁴⁰ ILO 169, Article 13 (1).

⁴¹ Ibid., Article 14.

⁴² Ibid, Article 16 (2).

⁴³ UDHR, Article 7.

⁴⁴ ICCPR, Article 26.

inhabited or used without their free and informed consent, to take steps to return those lands and territories. Only when this is for factual reasons not possible, the right to restitution should be substituted by the right to just, fair and prompt compensation. Such compensation should as far as possible take the form of lands and territories.⁴⁵

At the regional level, the rights to non-discrimination and equality are guaranteed by the African Charter.⁴⁶ Furthermore, equality of all peoples is explicitly protected.⁴⁷ The Working Group on Indigenous Populations/Communities of the African Commission explains how the different indigenous groups in central Africa suffer from being looked down upon by other members of the society, how in many places they are dehumanised and described as creatures, and how the rest of the population would prefer them to 'settle down and abandon their way of life and imitate their own way of living and earning'.⁴⁸ The working group declares that: 'the rampant discrimination towards indigenous peoples is a violation of the African Charter'.⁴⁹

An important problem is raised, however, by some African states' reaction to those standards. Rwanda, for example, explained to the African Commission during the examination of its state report in November 2007, that, because of the genocide of 1994, the government could not integrate the concept of indigenous peoples. The Rwandan government claimed that every Rwandan was equal, that there were no indigenous peoples in Rwanda, and that therefore the legal concept of indigenous peoples and its afferent protections did not apply to the country.⁵⁰

While it is clear to the African Commission that groups of hunter–gatherers from the African forests, such as the Batwa, Baka and Bagyeli, are indigenous peoples as understood in international law,⁵¹ the Commission also acknowledges that 'very few African countries recognise the existence of indigenous peoples in their countries' and 'even fewer recognise them in their national constitutions or legislation'.⁵²

Reactions such as that of the Rwandan government reveal a misunderstanding of the status of indigenous peoples, according to the Commission:

⁴⁵ UN Committee on the Elimination of Racial Discrimination, General Recommendation XXIII (51) concerning Indigenous Peoples, adopted at the 1235th meeting, 18 August 1997, UN Doc. CERD/C/51/Misc. 13/Rev. 4, paragraph 5.

⁴⁶ ACHPR, Articles 2 and 3.

⁴⁷ *Ibid.*, Article 19.

⁴⁸ ACHPR report, pp 35–6.

⁴⁹ *Ibid.*, p 34.

⁵⁰ There are no official transcripts of the oral response delivered in public session during the African Commission on Human and Peoples' Rights held in Brazzaville, Republic of Congo, in November 2007. However, unofficial notes taken by the International Working Group for Indigenous Affairs can be found at <http://www.gitpa.org/People%20GITPA%20500/GITPA%20500-6.htm>

⁵¹ ACHPR report, pp 95–7.

⁵² *Ibid.*, p 107; for a definition of indigenous peoples see pp 86–104.

One of the misconceptions regarding indigenous peoples is that to advocate for the protection of the rights of indigenous peoples would be to give special rights to some ethnic groups over and above the rights of all other groups within a state. This is not the case. The issue is not special rights. As explained above, the issue is that certain marginalised groups are discriminated [against] in particular ways because of their particular culture, mode of production and marginalised position within the state. This is a form of discrimination which other groups within the state do not suffer from. It is legitimate for these marginalised groups to call for protection of their rights in order to alleviate this particular form of discrimination.⁵³

The Commission further explains a related misconception: 'talking about indigenous right will lead to tribalism and ethnic conflicts'.⁵⁴ To this the Commission responds that human rights promote multiculturalism and diversity and that, to the contrary, it is a conception of unity and assimilation that causes conflicts. African countries should not fear that accepting the concept of indigenous peoples will cause conflicts in the country and divide their peoples.

C Conservation practices and customary use of land and natural resources

Relevant norms on land rights can also be found in instruments pertaining to environmental conservation. Various instruments that have emerged over past decades are another manifestation of legal developments that are inclusive of indigenous rights.

The Convention on Biological Diversity (CBD) of 1992⁵⁵ was ratified by a large number of African states. In its preamble, the Convention recognises

the close and traditional dependence of many indigenous and local communities embodying traditional lifestyles on biological resources, and the desirability of sharing equitably benefits arising from the use of traditional knowledge, innovations and practices relevant to the conservation of biological diversity and the sustainable use of its components.

The respect and preservation of traditional knowledge relevant for the conservation and sustainable use of biological diversity is also promoted and protected.⁵⁶

The CBD further provides that states should 'protect and encourage customary use of biological resources in accordance with traditional cultural practices that are compatible with conservation or sustainable use requirements'.⁵⁷ This includes indigenous agriculture, agro-forestry, hunting, fishing, gathering, use of medicinal plants, and other subsistence activities. This article, by implication, should also be read to include protection for the land base,

⁵³ African Commission on Human and Peoples' Rights (2006) *Indigenous Peoples in Africa: the Forgotten Peoples?*, ACHPR and IWGIA, Banjul and Copenhagen, pp 11–12.

⁵⁴ ACHPR report, p 88.

⁵⁵ Entered into force in 1993.

⁵⁶ CBD, Article 8 (j).

⁵⁷ *Ibid.*, Article 10 (c).

ecosystem and environment in which those resources are found. This is acknowledged in the Addis Ababa Principles and Guidelines on Sustainable Use of Biodiversity of 2004.⁵⁸

In addition, in 2000, states parties to the CBD adopted the Akwé: Kon voluntary guidelines for the conduct of cultural, environmental and social impact assessments regarding developments proposed to take place on, or which are likely to impact on, sacred sites and on lands and waters traditionally occupied or used by indigenous and local communities. The guidelines provide assistance to states parties to develop a collaborative framework within which governments, indigenous and local communities, decision makers and managers of developments can act. It also gives advice on the incorporation of cultural, environmental – including biodiversity-related – and social considerations of indigenous and local communities into new or existing impact-assessment procedures.⁵⁹

At the African level, the African Convention on conservation of nature and natural resources, in its revised version adopted in 2003,⁶⁰ provides that states should take measures 'to ensure that traditional rights and intellectual property rights of local communities including farmers' rights are respected'.⁶¹ The Convention further recognises that access to indigenous knowledge requires prior and informed consent from communities.⁶² This Convention revises the 1968 version, which did not integrate specific provisions for peoples' rights and was solely oriented towards the protection of soil, flora, fauna and other natural resources. The revised Convention is not yet in force, as only eight states have so far ratified it since its adoption. Burundi and Rwanda have ratified it, and Uganda and DRC have signed it.⁶³ The Convention has the potential to become an instrument used in advocacy for the recognition and protection of indigenous land rights if its provisions are interpreted in conjunction with other relevant international and regional standards.

⁵⁸ Adopted by the VIIth Conference of Parties to the CBD, especially in Principles 1 and 2. Principle 2 provides that 'sustainability is generally enhanced if Governments recognize and respect the "rights" or "stewardship" authority, responsibility and accountability to the people who use and manage the resource, which may include indigenous and local communities...'. The first principle of the 'Ecosystem Approach', adopted by the COP in Decision V/6 and considered to be one of the main tools for the implementation of the Convention, states that 'Different sectors of society view ecosystems in terms of their own economic, cultural and societal needs. Indigenous peoples and other local communities living on the land are important stakeholders and their rights and interests should be recognized.'

⁵⁹ Secretariat of the CBD, Akwé: Kon voluntary guidelines for the conduct of cultural, environmental and social impact assessments regarding developments proposed to take place on, or which are likely to impact on, sacred sites and on lands and waters traditionally occupied or used by indigenous and local communities, Montreal, 2004.
http://www.wipo.int/export/sites/www/tk/en/folklore/creative_heritage/docs/akwekon.pdf

⁶⁰ African Convention on the Conservation of Nature and Natural Resources, adopted by the OAU Heads of State at its General Assembly held in Maputo, Mozambique, 11 July 2003, by decision. Doc. EX/CL/50 (III), available at: <http://www.africa-union.org/root/AU/Documents/Treaties/Text/nature%20and%20natural%20recesource.pdf>.

⁶¹ *Ibid.*, Article XVII (1).

⁶² *Ibid.*, Article XVII (2).

⁶³ Fifteen ratifications are required for its entry into force, according to its Article XXXVIII. By January 2009, eight countries had ratified: Burundi, Comoros, Ghana, Libya, Lesotho, Mali, Niger and Rwanda. Thirty-six countries signed the Convention. The updated status of ratification can be consulted at <http://www.africa-union.org/root/au/Documents/Treaties/List/Revised%20Convention%20on%20Nature%20and%20Natural%20Resources.pdf>

In addition, the Organisation of African Unity⁶⁴ developed in 2000 an African Model Legislation for the Protection of the Rights of Local Communities, Farmers and Breeders, and for the Regulation of Access to Biological Resources.⁶⁵ This model law is designed to provide guidelines to states in developing access and benefit-sharing regimes with respect to biodiversity. In 2004, more than half of African countries had taken steps to adopt legislation based on the model law.⁶⁶ The model legislation promotes and support traditional and indigenous technologies for the conservation and sustainable use of biological resources. It guides states into recognising local and indigenous communities' collective rights to their biological resources. The model legislation also integrates an obligation to obtain prior and informed consent of indigenous and local communities in order to provide valid access to resources.⁶⁷

D Participation and consent

The principle of free, prior and informed consent (FPIC) is possibly the most dramatic example of the paradigm shift since the international colonial era to the modern conception of international human rights law. In contemporary international law, indigenous peoples' have the right to participate in decision-making and to give or withhold their consent to activities affecting their traditional lands, territories and resources. International human rights law places clear and substantial obligations on states in connection with resource exploitation on indigenous lands and territories. Several decisions of intergovernmental human rights bodies have established the rights of indigenous peoples to free prior and informed consent.⁶⁸ Consent must be freely given, obtained prior to final authorisation and implementation of activities and be founded upon an understanding of the full range of issues implicated by the activity or decision in question.

The United Nations Declaration on the Rights of Indigenous Peoples, adopted in 2007, explicitly stipulates the right to free, prior and informed consent.⁶⁹ The Convention on Biological Diversity requires that the traditional knowledge of indigenous and local communities may be used only with their 'approval', which has subsequently been interpreted

⁶⁴ The OAU (Organisation of African Unity) is the ancestor of the African Union. The OAU was dissolved and the AU founded in 2002.

⁶⁵ OAU, Algeria 2000, available at <http://www.cbd.int/doc/measures/abs/msr-abs-oau-en.pdf>

⁶⁶ Noah Zerbe (2004) Biodiversity, ownership and indigenous knowledge: Exploring legal frameworks for community, farmers and intellectual property rights in Africa, Elsevier, Amsterdam, available at <https://www.cbd.int/doc/article.aspx?id=13991>

⁶⁷ OAU, Algeria 2000, Article 18.

⁶⁸ See, inter alia, UN Committee on the Elimination of Racial Discrimination, General Recommendation XXIII (51) concerning Indigenous Peoples, adopted at the Committee's 1235th meeting, 18 August 1997, UN Doc. CERD/C/51/Misc. 13/Rev. 4; UN Committee on Economic, Social and Cultural Rights, General Comment No. 7, The Right to Adequate Housing [Article 11 (1) of the Covenant]: forced evictions, 1997; Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, UN Doc. HRI/GEN/1/Rev. 5, 26 April 2001, pp 49–54, paragraph 18; Committee on the Rights of the Child, Day of General Discussion on the Rights of Indigenous Children: Recommendations, 34th Session, 15 September–3 October 2003, paragraph 4; Organisation of American States, Report on the Situation of Human Rights in Ecuador, OEA/Ser. L/V/II. 96, Doc. 10, Rev. 1, 1997, p 89; Report No. 96/03, Maya Indigenous Communities and their Members (Case 12.053 [Belize]), 24 October 2003, paragraph 149.

⁶⁹ UNDRIP, 2007, Articles 10, 11 (2), 19, 28 and 32.

to mean with their FPIC.⁷⁰ The Inter-American Commission on Human Rights (IACHR) has developed considerable jurisprudence on FPIC.⁷¹

The African Commission also used this principle in the case of the Ogoni people of Nigeria.⁷² In this communication the African Commission considered the impact of oil exploration on the Ogoni people through an analysis of both the economic and social rights and the collective rights in the Charter. The Government of Nigeria was part of a consortium involved in oil production in Ogoniland, part of the oil-rich Niger delta region. Local Ogoni communities were not involved in the decisions affecting development of their region, and production activities were carried out without regard for their health or environment. A number of oil spills contaminated the water and soil, causing short- and long-term health consequences for the Ogoni people, due in part to the lack of proper safety measures. When the Ogoni people protested, state military forces carried out violent and often lethal attacks against them. The Commission found a violation of the right of peoples to a general satisfactory environment,⁷³ linking it with a violation of the individual's right to health.⁷⁴ Moreover, the Commission found a violation of the right of peoples freely to dispose of their wealth and natural resources,⁷⁵ since the government failed to involve Ogoni communities in the decision-making regarding oil exploration.⁷⁶

E The right to reparation

According to international legal principles and standards, indigenous peoples have a right to reparation for the human rights violations they have experienced. Remedies for human rights violations include restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition.⁷⁷ Reparation is intended to relieve the suffering of and afford justice to victims 'by removing or redressing to the extent possible the consequences of the wrongful

⁷⁰ Report of the Second Meeting of the Ad Hoc, Open-Ended, Inter-Sessional Working Group on Article 8 (j) and Related Provisions of the Convention on Biological Diversity. UNEP/CBD/WG8J/2/6/Add. 1, 27 November 2001, p 11.

⁷¹ See, inter alia, IACHR Report No. 27/98 (Nicaragua), paragraph 142, cited in *The Mayagna (Sumo) Awas Tingni Community Case*, Judgment on the Preliminary Objections of 1 February 2000, IACHR Ser. C, No. 66, 2000, Case 11.577; IACHR, (*Awas Tingni Indigenous Community - Nicaragua*), Annual report of the IACHR. OEA/Ser.L/V/II.102, Doc.6 rev., (Vol. II), 1067, paragraph 108 (16 April 1999); IACHR, Report No. 75/02, Case No. 11.140, *Mary and Carrie Dann (United States)*, 27 December 2002. OEA/Ser.L/V/II.116, Doc. 46, paragraph 130–1; Report No. 96/03, *Maya Indigenous Communities and their Members (Case 12.053 [Belize])*, 24 October 2003, paragraph 141.

⁷² *The Social and Economic Rights Action Center and the Center for Economic and Social Rights v. Nigeria*, Communication 155/96, Fifteenth Activity Report, 2001–2002, ACHPR/Rpt 15.

⁷³ African Charter, Article 24.

⁷⁴ *Ibid.*, Article 16.

⁷⁵ *Ibid.*, Article 21.

⁷⁶ *The Social and Economic Rights Action Center and the Center for Economic and Social Rights v. Nigeria*, Communication 155/96, Fifteenth Activity Report, 2001–2002, ACHPR/Rpt 15, paragraph 58.

⁷⁷ For a detailed treatment of remedies in human rights law, see D Shelton (1999) *Remedies in International Human Rights Law*, Oxford University Press.

acts and by preventing and deterring violations'.⁷⁸ One basic aspect of the right to reparation is the availability of effective remedies.⁷⁹

Theo van Boven, UN Special Rapporteur on the right to restitution, compensation and rehabilitation for victims of gross violations of human rights, states in his landmark UN study on reparations that:

Restitution shall be provided to re-establish, to the extent possible, the situation that existed for the victim prior to the violations of human rights. Restitution requires, *inter alia*, restoration of liberty, citizenship or residence, employment or property.⁸⁰

The Inter-American Court on Human Rights has consistently held that 'Reparation of harm brought about by the violation of an international obligation consists in full restitution (*restitutio integrum*), which includes the restoration of the prior situation ...' and compensation or other forms of indemnification for material and immaterial damages.⁸¹ The same principle has been applied by United Nations bodies responsible for oversight of state compliance with universal human rights and instruments, the International Court of Justice, and the European Court on Human Rights, pursuant to Article 50 of the European Convention of Human Rights.

The general principle of restitution in human rights law also applies to indigenous peoples. There is a difference in its application to indigenous peoples, however, because indigenous people individually and indigenous peoples as groups collectively hold rights. As van Boven stated, a

coincidence of individual and collective aspects is particularly manifest with regard to the rights of indigenous peoples. Against this background it is therefore necessary that, in addition to individual means of reparation, adequate provision be made to entitle groups of victims or victimized communities to present collective claims for damages and to receive collective reparation accordingly.⁸²

He adds that:

Vital to the life and well-being of indigenous peoples are land rights and rights relating to natural resources and the protection of the environment. Existing and emerging international law concerning the rights of indigenous peoples lays special emphasis on the protection of these collective rights and stipulates the entitlement of indigenous

⁷⁸ Theo van Boven, Study concerning the right to restitution, compensation and rehabilitation for victims of gross violations of human rights and fundamental freedoms, final report submitted by the Special Rapporteur, UN Doc. E/CN.4/Sub.2/1993/8, p 56.

⁷⁹ In human rights law, the availability of effective remedies is a right in and of itself that complements other recognised rights. See, *inter alia*, UDHR, Article 8; ICCPR, Article 2 (3); CERD, Article 13; European Convention on Human Rights, Article 13; American Convention on Human Rights, Articles 1, 8 and 25; African Charter on Human and Peoples' Rights, Article 7.

⁸⁰ Theo van Boven, *op. cit.* (note 78), p 57.

⁸¹ See *ibid.*, p 13.

⁸² *Ibid.*, p 8.

peoples to compensation in the case of damages resulting from exploration and exploitation programmes pertaining to their lands, and in case of relocation of indigenous peoples. The draft declaration on the rights of indigenous peoples [Article 27] recognizes the right to the restitution or, where this is not possible, to just and fair compensation for lands and territories which have been confiscated, occupied, used or damaged without their free and informed consent. Compensation shall preferably take the form of lands and territories of quality, quantity and legal status at least equal to those territories which were lost.⁸³

Article 28 of the UN draft Declaration on the Rights of Indigenous Peoples states that:

1. Indigenous peoples have the right to redress, by means that can include restitution or, when this is not possible, just, fair and equitable compensation, for the lands, territories and resources which they have traditionally owned or otherwise occupied or used, and which have been confiscated, taken, occupied, used or damaged without their free, prior and informed consent.
2. Unless otherwise freely agreed upon by the peoples concerned, compensation shall take the form of lands, territories and resources equal in quality, size and legal status or of monetary compensation or other appropriate redress.

In 1997, the UN Committee on the Elimination of Racial Discrimination also addressed this issue in its General Recommendation XXIII called upon States parties:

to recognize and protect the rights of indigenous peoples to own, develop, control and use their communal lands, territories and resources and, where they have been deprived of their lands and territories traditionally owned or otherwise inhabited or used without their free and informed consent, to take steps to return those lands and territories. Only when this is for factual reasons not possible, the right to restitution should be substituted by the right to just, fair and prompt compensation. Such compensation should as far as possible take the form of lands and territories.⁸⁴

Finally, Convention 169 of the International Labour Organization requires that indigenous peoples' collective rights of ownership and possession over the lands which they traditionally occupy shall be recognised.⁸⁵ The term 'traditionally occupy' does not require a continued and present occupation, but rather, according to the International Labour Organization, 'there should be some connection to the present'.⁸⁶ Consequently, under ILO 169 – and ILO 107, which uses the same language – indigenous peoples have the right to restitution and recognition of their rights to lands 'traditionally occupied' that they have been expelled from or that they have lost title to or possession of in the recent past, including those incorporated

⁸³ *Ibid.*, p 9.

⁸⁴ UN Committee on the Elimination of Racial Discrimination, General Recommendation XXIII (51) concerning Indigenous Peoples, adopted at the 1235th meeting, 18 August 1997, UN Doc. CERD/C/51/Misc. 13/Rev. 4, paragraph 5.

⁸⁵ ILO 169, Article 14.

⁸⁶ International Labour Office (2000), ILO Convention on Indigenous and Tribal Peoples 1989 (No. 169): A Manual, Project to Promote ILO Policy on Indigenous and Tribal Peoples, Geneva, p 18.

into protected areas without their consent. In the case of relocation, both consensual and non-consensual, ILO 169⁸⁷ also contains specified remedies: the right to return to traditional lands once the reason for relocation no longer pertains; allocation of lands of equal quality and legal status, unless the people(s) concerned express a preference for compensation; full compensation for any loss or injury resulting from relocation.

In summary, indigenous peoples' rights to land and natural resources are strongly affirmed and guaranteed by numerous inter-related human rights decisions and instruments, which have emerged from both regional and international human rights mechanisms in the past decades. However, the realisation of these rights through the implementation of the relevant decisions and instruments remains very challenging. While international and regional bodies have created solid instruments and taken groundbreaking decisions, very few of the principles expounded have been implemented in practice in the countries studied. But it is important to bear in mind that the principles and rights emerging from international law should be seen as minimum standards of protection for the rights of indigenous peoples, beneath which no state legislation should fall.

3 Conclusion: the way forward

The findings of the five country studies, along with the anthropological and legal elements described in the composite publication on indigenous forest peoples' land rights in Africa, call for reflection on possible ways forward. Retracing legal developments in each of the five countries has shown how indigenous peoples were dispossessed from their ancestral lands without being compensated and how they have been suffering from the consequences of these measures ever since. Country-specific recommendations can be found in each of the country studies. On a regional basis, three types of recommendations can be made to redress the issues raised in the studies: implementation, reparation and consultation.

A Implementation

The wide ratification by African states of international and regional instruments pertaining to indigenous peoples' rights demonstrates a strong commitment toward the protection and promotion of indigenous land rights. But concrete measures must be put in place for the standards to be translated into reality, including those of the African Charter on Human and Peoples Rights, the United Nations Declaration on the Rights of Indigenous Peoples, the United Nations Convention on the Elimination of All Forms of Discrimination and the Convention on Biological Diversity. In addition, states can show greater commitment by ratifying other recent international and regional treaties engaging the rights of indigenous peoples, such as the revised African Convention on the Conservation of Nature and Natural Resources and the International Labour Organization Convention No 169.

Fundamentally, the recognition of the existence of indigenous forest peoples in Africa is crucial to the realisation of the human rights guaranteed in the international and regional instruments. The particular situation of 'Pygmy' hunter-gatherers in Africa has led the African Commission to define them as indigenous peoples. Confusion around the concept of

⁸⁷ ILO 169, Article 16 (3–5).

indigenous peoples has also been recognised in documents of the Working Group on Indigenous Peoples/Communities.⁸⁸ Very few African countries recognise the existence of indigenous peoples on their territories.⁸⁹ Recognition must be the starting point for the application of international and regional standards for their protection.

B Reparation

Indigenous peoples should be given the opportunity to reacquire their ancestral land and acquire legal property rights on these lands. International law is unequivocal: it provides for reallocation of ancestral land to indigenous peoples and, when this is impossible, the allocation of alternative lands. The land rights studies show that this has not yet been done in Burundi, Cameroon, DRC, Rwanda or Uganda.

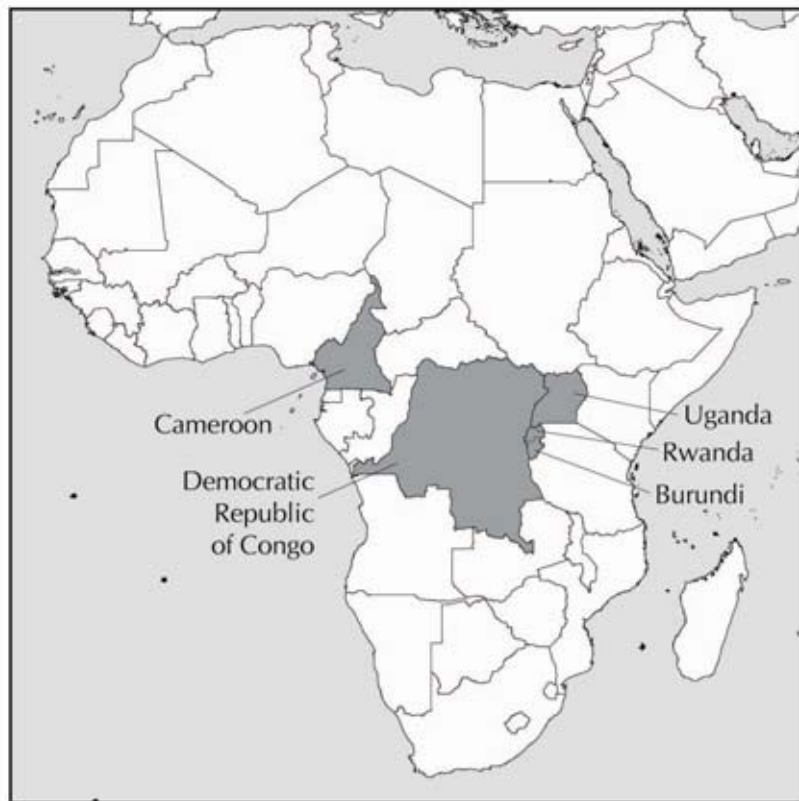
As explained in the country studies, tenure reforms are taking place in these five countries. The reforms are opportunities for government to take affirmative measures to tackle the specific problems that indigenous peoples face. In some cases, reintegration on the ancestral lands is possible and compatible with environmental conservation objectives. In other cases, alternative land can be provided, in accordance with international standards. Additionally, urgent measures to fight extreme poverty and marginalisation can be taken while reforms are being implemented.

C Consultation and participation

Contemporary human rights law is clear about participatory requirements in relation to decisions affecting indigenous peoples' right to land: these decisions must be validated through their free, prior and informed consent. As demonstrated in the country studies, displacements and eviction of indigenous peoples have happened without them being consulted and involved in the decision. Still landless, indigenous peoples continue to be marginalised from decisions concerning land. Viable and fair solutions will only emerge from consultations with indigenous communities and their involvement in decision-making processes.

⁸⁸ The report of the working group: Advisory Opinion of the African Commission on Human and Peoples Rights Concerning the United Nations Declaration on the Rights of Indigenous Peoples, adopted at the 40th Ordinary session of ACHPR, in May 2007, Accra, Ghana.

⁸⁹ *Ibid.*, Chapter 2, section 2.2 (B).



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