



UNIVERSIDADE CATÓLICA PORTUGUESA

Access to Justice and Fundamental Rights for Indigenous People in Africa

Exploring the Role of Humanitarian Aid

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Master in Law

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“For to be free is not merely to cast off one’s chains, but to live in a way that respects and enhances the freedom of others.”

Nelson Mandela

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Abstract

By exploring the subject of access to justice and fundamental rights for indigenous peoples in Africa, as well as the role of humanitarian aid, this paper aims to shed light on the issues faced by these communities and propose strategies for their empowerment and well-being. It analyses the historical context, legal frameworks, and socio-cultural factors that affect indigenous communities. By analyzing case studies and best practices, this study targets to identify effective ways for empowering indigenous peoples and ensuring that their rights are upheld. Notwithstanding the implementation of international HR standards in a multilateral context with international courts such as the International Criminal Court, the International Court of Justice, the International Criminal Tribunal for Rwanda or the UN HRC among other international judicial systems ; only the regional judicial systems will be analyzed in this paper, as the goal of this discussion is regarding the impact of its jurisprudence on African indigenous peoples' fundamental rights.

Keywords

Indigenous peoples – Africa – Fundamental Rights – Humanitarian aid – Justice – CSOs – NGOs

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LIST OF ABBREVIATIONS AND ACRONYMS

Abbreviation	Developed term
ACHPR	African Charter on Human and Peoples' Rights
CAR	Central African Republic
CBD	Convention on Biological Diversity
CIJ	Customary and Informal Justice
CSO	Civil Societies Organizations
DRC	Democratic Republic of Congo
FPIC principle	Free, prior and informed consent principle
GA	General Assembly
HR	Human Rights
HRC	Human Rights Council
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
IL	International Law
ILO	International Labor Organization
NGO	Non-Governmental Organizations
OAU	Organization of African Unity
UN	United Nations
UNDRIP	United Nations Declaration on the Rights of Indigenous Peoples
UNICEF	United Nations International Children's Emergency Fund

1. INTRODUCTION

HR¹ have been existing since forever, they are grounded in humanity. Every ancient civilization that ever existed knew that the human being is inherently entitled to a dignified life, filled with the inalienable sacrality of human life. The only difference between ancient times and modern society is that whereas the fundamental rights concept is now institutionalized through written international and domestic laws, ancient civilizations applied them selectively because of the prevailing modes of production and the attendant relations of production they were familiar with. It is now widely established and accepted that HR are applicable to everyone regardless of obstructive factors such as race, class, gender, religion, ethnicity, sex... Africa's colonial history plays a significant role regarding indigenous peoples' rights, and even more regarding their right to land. During the pre-colonial period, African populations were governed by customs and not by laws. During the colonial period, the organic development of African laws was interrupted, as the colonialists countries did not respect the existing ethnic divisions, the religions, and languages. The colonial legacy – beside from lasting long after independence – has had a major influence in the style of governance prevalent in Africa.² Indigenous peoples live on all continents, there is no legal definition of indigenous peoples under IL, not even in the UNDRIP. It is estimated that around 50 million indigenous peoples live on the African continent, where they often face difficulties such as discrimination, non-recognition of their rights to land and natural resources, and severe economic, social and cultural marginalization. In many parts of Africa, indigenous communities are being driven off their ancestral lands to make way for wildlife reserves, tourist resorts or the extraction of natural resources.³ The African Commission through its Working Group of Experts on Indigenous Communities / Populations set out four criteria defining indigenous peoples ; occupation and use of a specific territory, the voluntary perpetuation of cultural distinctiveness, self-identification as a distinct collectivity, as well as recognition by other groups and an experience of subjugation, marginalization, dispossession, exclusion or discrimination.⁴

¹ HR are based on important values : human dignity, rule of law, democracy, freedom, equality and justice.

² (Muiu, 2010, p. 1318), Independence for African countries is a three-stage process: physical removal of colonial powers, ongoing struggle against neocolonialism, and economic independence and unity for all Africans.

³ (Gilbert, 2017, p. 657) See the 2003's report by the Working Group on Indigenous Populations / Communities of the African Commission on Human and Peoples' Rights which provides a profound analysis of the situation of indigenous peoples in Africa.

⁴ See Chapter 4 (Report of the African Commission's Working Group of Experts on Indigenous Populations / Communities, 2005)

2. HISTORICAL CONTEXT AND CHALLENGES

2.1. Brief historical context of indigenous fundamental rights in Africa

The definition and scope of indigenous peoples' rights are usually contentious in most African countries. At the national level, many States are still reluctant to recognize the specific rights of indigenous peoples – indeed, States have strived for a homogenous system that is driven by national interests but neglects the identities to make-up these interests. The colonial history of the continent plays a significant role regarding indigenous peoples' rights, and especially regarding their right to land. Indeed, colonial rules have a considerable negative impact on land rights for most indigenous peoples. A critical issue for many indigenous peoples is their lack of formal and official title which proves their land ownership. Under IL, there is now a strong jurisprudence emerging from the Inter-American Court of HR, highlighting that possession should constitute title to land property. There is a need to adopt a strategy for pluralization,⁵ which is based on the different cultures and identities that make up a State including indigenous populations. Barnard⁶ makes an interesting observation on the relationship between indigenous rights and HR ; he notes that the core components in the indigenous rights discourse are indigenous populations' right to land and their right to access natural resources. He indicates then the need to utilize the existent HR structure to promote and protect indigenous rights. The issue of equality and non-discrimination plays a crucial role as it forms the basis of current HR discourse. These developments are particularly significant as they represent a major force towards inclusiveness, and the aim is for national systems to adopt such a perspective on the interests of different groups, particularly indigenous populations and rights protection. The relationship between HR and ethno-cultural diversity is a complex one, requiring diverse implementation strategies shaped by national political, cultural and social systems. Its existence depends on existing mechanisms to support the protection of HR.⁷

⁵ (Vieytez, 2014, p. 2), against the process of nationalization of rights, it is necessary to give the correspondent importance in international and domestic law to the concept of minority and to identify and use different kind of policies and legal instruments for the accommodation of diversity.

⁶ (Barnard, 1992)

⁷ (Makumbe, 2018, pp. 160, 161), it is not a simple process but rather a recurring attempt to reconcile somewhat contradictory rights with the aim of including all people and ensuring that the rights of different groups are recognized and protected.

2.2. The complexity to define indigenous peoples

During the colonial period, the word indigenous was used for the people inhabiting or existing in land from the earliest times or from before the arrival of colonialists. The first organization to expand this concept was the Pan-American Union in 1938, which declared that indigenous people were descendants of the first inhabitants of the land. It was further examined by the GA in 1949 whom recommended a study of the ‘Social Problems of the Aboriginal Populations and Other Under-Developed Social Groups of the American Continent’. In 1960, the UN adopted Resolution 1514⁸ which granted the independence to colonial countries and peoples and characterized the foreign rule as a violation of the HR, affirmed the right to self-determination and called for an end of the colonial rule. Between the 1960s and 1970s, an international level indigenous activism arose. In 1971, the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities commissioned a study on the discrimination against indigenous peoples. The report, written by Cobo, published in 1983, was indicative of the difficulty in defining indigenous people. Despite the lack of an authoritative definition, there are criteria that help to define indigenous peoples.⁹ On an individual basis, an indigenous person is one who belongs to these indigenous populations through self-identification as indigenous and is recognized and accepted by these populations as one of its members – acceptance by the group.¹⁰ This preserves for these communities the sovereign right and power to decide who belongs to them, without external interference. Indigenous peoples are distinct social and cultural groups that share collective ancestral ties to the lands and natural resources where they live, occupy or from which they have been displaced.¹¹ In addition of the criteria stressed above, the UN Permanent Forum on Indigenous Peoples defined some more criteria such as a strong link to territories and surrounding natural resources ; distinct social, economic and political systems ; and distinct language, culture and beliefs.¹² During the process of the UNDRIP’s adoption, a formal definition of indigenous peoples needed to be set ; as there was

⁸ ((XV), 14 December 1960)

⁹ (José R. Martínez Cobo, 1987), para 379-380 ; Indigenous communities, peoples and nations are those which, having a historical continuity with pre-invasion and pre-colonial societies that developed on their territories, consider themselves distinct from other sectors of the societies now prevailing in those territories, or parts of them. They form at present non-dominant sectors of society and are determined to preserve, develop, and transmit to future generations their ancestral territories, and their ethnic identity, as the basis of their continued existence as peoples, in accordance with their own cultural patterns, social institutions and legal systems.

¹⁰ (Cher Weixia Chen, 2023, p. 4)

¹¹ The land and natural resources on which they depend are linked to their identities, cultures, livelihoods, as well as their physical and spiritual well-being. Indigenous peoples often lack formal recognition over their lands, territories and natural resources, are often last to receive public investments in basic services and infrastructure and face multiple barriers to participate fully in the economy, to have access to justice, and to participate in political processes and decision making.

¹² (Indigenous Peoples and the United Nations Human Rights System, 2013, pp. 2,3)

no such definition under IL. Over the course of international discussion and debate, four themes emerged as being important criteria in conceptualizing indigeneity : priority in time, perpetuation of cultural distinctiveness, self-identification and recognition by other actors, experience of subjugation, marginalization or discrimination.¹³ Unfortunately, the predominant approach by African governments is the suppression of diversity through assimilation, with a focus on developing and integrating peoples who are seen as primitive. These pre-colonial development strategies mimic those of imperial states as well as various postcolonial development initiatives funded and led by the international organizations. The continent's complicated history makes identifying as indigenous in Africa a complex exercise. There are tensions fueled by issues of power, representation, and difference. In addition, the concept of indigeneity, originally championed by indigenous peoples from the Americas and Australasia, had to be molded and reframed to fit the African context as indigenous peoples (re)asserted their agency previously been erased by the State. It is therefore not that surprising that its applicability is questioned, despite the increasingly vocal engagement of the indigenous community. This molding of indigeneity to fit the African environment has led to skepticism among scholars who have pointed out that self-identification as indigenous can – and possibly has been – used by groups who might not identify as indigenous as a way to access the benefits of collective rights as a way to better access their natural resources and land rights. Important rights for indigenous peoples have been guaranteed by international and regional legal instruments¹⁴, nevertheless the question has remained regarding if these protections are enough to protect indigenous peoples or whether a separately formulated response to their situation is necessary and appropriate.¹⁵ Scholars have a divergent opinion on this matter, some would argue that indigenous voices will get lost under a generalist HR system, whereas others believe it is sufficient to meet the needs of indigenous peoples.¹⁶ Collective rights versus individual rights is another contentious issue. Collective rights have historically been incompatible with IL that is traditionally centered on individuals and States, and so, indigenous rights – which include a set of collective rights – have been an uneasy fit for IL. Nonetheless, with the emergence of third generation rights¹⁷, the international legal forum has grown to accept

¹³ See also Article 33(1) of the UNDRIP as it states the indigenous peoples' right to determine their own identity.

¹⁴ See the legal framework chapter of this paper.

¹⁵ The question here is regarding the necessary separate set of rights specifically for indigenous peoples.

¹⁶ (Cher Weixia Chen, 2023, p. 6)

¹⁷ Also known as solidarity HR, they are rights that try to go beyond the framework of individual rights to focus on collective concepts, such as community or people.

indigenous group claims.¹⁸ Individual rights are those which belong to each person and which he or she can assert vis-à-vis the State, the community or other human being. Each individual can exercise these rights alone, according to his or her own will. But certain individual rights can only be exercised collectively – freedom of assembly, association or trade union freedom. Collective rights are those that belong to a group or collectivity and are intended to protect the integrity of that group or collectivity (right to development and right to self-determination)¹⁹, they can only be exercised if several people agree to use collectively – together and for the same purpose – the right that belongs to each of them.

2.3. The principle of self-determination

The principle of self-determination is among the most confusing and controversial concept with regard to indigenous rights in IL. It is an important and contentious issue for indigenous peoples and postcolonial nations and what this may mean in terms of juridical systems. The right to self-determination originates from a lot of international instruments and covenants, such as the UN Charter,²⁰ the Universal Declaration of HR, the ICCPR and the ICESCR.²¹ The UNDRIP²² also refers to self-determination – which gives a strong normative directive to provide for indigenous control and participation in the justice processes by which they are affected.²³ At the regional scale, the ACHPR²⁴ affirms the right to self-determination. The principle of self-determination is also defined by several scholars, and they do not have the same opinion and definition of this principle. For instance, Cobo in its study from 1987 wrote a definition of self-determination,²⁵ Wiessner also proposed his view of the self-determination principle and introduced a dichotomy between internal and external self-determination in the context of

¹⁸ (Cher Weixia Chen, 2023, pp. 11, 12), in practice, collective rights have emerged and become increasingly acceptable under IL (Mazel, 2009). See Conventions No. 107 and 169, and the UNDRIP (Articles 3, 6, 26) – all affirms the collective indigenous rights to land, territories and resources.

¹⁹ The recognition of group rights for indigenous peoples is essential to establish an effective instrument for the protection of indigenous ways of life and to secure their cultural survival.

²⁰ See Article 1 of the UN Charter that shows the purpose of the international body

²¹ See Article 1 of the ICCPR and the ICESCR

²² See Articles 3, 4, 11(1), 33 and 34 of the UNDRIP

²³ (Access to justice in the promotion and protection of the rights of indigenous peoples: restorative justice, indigenous juridical systems and access to justice for indigenous women, children and youth, and persons with disabilities, 2014, p. 17)

²⁴ See article 20(1) of the ACHPR

²⁵ (José R. Martínez Cobo, 1987, pp. 20, para 269, 272, 273) Martínez argued for the fact that two categories of self-determination could exist : the internal (a group with a definite territory can be autonomous in the sense that it has a separate and distinct administrative judicial structure, determined by and intrinsic to the group) ; and the external – also known as secession – (the right to constitute a State and to choose various forms of association with other political communities).

indigenous peoples,²⁶ Kingsbury provided five categories regarding the exercise of self-determination.²⁷ The right to self-determination is a central right for indigenous peoples from which all other rights are issued. In relation to access to justice, the principle of self-determination guarantees their right to maintain and strengthen indigenous legal institutions and to apply their own customs and laws. Most of the articles written about the self-determination principle are from a public IL perspective ; but self-determination is also analyzed from three main standpoints : the creation of independent states ; the free association of peoples within an existing state or the integration with another state.²⁸ Indigenous and customary structures are typically seen by the government as rivals to formal institutions, and thus a threat to the authority of the State and to political unity and territorial integrity.²⁹ Recognizing indigenous nations will lead to ethnic conflict, the fear of loss of control over land and natural resources is likely an important factor. However, while denial of rights can lead to violence, recognition of rights has rarely been indicative of conflict. Some small steps have been taken by States at the national policy level, although implementation is lagging. The moral basis for self-determination is widely recognized, but its validity in IL is still disputed. Hence, it has not received much support by the great powers in the international system and therefore fails to attract committed efforts on the part of the UN to provide clear ways to resolve self-determination agitations regarding the provisions in its Charter on respect for the principle of equal rights and self-determination of peoples and other international instruments.³⁰ This new understanding of self-determination puts indigenous peoples in the forefront in that they have the right to freely determine the way their lands and its natural resources should be used, protected, and respected on their own terms.³¹

²⁶ (Wiessner, 1999) external self-determination : the right of peoples to freely determine their international status including the option of political independence, and internal self-determination : the right to determine their form of government and their individual participation in the processes of power.

²⁷ (Kingsbury, 2001), (a) mandated/trust territories; (b) distinct political, geographic entities subject to a gross failure of the duties of the state; (c) other territories where self-determination is applied by the parties; (d) highest level constituent units of a federal state in the fact of dissolution; and (e) formerly independent entities reasserting their independence with the tacit consent of the state, where their incorporation into the state was illegal or of dubious legality.

²⁸ (Nasirumbi, 2020, p. 500) Indigenous peoples and colonial peoples are bearing similarities, leading to the fact that they should be considered within the meaning of colonial peoples to allow them to benefit from the right of self-determination.

²⁹ (Werner, 2023, p. 393)

³⁰ (Mustafa, 1971)

³¹ (Barrie, 2018), the right to self-determination has matured towards a right for indigenous peoples to control their lands and territories and to be direct actors in their future.

3. LEGAL FRAMEWORK

3.1. Universal protection of fundamental rights

3.1.1. Treaties drafted within the UN

The UN Charter is its founding document and was adopted on June 26, 1945.³² The International Convention on the Elimination of All Forms of Racial Discrimination was adopted on December 21, 1965. As a third-generation HR instrument,³³ the Convention commits its members to the elimination of racial discrimination and the promotion of understanding among all races. The first legal instrument that can be used as a protection of indigenous people is the ICCPR from 1966.³⁴ This covenant and the ICESCR from 1966 are built on the rights in the Universal Declaration of HR, which provides the foundation for HR recognition and protection and sets a tone on the universality of HR and their applicability to every human being, regardless of their political, cultural, racial or religious backgrounds. Together, the Universal Declaration from 1948 and these two covenants form the International Bill of HR. These two international covenants were adopted by the GA of the UN to shape further international HR. The Convention on the Elimination of All Forms of Discrimination against Women adopted on December 18, 1979, and the Convention on the Rights of the Child – the GA adopted this Convention through its resolution 44/25 on November 20, 1989 – and the Optional Protocol to the Convention on the Rights of the Child adopted by the GA on May 25, 2000, with the aim of abolishing the military exploitation of children can be cited. The last international legal document to be adopted about indigenous peoples' rights is the UNDRIP on September 13, 2007. Despite its flaws, the UNDRIP represented a transformative moment as its universal character, which recognizes specific rights for indigenous peoples, has a major effect on their rights worldwide.³⁵ The UNDRIP is *prima facie* a non-binding instrument, nevertheless, it represents the dynamic development of international legal norms and reflect the commitment of states to move in certain directions, abiding by certain principles.³⁶

³² The UN Charter establishes the purposes, governing structures and overall framework of the UN. As a Charter and constituent Treaty, its rules and obligations are binding on all members and supersede those of other treaties

³³ (Young and Sing'Oei, 2014, p. 94), many African nations are now enjoying third generation constitutions that have emerged out of transitions from military rule or other forms of political oppression and violence, they embrace third-generation HR – collective rights (right to peace, right to development, right to environment, right to self-determination) – encompassing protections not only for civil and political rights – first generation of HR – but also for economic and social rights – second generation of HR.

³⁴ (Phillips, 2015, pp. 124, 125), see Article 27 of the ICCPR (right to preserve and enjoy their culture)

³⁵ (Matos, 2018, p. 273)

³⁶ When countries adopt the UNDRIP, it establishes an important standard for the treatment of indigenous peoples and will undoubtedly be a significant tool towards eliminating HR violations against the over 370 million indigenous people worldwide and assist them in combating discrimination and marginalization.

3.1.2. Treaties drafted within the ILO

In 1989, the ILO adopted Convention No.169 ‘The Indigenous and Tribal Peoples Convention’ – which replaced Convention No.107 from 1957 concerning the protection and integration of indigenous and tribal and semi-tribal populations in independent countries, as the Convention was only ratified by 27 countries – including 6 African – and as it was widely rejected by indigenous peoples, who saw it as a threat to the preservation of their cultural identity.³⁷ The Convention No.107 was the first international legal instrument providing a definition for indigenous peoples – called at that time ‘populations’ – they were defined in terms of their history, of colonization, along with their social, economic and cultural distinctiveness. Even though all its flaws, this Convention No.107 conferred indigenous peoples’ rights over the territories traditionally occupied by them.³⁸ Convention No.169 permits to indigenous and tribal peoples to enjoy the same rights and protections, but it was not widely ratified – only 24 countries are ratified it, including 1 African country – the CAR. In its Convention No.169, the ILO puts great emphasis on indigenous peoples’ rights to consultation, participation and consent.³⁹ The object here is to establish a dialogue between the State and the indigenous peoples in finding appropriate solutions. The duty of States to consult indigenous peoples in decisions that affect them and to ensure their participation is reflected in various provisions of the UNDRIP – Article 32.⁴⁰ Since Governments have historically cut out indigenous peoples from participating in the decision-making processes that affect them, Convention No.169 represents a country’s commitment to mending that relationship and to respecting indigenous peoples’ identities, traditions, and rights to land and resources. It is indeed essential for indigenous peoples to explore the opportunities of engagement to realize rights through this Convention, as it is the only binding one on the rights of indigenous peoples in IL. The Convention simultaneously is a legal agreement and offers technical assistance to countries ratifying it. It is an invaluable resource to governments seeking to repair and improve their relationship with indigenous peoples.

³⁷ (Werner, 2023, pp. 384,385), for the indigenous peoples, this Convention No.107 was focusing on their assimilation, considering them as backward and temporary societies whose survival depended on their integration in the modern society.

³⁸ (Ormaza, 2012, pp. 249,250)

³⁹ See Article 6(2) (C169 - Indigenous and Tribal Peoples Convention, 1989 (No. 169), 1989)

⁴⁰ See Article 32, second point (United Nations Declaration on the Rights of Indigenous Peoples, 2007)

3.2. Regional protection of fundamental rights

3.2.1. Treaties drafted within the OAU⁴¹

The African [Banjul]⁴² Charter on Human and Peoples' Rights adopted on June 27, 1981, in Nairobi, Kenya at the OAU's eighteen summit, was the first declaration to be adopted regarding the indigenous African peoples' HR. The notion of indigeneity has risen to political prominence as indigenous peoples have fought for recognition of their rights.⁴³ Within the framework of the African regional system, the African Charter on the Rights and Welfare of the Child was adopted on July 11, 1990 and is the first regional instrument exclusively dedicated to the regulation of the rights of the minors ; and the Protocol to the ACHPR on the Rights of Women in Africa [Maputo Protocol] adopted on July 1, 2003.⁴⁴ The last treaty adopted within the OAU is the Protocol to the ACHPR on the Establishment of an African Court on Human and Peoples' Rights,⁴⁵ adopted on June 10, 1998.⁴⁶ Other treaties of the system can be mentioned, such as the OAU's Convention Governing the Specific Aspects of Refugee Problems in Africa adopted on September 10, 1969 ; the African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa adopted on October 23, 2009 ; the African Charter on Democracy, Elections and Governance adopted on January 30, 2007 ; the Economic Community of West African States' 2001 Additional Protocol on the Place and Role in Promoting Democracy and Governance in West Africa.

3.2.2. African Constitutions

There are significant signs of the emergence of new legal frameworks to recognize and protect indigenous peoples' rights across the continent. For instance, the new Constitution of Kenya, from 2010, recognizes historically 'marginalized group',⁴⁷ including indigenous communities. The Constitution of Cameroon also mentions in its Article 2 the protection of the rights of indigenous peoples. In 2011, the Republic of Congo became to first country to adopt a specific

⁴¹ Legally replaced by the African Union (AU) in 2001

⁴² (Ngom, 1984, p. 68) in 1979, in Monrovia (Liberia), 25 heads of state attended. At this summit, a meeting of experts was set up to draw up a preliminary draft of the ACHPR. One year later, a meeting was arranged in Banjul (Gambia), this ministerial conference was to adopt the draft ACHPR, on the basis of a text drawn up by experts who had met earlier in Dakar (1978). The meeting was not very fruitful, and only the preamble and the first eleven articles were adopted.

⁴³ (Young and Sing'Oei, 2014, p. 103)

⁴⁴ (Rodriguez, 2021, pp. 236-239)

⁴⁵ (Mubiala, 2005, pp. 95, 96) The Protocol to the ACHPR establishing the African Court on Human and Peoples' Rights entered into force with the ratification of 15 countries, which was achieved on January 25, 2004. However, the Court did not become fully operational until early 2009.

⁴⁶ (Droits de l'homme en droit international, 2007, pp. 623-630)

⁴⁷ See Kenya's Constitution's Chapter seventeen – general provisions ; Article 260 – interpretation

law on indigenous peoples : Law on the Promotion and Protection of the Rights of Indigenous Populations in the Republic of Congo.⁴⁸ In 2022, the DRC took a big leap forward in recognizing the customary rights of its indigenous population by adopting a new law on the Promotion and Protection of the Rights of the Indigenous Pygmy Peoples. This historic law is the country's first ever legislation to formally recognize and safeguard the rights of indigenous peoples, in particular their land rights. The Constitution of the Republic of Benin makes the provisions of the ACHPR an integral part of the national constitution ; by clarifying how international should be treated in and by its domestic courts.⁴⁹ The Constitution of the CAR states in its Article 6 the equality before the law of all human beings without distinction of race, ethnic origin, region, sex, religion, political affiliation or social position and the protection of the rights of indigenous peoples and the guarantee of equality for all rights in all the domains for men and women. Lastly, the Malawi's Constitution adopted in 1998, shows the protection granted to everyone, none withstanding their origin, race, customs, ethnicity in its Chapter IV – Section 26 of the Constitution⁵⁰ and Section 28.⁵¹ It is up to NGOs and HR activists to advocate the advancement and implementation of these rights to the relevant state bodies, particularly the courts, who must in turn ensure that these rights have meaning and are better recognized for the population.⁵²

4. INDIGENOUS RIGHTS IN IL UNDER JURIDICAL SYSTEMS

4.1. International, regional, indigenous and CIJ systems

Historically, law and legal institutions have played a significant role in the alienation and marginalization of indigenous peoples – who are asking the same system that has contributed to that prejudice to determine whether or not the prejudice is justified. As said by the Expert Mechanism of the UN, access to justice requires the ability to seek and obtain remedies for wrongs through institutions of justice, formal or informal, in conformity with HR standards.⁵³ It is essential for the protection and promotion of all other HR. The challenges faced by indigenous peoples in freely exercising their juridical rights and pursuing juridical development within their societies are diverse and complex. In most cases, there is a gap between what

⁴⁸ (N'Zobo, 2012), See Law n°5-2011

⁴⁹ It can be seen through the Preamble of Benin's Constitution specifically references to the UN Charter, the Universal Declaration of HR, and the UNDRIP ; and also in Benin's Constitution's Article 7, adopted on December 2, 1990.

⁵⁰ See Malawi's Constitution's Section 26 – culture and language

⁵¹ See Malawi's Constitution's Section 28 – right to property

⁵² (Chirwa, 2005, p. 241), without litigation Constitutions will remain ineffectual.

⁵³ (Programming for Justice : Access for All, 2005)

international and national frameworks proclaim and the situation on the ground, as indigenous juridical systems continue to be subordinated despite legal recognition.⁵⁴ Often, the major challenge that remains is the formal recognition of indigenous juridical systems and indigenous peoples' right to promote, develop and maintain them. An additional crucial hurdle is the financing of indigenous juridical systems ; without sufficient resources, they are unsustainable and their contribution to ensuring access to justice is compromised. Access to justice, in addition of being a right in itself, is also a paramount relevance as a means to obtain remedies. Barriers to this right and related remedies exist for indigenous women, children, youth, and persons with disabilities, who face challenges including discrimination in the criminal justice system and overrepresentation among the incarcerated population. The UNDRIP affirms the right of indigenous people to maintain and strengthen their own juridical systems.⁵⁵ The Convention No.169 also elaborates on the right of indigenous peoples to maintain their customs and customary laws.⁵⁶ In the last few years, many communities have engaged with litigation as a potential way to achieve recognition of their rights and challenge the discrimination they face. CIJ systems can play a crucial role in facilitating access to justice for indigenous peoples, particularly in contexts where access to the State's justice system is limited due to distance, language barriers and systematic discrimination. These indigenous juridical institutions can provide better access to justice because they may be geographically closer, resolve disputes more quickly, cost less, be less prone to corruption and discrimination, can be conducted by trusted people and are more familiar in terms of linguistic and cultural relevance. CIJ practices have existed for 100 of years and are deeply rooted in the realities of the people they serve by prioritizing the needs of the community, making customary justice highly people-centered, collaborative and harmonious. Despite criticism of perpetuating existing power dynamics and conservative social norms, customary and informal justice systems remain a very important vehicle for addressing access to justice. CIJ's system practices remain the first point of contact for much of the world's population, but especially for women, the poor, minority groups and marginalized communities. It is estimated that 80% of the world's legal disputes are resolved outside formal court systems thanks to CIJ's systems. In 2003, the African Commission on Human and Peoples' Rights adopted some principles and guidelines on the right to a fair trial

⁵⁴ (Access to justice in the promotion and protection of the rights of indigenous peoples: restorative justice, indigenous juridical systems and access to justice for indigenous women, children and youth, and persons with disabilities, 2014, pp. 8,9)

⁵⁵ See UNDRIP's Articles 5, 27, 34, 40

⁵⁶ See Convention No.169's Articles 8(2) and 9(1)

and legal assistance. Paragraph Q⁵⁷ on traditional courts⁵⁸ sets out the conditions that traditional indigenous courts must meet in order to act and render justice. For instance, in Sierra Leone, most people have neither the time, money nor literacy skills to access formal justice structures, therefore, they rely on CIJ mechanisms. However, all justice systems, whether formal or informal, have shortcomings. It is therefore particularly important to examine how CIJ systems deal with vulnerable and marginalized groups within their respective communities ; some CIJ systems reinforce damaging including female genital mutilation and forced marriage, they are also often seen as rooted in tradition and slow to change, and many are criticized for their lack of appeal procedures and exclusion of young people, women, and vulnerable groups.⁵⁹

4.2. Regional jurisprudence on the protection and development of indigenous peoples' rights

4.2.1. *The case n°276/200360*

Positive examples of international HR jurisprudence include decisions that expand on domestic protection of indigenous peoples' rights such as the decision of the African Commission on Human and Peoples' Rights⁶¹ in a case of 2010.⁶² This is the first judgment from the African Commission to address the rights of indigenous peoples and their claims to land and natural resources. It is also the first ruling by an international tribunal which finds a violation of the right to development. The Commission examined the Kenyan government's eviction of the indigenous Endorois community from their ancestral land around Lake Bogoria to establish a game reserve. Finding violations of the rights of the Endorois to religion, culture, property, natural resources and development, the Commission called for the recognition of Endorois ownership of their ancestral land and its restitution to the community. In this case, the complainants are alleging violations resulting from the displacement of the Endorois community from their ancestral lands, the

⁵⁷ See Principles and guidelines on the right to a fair trial and legal assistance in Africa, paragraph Q

⁵⁸ Traditional courts are defined in this guidelines as “a body which, in a particular locality, is recognized as having the power to resolve disputes in accordance with local customs, cultural or ethnic values, religious norms or tradition.” See paragraph S, ‘use of terms’.

⁵⁹ (Diverse Pathways to Everyday Justice: Leveraging Customary and Informal Systems in Realizing Justice for All, 2019) To facilitate change in this reality, it is necessary to understand what the community wants and needs, and how the actions of the CIJ system can impede this. It is then imperative to determine what kind of relationship formal and informal systems may have, empower justice seekers to improve the demand for justice and the options available to access justice, and identify potential reforms in informal systems.

⁶⁰ (Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v. Kenya, 2010)

⁶¹ The Commission is composed of eleven members, elected for a 6-year renewable mandate, see Article 33 of the ACHPR.

⁶² (African Commission on Human and People's Rights, 2010)

failure to adequately compensate them for the loss of their property, the disruption of the community's pastoral enterprise and violations of the right to practice their religion and culture. They allege that the Government of Kenya is in violation of the ACHPR⁶³, the Constitution of Kenya and IL, for forcibly removing the Endorois from their ancestral lands around the Lake Bogoria area, without proper prior consultations, adequate and effective compensation. The complainants are a community of 60 000 people who for centuries have lived in the Lake Bogoria area and practiced a sustainable way of life which is inextricably linked to their ancestral land. The Endorois have been accepted by all neighboring tribes and kept occupying and enjoying undisturbed use of the land under the British occupation, although they claimed title to the land in the name of the British crown. The complainants state that Lake Bogoria is central to their religious and traditional practices, and that the Monchongoi Forest is considered the birthplace of the Endorois and the settlement of the first Endorois community. In addition to the declaration of the violated articles of the ACHPR, the complainants are also seeking a restitution of their land, with legal title and clear demarcation, and a compensation to the community for all the loss they have suffered through the loss of their property, development and natural resources, but also freedom to practice their religion and culture. The African Commission recommends that the Government of Kenya recognize rights of ownerships to the Endorois and reconstitute their ancestral land, ensure an unrestricted access to Lake Bogoria and surrounding sites for religious and cultural rites, and pay adequate compensation to the community for all the loss suffered. In this case, the Commission began its discussion by wondering the indigenous or population character of the Endorois based on the meaning of the ACHPR and therefore which protection do they require. The African Commission identified a certain number of features that a group of individuals should manifest in order to be considered as peoples.⁶⁴ This decision is remarkable for several reasons. It is the first time that the Commission has ruled on the definition of indigenous peoples in Africa, on their rights to land and natural resources. By accepting the Endorois as an indigenous community, the decision completes a process of ethnic invention that began in the 1990s.⁶⁵ This decision is therefore not only a victory for the Endorois, but also represents a new avenue for marginalized and vulnerable communities across Africa to gain recognition of their rights. In the context of

⁶³ The complainants seek a declaration that the Government of Kenya is in violation of Articles 8 (right to practice religion), 14 (right to property), 17 (2), (3) (right to culture), 21 (rights to free disposition of natural resources), 22 (right to development)

⁶⁴ See paragraph 151 of the Endorois judgement (case n° 276/2003)

⁶⁵ The African Commission recognized the ethnicity of the Endorois. World widely speaking, it is a big step towards the inclusion of everyone, regardless of their origins, customs, faith, race.

increasing pressure on land for environmental conservation and economic development, the importance of the Commission's decision cannot be overstated. Indeed, the wider implications for social justice and intercommunity relations are controversial, as the decision reinforces an inherently exclusive sense of ethnic territoriality and overlooks glaring inequalities in wealth and power. Although the Commission's recommendations have yet to be fully implemented by the Kenyan state, the Commission has potential for engaging Kenya's State and companies to better protect HR, which has already manifested itself in the Endorois complaint. Some of these efficacious developments must be highlighted. Bringing the Endorois' complaint before the African Commission can therefore be seen as contributing to the normalization of indigenous peoples' rights, which are then more amenable to recognition by national courts, given that Kenya is a dualist state.⁶⁶ As a matter of fact, the Endorois communication at the African Commission has attracted the attention of the UN Special Rapporteur on the HR and Fundamental Freedoms of Indigenous Populations, as well as the HR Committee and the Committee on Economic Social and Cultural Rights. As a result, a wide range of stakeholders took an interest in the challenge facing the Endorois community and other indigenous minorities in Kenya – such as the civic education funded by the European Union to monitor local governance processes for instance. Because of the level of media coverage of the Endorois' struggle, CSOs were more likely to get involved and to approach the Endorois community. In fine, the Endorois decision became the rallying call in the context of the campaign for a new Constitution in Kenya.⁶⁷ The adoption of this new Constitution – which effectively abolished the trusteeship land regime and created a new community-based land tenure system – represents the greatest political progress ever made by minorities in Kenya.

4.2.2. *The case n°006/201268*

In Kenya, the Mau forest is the ancestral home of an indigenous community called the Ogiek people – which comprises 20 000 members, about 15 000 of whom inhabit in the greater Mau Forest, a land mass of about 400 000 hectares. The Ogiek are divided into clans, they have their own language and their own social norms and forms of subsistence. As a hunter-gatherer community, the Ogiek have for centuries depended on the Mau Forest for their residence and

⁶⁶ Dualism tends to assert that the norms of IL only acquire legal force when transposed into domestic law, and as Kenya did not ratify the UNDRIP, this decision given by the African Commission may shed light on the indigenous peoples' HR.

⁶⁷ (Sing'Oei, 2011, p. 540) – “The Endorois decision is unequivocal in its conclusion that the state must provide clearer mechanisms for the arbitration of corporate versus community interests in a more sustainable manner.”

⁶⁸ (African Commission on Human and Peoples' Rights v The Republic of Kenya, 2022)

as a source of livelihood. In October 2009, the Kenya Forestry Service ordered the eviction of the Ogiek community from the Mau Forest within 30 days. The Kenyan government knew that the Ogiek had occupied lands in the Mau Forest since forever, however they refused to recognize them as an indigenous population that needed to be protected. The following month, the Centre for Minority Rights Developments and Minority Rights Group International – two NGOs acting on behalf of the Ogiek community of the Mau Forest – submitted a complaint to the African Commission on Human and Peoples’ Rights, which in turn transferred the case to the African Court on Human and Peoples’ Rights in 2012. After the African Court was seized, it ordered the Kenyan government to immediately reinstate the restrictions it had imposed on land transactions in the Mau Forest complex as a provisional measure, to prevent the Ogiek people from further irreparable harm while the case was being examined. On May 26, 2017, the Court reached a decision on the matter and found that Kenya had violated the Ogiek community’s rights. The Court said that Kenyan authorities should not have expelled the Ogiek from their ancestral lands against their will and should not have deprived them of disposing of the food produced by these lands. In doing so, they violated their right to land and their right to disposing of the wealth and natural resources of their land. Also, the judges recognized that the evictions rendered it impossible for the Ogiek to continue their traditions and religious practices which are all linked to religious sites in the Mau Forest. On June 23, 2022, the Court further ordered Kenya to pay compensation to the Ogiek for the material and moral prejudice they suffered, as well as to take all necessary measures, legislative and otherwise, to identify, delimit and title Ogiek ancestral land and to grant them collective title to such land. Where concessions have already been granted over parts of this land, the Court ordered Kenyan authorities to commence consultation between the Ogiek and the other concerned parties in order to reach an agreement on returning such land or continuing their operations by way of lease or royalty and benefit sharing with the Ogiek. The Court also ordered Kenya to guarantee full recognition of the Ogiek as indigenous peoples of Kenya and to take all measures to protect the right of the Ogiek to be effectively consulted in respect of all development, conservation or investment projects on its land. After years of struggle with the national authorities, the Ogiek were finally recognized as an indigenous community, having rights on the Mau forest and which religious and cultural specificities must be protected. For the NGOs that brought the case and for many observers, this is a historic case, which brings hope for the advancement of rights of indigenous people or other minorities in Kenya and more broadly. Even though this decision is binding the Republic of Kenya, between the issuance of

the judgments on merits in 2017, and the judgment on reparations in 2022, violations of the Ogiek's rights continued.

4.3. HRC's Resolutions

The cases the HR Committee received – alleging violations of the rights set down in the ICCPR – have a significant value. As a matter of fact, these decisions frame the struggle of indigenous peoples and their members all around the world. A resolution adopted about the Technical assistance and capacity-building in the field of HR in the CAR states the deep concern of the HRC about the unstable security situation in the CAR and the violations and abuses of HR and of international humanitarian law that continue to be perpetrated, as well as the numerous cases of sexual abuse and violence committed against civilians. Nevertheless, the HRC is welcoming the efforts of subregional organizations in the ongoing mediation process, as well as the humanitarian assistance provided by the State members of these organizations to the population of the CAR. However, the Council stressed the urgent and imperative need to end impunity in the CAR to bring justice to the perpetrators of violations of HR and of international humanitarian law and to reject any general amnesty for such persons, and the need to strengthen national and hybrid judicial mechanisms to ensure that they are held to account for their actions.⁶⁹ In another resolution, the HRC recognized that ‘the UNDRIP has positively influenced the drafting of several constitutions and statutes at the national and local levels and contributed to the progressive development of international and national legal frameworks, jurisprudence and policies ; and acknowledge the participation of Indigenous Peoples’ representatives and institutions duly established by themselves in the meetings of various UN organs and their subsidiary bodies’.⁷⁰ In the concluding remarks of the HRC’s dialogue on September 28, 2023 with the Expert Mechanism on the Rights of Indigenous Peoples and with the Special Rapporteur on the Rights of Indigenous Peoples⁷¹, concrete suggestions were made on the implementation of legislation at national level, as well as on the creation of national action plans for meaningful consultation and interaction with indigenous organizations ; and in terms of how to strengthen the representation of indigenous peoples on the HRC, particularly

⁶⁹ (Resolution adopted by the Human Rights Council on 12 October 2023, 54/31. Technical assistance and capacity-building in the field of human rights in the Central African Republic , 2023)

⁷⁰ (Resolution adopted by the Human Rights Council on 11 October 2023, 54/12, Human rights and Indigenous Peoples, 2023)

⁷¹ (Lightfoot & Cali-Tzay, 2023)

young populations, this could be done by increasing funding for the Voluntary Fund and for indigenous organizations applying to participate in the Council.

5. ACCESS TO JUSTICE FOR INDIGENOUS PEOPLES

Justice Charles Kajimanga⁷² defines the access to justice as “The right of individuals and groups to obtain a quick, effective and fair response to protect their rights, prevent or solve disputes and control the abuse of power, through a transparent and efficient process, in which mechanisms are available, affordable and accountable.” In the absence of access to justice, people are unable to have their voice heard, exercise their rights, challenge discrimination or hold decision-makers accountable. Access to justice helps to preserve human dignity, it is helpful in efforts to grow civil society and to reduce and end poverty. Delivery of justice should be impartial and non-discriminatory. To strengthen access to justice, the UN system works with national partners to develop national strategic plans and programs for justice reform and service delivery. One of the major obstacles in accessing justice is the cost of legal advice and representation. The UN system supports the provision of legal aid by building the capacity of rights-holders, improving legal aid programs that empower rights-holders, particularly the poor and marginalized groups, and supporting legal awareness, legal aid clinics and public information campaigns. Access to justice is a requirement that is increasingly at the heart of the major debates of our time, whether in the fields of economic, political and social development, peace, HR or culture. This issue forms a bridge between the past, the present and the future, as it refers to the marginalization and systemic discrimination suffered by members or groups of society. The solid international HR framework developed over the last 70 years, and the way in which it is further developed through the interpretation of international HR bodies, gives access to justice the normative contours and specificity necessary for its practical implementation. Major elements such as the rule of law, the right to the truth and other fundamental normative frameworks have given new weight to access to justice. Based on the legal framework defined in chapter 3, several cultural biases and discrimination within legal systems issue have been identified. As a matter of fact, indigenous women, children, youth, and persons with disabilities face discrimination on multiple grounds, which often puts them in a particularly disadvantaged situation. So, there is a huge need to pay attention to the situation of these specific groups, who face cumulative discrimination. Winning a court case, whether at the level of the African Commission on Human and Peoples’ Rights or nationally,

⁷² (Kajimanga, 2013)

has proven to be only one small step in the struggle against marginalization, discrimination, and dispossession.⁷³ The African Commission's report argues that indigeneity 'is today a term and a global movement fighting for rights and justice of those particular groups who have been left at the margins of development paradigms, whose cultures and way of life are subject to discrimination and contempt and whose very existence is under threat of extinction'.⁷⁴

5.1. Access to justice for specific groups

5.1.1. Indigenous women

Numerous barriers exist for indigenous women in accessing justice on an equal basis to others. These barriers exist within society, within State criminal justice systems and within ICJ systems. Indigenous women are disproportionately at risk of experiencing all forms of violence, compounded by multiple forms of discrimination based on race, gender and other forms of identity, including disability and sexual orientation. Remote or rural local is another barrier for indigenous women to have access to justice. Indigenous women are overrepresented in national criminal justice systems. Reporting of violence against indigenous women is lacking, as sometimes they do not feel comfortable to fill complaints or as they may be unaware of the protections available. Lastly, justice systems are mostly male dominated and discriminating against women. International HR law requires that States take all measures to ensure equality before the law.⁷⁵ The Committee on the Elimination of Discrimination against Women has noted with concern – in its study by the Expert Mechanism on the Rights of Indigenous Peoples from April 29, 2013 – the lack of women, including indigenous women, appointed to the judiciary and has called for gender-sensitization training of justice officers. The Committee has noted further that laws or customs that limit a women's access to legal advice or ability to seek remedy before courts, or accord lesser value to a female testimony, violate the right to equality before the law.⁷⁶

5.1.2. Indigenous children and youth

The rights of indigenous children and young people are recognized, implicitly and explicitly, by the Universal Declaration of HR ; the ICESCR ; the Convention on the Rights of the Child ;

⁷³ (Werner, 2023, p. 392), while technically the decisions of the African Court on Human and Peoples' Rights are legally binding, there is no follow-up instrument or mechanisms to make sure that the States comply.

⁷⁴ See (Report of the African Commission's Working Group of Experts on Indigenous Populations / Communities, 2005) page 87

⁷⁵ See (Convention on the Elimination of All Forms of Discrimination against Women, 1979) Article 15

⁷⁶ (Access to justice in the promotion and protection of the rights of indigenous peoples, 2013

the World Declaration and Plan of Action on the Survival, Protection and Development of Children ; the Declaration of the World Summit for Children ; the UNDRIP and of course the African Charter on the Rights and Welfare of the Child.⁷⁷ There is some discrimination towards indigenous youth ; despite the fact that the available data is limited, several studies show that indigenous children and youth are disproportionately represented in criminal justice systems. The Committee on the Rights of the Child pointed out that disproportionate high rates of incarceration of indigenous children may be attributed to systematic discrimination within the justice system and / or society. Other areas in which persistent barriers remain are access to justice for indigenous children who have been victims of domestic violence or sexual abuse ; and once in custody, indigenous youth may be less likely to benefit from non-custodial sentencing options or restorative justice measures, more likely to receive the most punitive measures and to be subjected to the harshest treatments, such as being placed in secure confinement. The Committee has called upon the States to take measures to address juvenile crimes without resorting to judicial proceedings wherever possible and also to support traditional restorative justice systems to promote the best interests of the child. The governments must make certain that their national constitutions as well as their statutory and customary laws, reflect the provisions of international HR instruments. Nevertheless, it is argued that custom tradition, culture, and religion are major constraints to the recognition and protection of the rights of children in Africa. In several countries, traditional values are often deployed as an excuse to undermine HR, including those of children.⁷⁸ For children's rights to be recognized and protected in an African country, it must be the case that the country has first internationalized its constitutional law ; then the country must establish a governing process that adequately constrains the state and prevents civil servants and political elites from acting with impunity and violating the rights of children. The issue is regarding the fact that such a governing process must have the judicial system that is independent enough to bring to justice those who violate children's rights. Unfortunately, in many African countries, even including those that have domesticated the various international HR instruments, there is still a widespread abuse of the rights of the children.⁷⁹ Indigenous children and youth are exposed to economic and social factors that impact their fundamental rights. They are often forced to leave

⁷⁷ Also known as the African Children's Rights Charter, adopted in 1990 and entered into force in 1999. The African Committee of Experts on the Rights and Welfare of the Child was formed in July 2001.

⁷⁸ (Reid, 2013)

⁷⁹ (Mbaku, 2022, p. 231), this is due to the fact that these countries do not yet have a governing process that can adequately prevent those whose role it is to enforce the laws and protect children from prohibiting adoption behaviors that contribute to non-enforcement of the law.

their traditional communities in search of work or education and move to the city where they are frequently discriminated against and do not have the same opportunities as others to find work and access education.⁸⁰ Their new condition can have devastating consequences on their self-esteem and cultural identity, and thus be at the root of many serious medical and social disorders, such as depression and drug addiction. Indigenous youth inherit the responsibility of protecting and preserving the traditional lands, resources and sacred sites that represent their cultural heritage and determine their identity. Various HR bodies, including treaty and Charter bodies, can address concerns about the rights of indigenous children, such as UNICEF, the UN Youth Advisory Group. According to Survival International, there are nearly one million tribal and Indigenous children across Asia, Africa, and South America who are currently attending institutions that bear a striking resemblance to Canada's residential schools. Indigenous residential schools are institutions that operated from the late 19th to the late 20th century, and which indigenous children in Canada were forced to attend. Investigations have shown that many young people attending these institutions were victims of neglect and abuse. The negative consequences of childhood abuse have been well documented, notably by the work of the Truth and Reconciliation Commission of Canada. Residential schools were a form of public boarding school education for Native Americans in Canada, separating them from their families to 'kill the Indian in the child' and culturally indoctrinate them. In 1920, attendance at residential schools became compulsory for children aged 7 to 16. The last residential school in Canada closed in 1996. Since then, there has been a growing outcry about these methods, which began in Ontario in 1831. In 1991, the Federal Government launched a public inquiry following reports of physical, psychological, and sexual abuse by former residents. Many Quebec teachers believe that teaching the history of residential schools is essential to understanding the current issues facing aboriginal peoples, and envisaging reconciliation with them.⁸¹ Indeed, society must become aware of the impact that residential schools have had on these populations. Ignorance must end. Canada's Truth and Reconciliation Commission was active from 2008 to 2015 and was organized by the parties to the Indian Residential Schools Settlement Agreement ; before this Commission, the term 'cultural genocide' is used. Some authors have suggested that the negative impacts of residential schools were not confined to

⁸⁰ See (Fiche d'information No 9 : Les enfants et les jeunes autochtones, 2000), indigenous children and young people are one of the groups most at risk of fundamental rights violations, as their language, customs and values often set them apart from the society to which their community belongs.

⁸¹ (Machillot, 2021), In June 2021, the discovery of children's bones at former residential school sites in British Columbia and Saskatchewan sparked a wave of indignation across the country. This sad event reminds us how important it is to shed light on this part of our history.

former aboriginal residents, but also affected their descendants. In this context, the theory of the intergenerational cycle of childhood victimization is particularly useful for understanding the impact of residential schools on survivors and their descendants. Research on this subject tells us that not only can the victim become an abuser in turn, but that he or she is also at greater risk of experiencing further abuse as an adult, or of other difficulties.⁸²

5.1.3. Indigenous persons with disabilities

A key framework Convention is the one on the Rights of Persons with Disabilities, which guide the interpretation of other relevant international HR and the development of instruments in this regard. Non-discrimination is a general principle of this Convention – Article (3)b). Indigenous persons with disabilities face considerable obstacles in terms of access to justice ; such as living in rural areas, limited access to information provided in accessible formats and appropriate languages, inaccessibility of legal counsel. There are also concerns regarding the treatment of indigenous persons with disabilities in detention. Indeed, the UN Office on Drugs and Crimes has found that indigenous persons with disabilities face magnified difficulties in prisons and that women prisoners with disabilities are at particularly high risk of manipulation, violence, sexual abuse and rape.^{83,84} Although legal protections and the social status of indigenous persons with disabilities have both improved, there still are many areas where services and accessibility fall short,⁸⁵ some areas need to be addressed : services, legal capacity, imprisonment. Nevertheless, some factors could contribute to overcome these issues. For instance, at the international level, the Committee on the Rights of Persons with Disabilities instituted by the UN has taken the opportunity to comment on the situation of indigenous persons with disabilities’ access to justice. Its observations have focused on the equality and non-discrimination issue, the liberty and the security of the person, the importance of data and statistics and the situation of indigenous children with disabilities.

⁸² See (Dion, Hains, Ross, & Collin-Vézina, 2016), For instance, the results of several studies indicate that people who were sexually abused as children are at greater risk of their children being sexually abused. Notably, the prevalence of sexual assault has been estimated at 50% in mothers whose child had been sexually assaulted, whereas this figure is closer to 18-20% for women in the general population.

⁸³ (Pollack, 2014, pp. 310, 311)

⁸⁴ See (Handbook on Prisoners with special needs, 2009, p. 45)

⁸⁵ (Larson, 2014, p. 225), the persons with disabilities still face wide gaps in achievement, access and services

5.2. Key areas for improving fundamental rights and access to justice for indigenous peoples

5.2.1. Initiatives promoting access to justice and legal assistance

Scholars generally agree that one of the most important goals of the international indigenous movement is to advance indigenous rights under IL.⁸⁶ Several key actors have played significant roles in this movement. Three UN bodies, namely, the Working Group on Indigenous Populations, the Permanent Forum on Indigenous Rights, and the Special Rapporteur on the Rights of Indigenous Peoples, have been instrumental in setting norms on indigenous rights. International and African NGOs played an important advocacy role for setting up an African regional protection of HR mechanism. NGOs have played an advocacy role with the African Commission, helping it to improve its working methods. By May 30, 2003, the African Commission had granted consultative status to 13 National HR Institutions and by January 1, 2004, the Commission had already granted consultative status to more than 300 NGOs.⁸⁷ The Commission has gradually defined the framework for its relations with NGOs and national rights institutions, to which it grants consultative and affiliate status respectively. HR NGOs with observer status are required to present their activity reports to the African Commission. National HR Institutions granted affiliate status with the African Commission are obligated to submit reports on activities undertaken in promoting and protecting HR under the ACHPR and at the national level. As analyzed before in the paper, the African Constitutions have a high level of HR norm recognition, but the enforcement through the African Commission is relatively weak and remains problematic. Nevertheless, this situation has improved since the development of subregional institutions and an indigenous African fundamental rights jurisprudence. Indeed, the domestic level is the most important in the protection of HR – followed by the regional and global systems – as the domestic level has the benefit of direct enforcement, and the regional scale has the advantage of peer pressure that the global level often lacks. Nonetheless, the effectiveness of the mechanisms and their capacity to facilitate the coordination of HR norms recognition and enforcement have yet to be proven.

⁸⁶ (Morgan, 2007)

⁸⁷ (Mubiala, 2005, pp. 92, 93)

5.2.2. CSOs in international advocacy coalitions

International indigenous rights coalitions involve indigenous and non-indigenous CSOs. Similarly as self-identification points out on different aspects of indigeneity across regions or continents, there is a variance between indigenous and non-indigenous CSOs. This can be explained through the fact that they might have different understandings of indigenous values, symbolism and customs. The four main issues these CSOs are advocating are regarding the unequal treatment African indigenous peoples can face, the self-determination concern, the violence and threats to indigenous culture and the question of the environment. Even though indigenous and non-indigenous CSOs may have not the same approach in their messaging and interpretation of indigenous rights issues in the international scene, their voices are heard – and even more since the adoption of the UNDRIP as the CSOs in indigenous rights coalitions are more homogenized. The State has a responsibility to ensure the promotion and protection of HR principles, norms and instruments ; CSOs and NGOs have a role to play through its struggles and participation in HR culture.⁸⁸

5.2.3. Transitional justice mechanisms and restorative justice

Another avenue to explore are the truth commissions⁸⁹ which have on many occasions been established in nations where there are indigenous peoples in order to redress HR violations, in accordance to the right of victims to an effective remedy and the right to know the truth to the fullest extent possible.⁹⁰ Truth commissions investigate violent historical periods⁹¹ and are going further than the traditional focus on individual HR violations to tackle collective HR violations to economic, social, cultural and environmental rights. The involvement of indigenous peoples in these processes has varied, ranging from not being included at all, to more recent instances of truth commissions established specifically to address rights violations experienced by indigenous peoples, where indigenous peoples have led the processes from their initiation. In many cases, however, truth commissions have failed to address the needs of indigenous peoples in any significant ways. Challenges faced by truth commissions include ensuring the independence

⁸⁸ See (Zezeza, 2007, p. 491), CSOs have expanded, and in the last two decades, HR NGOs have emerged as powerful instruments in Africa's drive for the promotion of HR and development.

⁸⁹ (Lavin, 2014), a key factor contributing to the development of the right to the truth is the establishment of truth commissions.

⁹⁰ The right to truth has been increasingly recognized by various UN Resolutions, expert reports, and national courts, regional and international decisions. See UN HR Council's Resolution A/HRC/EMRIP/2013/2 and Resolution A/HRC/27/65.

⁹¹ See (Librizzi, 2014), The recommendations of truth commissions generally seek to identify the causes of the violations, determining patterns of abuse and preventing recurrence.

and credibility of the commission ; political interference ; inadequate funding; and ensuring continued participation of marginalized groups, civil society and victims' organizations. Truth commissions have also been criticized for weak outcomes, lack of implementation of their recommendations or adequate follow-up. Implementation of these recommendations has generally been weak even where recommendations are strong. There are a number of advantages of truth commissions, including that they might be more consistent with indigenous peoples' conceptions of justice and cultures; they can inspire political commitment to the resolution of grievances. A positive example of indigenous engagement comes from the Truth, Justice and Reconciliation Commission of Kenya.⁹² Truth commissions have varying purposes and modes of operation, yet many display features that align with or support restorative justice principles. Truth commissions have significant potential to help remedy abuses suffered by indigenous peoples and strengthen their rights. Implemented properly, with strong guarantees of independence, integrity and adequate leadership, as well as considering the rights, perspectives and needs of indigenous peoples, truth commissions can help strengthen the identity of indigenous peoples, and respect for their civil, political, economic, social and cultural rights, as well as their rights to ancestral lands and natural resources the rights of indigenous peoples and proposing policies to prevent further violations. National NGOs have a key place in the work of truth commissions.⁹³ Indeed, they usually monitor the commission's activities, provide honest feedback and push the commission to respond appropriately to the needs of victims and communities. CSOs may offer support services that the commission may wish to refer the victims and survivors to – such as individual or group counselling, community support mechanisms, or basic medical services to those injured or still suffering from past violence.

6. HUMANITARIAN AID AND INDIGENOUS EMPORWERMMENT

6.1. Role of humanitarian organizations in supporting indigenous rights

In 1982, a UN Working Group on Indigenous Populations was established by the Economic and Social Council, and indigenous peoples' organizations and NGOs continued to establish an international advocacy network which grew in strength over the years. At the international

⁹² Although not specifically focused on indigenous peoples, the Commission provided an explicit forum for the expression of indigenous issues regarding historical injustices, marginalization and ethnic tension. The Commission hired indigenous people as part of its staff ; conducted public hearings allowing testimony in different languages, including Maasai ; and conducted outreach to indigenous communities and organizations that addressed their rights.

⁹³ (Rule-of-law tools for post-conflict states : Truth commissions, 2006)

level, the Indigenous Peoples of Africa Coordinating Committee was founded in 1997 and its Constitution was adopted by its founders at the UN Working Group on Indigenous Peoples meeting. Nowadays, this committee is the largest indigenous network in the world with 135 indigenous peoples' organizations from 20 African countries. Much remains to be done however, to allow indigenous peoples to live and flourish in self-determined ways.⁹⁴ Litigation is a lengthy, technical and costly process usually requiring the involvement of external actors⁹⁵ ; this includes local, national or international NGOs with external funding. Relying on this source of external support is unpredictable. Indeed NGOs are very often limited to short-term funding and objectives, whereas litigation is long term and unpredictable.⁹⁶ The consequence is that indigenous peoples have to rely on a multitude of changing actors to support their case. Also, such involvement from external actors has impacts on the basis of their own opinions and interests ; it means that it might not match and relate to their interests and visions. Then, the approach developed by the organizations needs to be based on a very inclusive and clear participatory model. Nowadays, the objective of the NGOs is more to alleviate suffering where and when it occurs, as well as to save lives, through emergency interventions, than the defense in general of HR or the attempt to contribute in improving the human condition in situations that offend human dignity.⁹⁷

6.2. Socio-economic development projects, capacity building and indigenous peoples' land rights

For many African indigenous communities, wildlife conservation, economic development and tourism have often become synonymous with destitution and loss of lands. In the name of development or conservation, indigenous peoples have often been pushed away from their traditional lands, losing access to their ancestral territories and their essential natural resources contained in these lands.⁹⁸ A variety of international treaties and conventions, provide support for indigenous peoples in their struggle to preserve physical and cultural survival in the face of

⁹⁴ (Werner, 2023, p. 397)

⁹⁵ (Gilbert, 2017, p. 685)

⁹⁶ See (Zezeza, 2007, pp. 491, 492), while international HR NGOs have made positive contributions and have worked with African NGOs, the capacity of the African NGOs are limited to undertake independent initiatives as they are largely dependent on northern and external resources and support, as they tend to be small in size, limited in budget, cluster in urban areas. Nevertheless, it has to be noted that there is a growing solidarity of purpose between indigenous and international NGOs and between NGOs and members of civil society.

⁹⁷ (Libório, 2021), Violations of HR and human dignity now translate into threats against the life or integrity of bodies subjected to violence or unnecessary suffering. The response is an intervention aimed at saving lives and relieving suffering, by suspending the reference to differences and inequalities, to treat human beings as beings vulnerable to suffering, threatened by violence, whether due to human action or disasters attributed to nature.

⁹⁸ (Gilbert, 2017, p. 672)

economic development projects imposed upon them, and which threaten environmental sustainability. International treaties and conventions are binding on signatories and also arguably are deemed part of customary IL or ‘general principles’. The most important issues today regarding the economic development concerns the question of whether the FPIC of indigenous people before economic development projects may legally proceed is required ; the question of what constitutes a legally sufficient consultation ; and the issue of whether economic development projects – under certain circumstances – are illegal under IL regardless of whether consent or consultation is required^{99,100} The HR Committee of the ICCPR in its General Comment 23, the monitoring body of the ICESCR and the monitoring body of the International Conventions on the Elimination of All Forms of Racial Discrimination in its General Recommendation 23 have all emphasized that indigenous communities have effective participation in decisions that affect the indigenous community and that no decisions are taken directly relating to the indigenous peoples’ rights and interest without their FPIC, and so international institutions strongly backed the FPIC principle.¹⁰¹ This led to the recognition of this specific right granted to indigenous peoples in international instruments ; the UNDRIP and the ILO Convention No.169. The FPIC principle is derived from indigenous peoples’ rights to land, territories and resources, cultural and self-governance rights, including the right to self-determination. FPIC allows indigenous peoples to provide or withdraw consent, at any point, regarding projects impacting their territories ; and to engage in negotiations to shape the design, implementation, monitoring, and evaluation of projects.¹⁰² To give an example, on November 11, 2012, 96% of the local peoples concerned rejected the operation of the mine in a public referendum ; following this referendum, in December 2013, the Constitutional Court of Guatemala in *Mataquescuintla v. Guatemala*, held that under the Convention No.169, the Government was required to obtain the peoples’ consent before it could proceed to permit a mining operation by a private corporation to begin production.¹⁰³ Regarding the FPIC principle,

⁹⁹ (Phillips, 2015, pp. 120,121)

¹⁰⁰ (Barrie, 2018, p. 180), see Article 32 and in particular Article 32(2) of the UNDRIP and Article 6(2) of the Convention No.169

¹⁰¹ Free : the consent is free, given voluntarily and without coercion, intimidation or manipulation. A process that is self-directed by the community from whom consent is being sought, unencumbered by coercion, expectations or timelines that are externally imposed. Prior : the consent is sought sufficiently in advance of any authorization or commencement of activities. Informed : the engagement and type of information that should be provided prior to seeking consent and also as part of the ongoing consent process. Consent : a collective decision made by the rightsholders and reached through a customary decision-making processes of the communities. See (Indigenous peoples : free, prior and informed consent , s.d.)

¹⁰² (Ndlovu & S. Nwauche, 2022, p. 202) “The principle of FPIC seeks to ensure that indigenous peoples are afforded opportunities to make free and informed choices about the development of their lands and resources.” ¹⁰³ (Soares, 2013)

its presence within national legislation is a crucial indicator of the extent to which the State recognizes indigenous peoples rights within its jurisdiction.¹⁰⁴ For instance, the elements of the FPIC principle are to be seen in Kenya's constitutional, statutory and policy provisions ; in its Article 63. Also, Article 36 of Kenya's Community Lands Act 2016 incorporates the elements of FPIC as defined in the Endorois and Ogiek decisions, establishes a clear path for its implementation and provides the closest and strongest articulation of FPIC in relation to indigenous peoples' lands, territories and resources, as it stipulates that investment in community lands must be made after a « free and open consultative process ». Through a democratic process, the community has the final say on development initiatives on its land. The Endorois and Ogiek decisions rulings keenly demonstrate that the UNDRIP has been continuously relied upon as an authoritative source of law and guidance by both the Commission and the Court in determining the scope of protection for indigenous peoples' rights in Africa. This builds on the Commission's clear approach to prioritizing indigenous rights on the continent even before the UNDRIP was adopted.¹⁰⁵ Even though, decisions sometimes challenge the idea that the State has a monopoly on the exercise of law, they have not led to any change in the practice of companies with regard to their obligation to consult indigenous populations on projects that affect them. Indeed, some States continue to oppose and undermine the FPIC HR standard. Indeed, there is still a wide gap between what is clearly established in IL and actual practice. However, a growing number of indigenous communities are able to assert their rights, and companies are generally expected to respect these rights and obtain FPIC. The risks associated with not obtaining FPIC, and the consequent lack of a social license to operate, are obvious. Many large-scale extraction projects have been halted or delayed for long periods due to protests from indigenous populations, and defending the interests of indigenous populations leads to questioning the legality of concessions and their potential revocation.¹⁰⁶ As Article 27 of the ICCPR supports the rights of indigenous people to preserve and enjoy their culture, it does make sense that IL provides support and a way of relief for indigenous people's rights ; and also, because usually corporations and governments

¹⁰⁴ In Latin America, indigenous peoples are attaining significant recognition of customary access rights to natural resources through the national courts. Several countries have passed laws or have jurisprudence that reference indigenous peoples' right to the FPIC principle.

¹⁰⁵ (Claridge, 2019), both the Court and the Commission have firmly embraced these concepts of indigenous peoples' rights, in relation to communal property rights over ancestral land, to rights to culture and religion and to freely enjoy their natural resources. A clear message is sent to Governments across the continent that indigenous peoples must be recognized and can no longer be routinely discriminated and marginalized.

¹⁰⁶ (MacInnes, Colchester, Whitmore, 2017, p. 158) "The message is clear. The extractive industry must toe the line on HR and pursue due FPIC processes or face increasing difficulties in dealing with both the local and the international community."

creating development do not take in perspective indigenous people's habits and rarely provide adequate replacements for subsistence economies which sustain indigenous peoples. This protection and preservation of indigenous peoples' customary land is even more important as it is a world heritage ; ongoing environmental degradation is a threat to the future survival of many indigenous peoples as their cultural identity and heritage are inextricably linked to their traditional lands. Also, protecting indigenous rights also protects the global environment. While indigenous peoples own, occupy or use a quarter of the world's surface area, they conserve 80% of the world's remaining biodiversity, and they hold vital ancestral knowledge and expertise on how to adapt, mitigate, and reduce climate and disaster risks.¹⁰⁷ Much of the land occupied by indigenous peoples is under customary ownership, yet many governments recognize only a fraction of this land as formally or legally belonging to indigenous peoples. Even when indigenous territories and lands are recognized, protection of boundaries or use and exploitation of natural resources are often inadequate. Insecure land tenure is a driver of conflict, environmental degradation, and weak economic and social development. This threatens cultural survival and vital knowledge systems – loss in these areas increasing risks of fragility, biodiversity loss, and degraded one health (or ecological and animal health) systems which threaten the ecosystem services upon which we all depend. Improving security of land tenure, strengthening governance, promoting public investments in quality and culturally appropriate service provision, and supporting indigenous systems for resilience and livelihoods are critical to reducing the multidimensional aspects of poverty while contributing to sustainable development and the Sustainable Development Goals. Also, as pointed out by the CBD, new objectives that will frame future global biodiversity policy against a backdrop of rapidly declining biodiversity and the pressure for transformative change are set. Indigenous peoples' conceptions of nature support and concretize the CBD's 2050 vision of "Living in harmony with nature". The participation of indigenous peoples and local communities in biodiversity policy contributes to the recognition of their rights and is essential to exercise their recognized rights to territories and resources.

6.3. Geographical perspective

In Australia, the Aboriginal and Torres Strait Islander Peoples are overrepresented in all aspects of the justice system. It is the result of a complex interplay of historical¹⁰⁸ and contemporary

¹⁰⁷ (Indigenous Peoples Overview , 2023)

¹⁰⁸ These historical factors have led to contemporary disadvantages that increase the likelihood of coming into contact with the justice system and being incarcerated.

factors and social determinants. For instance, they are more likely to be charged with offences, to receive harsher sentences for offences, also they are less likely to receive sentences that are alternatives to incarceration.¹⁰⁹ Aboriginal and Torres Strait Islander Peoples' access to justice in Australia depends on several core elements ; they must be able to exercise self-determination while maintaining their own cultural customs ; justice policy must be coordinated to ensure that they can access justice on the same terms as the dominant resident population in Australia and address the wide range of related issues that affect their ability to access justice. Everyone has a role to play in this – the Aboriginal and Torres Strait Islander people, NGOs, Government – and work together to facilitate access to justice for all Australians.

Regarding the Inter-American Court of HR, the case of *Awas Tingni v. Nicaragua*¹¹⁰ is the first legally binding decision by an international tribunal to uphold the collective land and resource rights of indigenous peoples in the face of a state's failure to do so. The judgment was given on August, 31, 2001, and the Court held that the international HR to enjoy the benefits of property¹¹¹ includes the right of indigenous peoples to the protection of their customary land and resource tenure. The Court ruled that the State of Nicaragua violated the property rights of the community by granting a foreign company a logging concession on traditional community land and by failing to adequately recognize and protect the community's customary land tenure. As a result in this case, the Court ordered Nicaragua to demarcate clearly and precisely and title Awas Tingni's traditional lands in accordance with its customary lands and resource tenure patterns.¹¹² The Court's interpretation avoids the discrimination of the past and instead of excluding indigenous modalities of property, it embraces them and marks a new path for understanding the rights and status of the world's indigenous peoples. A more recent case of the Inter-American Court of HR declared that Argentina¹¹³ violated indigenous groups' rights to communal property, a healthy environment, cultural identity, food, and water ; and order specific restitution measures.¹¹⁴ This decision marks an important milestone in the protection

¹⁰⁹ (National Congress of Australia's First Peoples — Solonec & Kiss, 2014, p. 50), Aboriginal and Torres Strait Islander peoples across Australia are overrepresented in the western justice system, and their involvement in the criminal justice system in particular reaches critical levels.

¹¹⁰ (The Mayagna (Sumo) Awas Tingni Community v. Nicaragua, 2001)

¹¹¹ As affirmed in the American Convention on HR, see particularly Article 21 (right to property), Article 26 (progressive development)

¹¹² (Grossman & Anaya, 2022), The decision of the Inter-American Court is an authoritative interpretation of the general HR to property that is grounded in various sources of IL.

¹¹³ (Indigenous communities of the Lhaka Honhat (our land) Association v. Argentina, 2020)

¹¹⁴ Including actions to provide access to adequate food and water, and the recovery of forest resources and indigenous culture.

indigenous peoples' rights, and in the extension of autonomous rights to a healthy environment, water and food, which are now directly justiciable under the Inter-American HR system.¹¹⁵

7. Conclusion

How to define indigenous peoples, their right to self-determination and their collective versus individual rights are contentious issues in our modern society. Even though the recognition of indigenous peoples is more and more accurate, indigenous peoples continue to experience political subjugation, economic marginalization, language and cultural discrimination and land dispossession. In terms of the development of an indigenous jurisprudence, regional decisions provide a platform for further action by the indigenous peoples. It will be necessary to monitor the implementation of these rulings and analyze the consequences of these cases on the recognition of the fundamental rights of indigenous peoples. Related to jurisprudence, a more practical aspect regards engaging with litigation ; which is lengthy, technical, costly. For the recognition of indigenous rights to be really accurate, several changes should be made. It is at the domestic level that the interpretation and implementation of the ACHPR and other fundamental rights instruments must be felt and resonate. In fact, the regional HR system in Africa depends largely on the political context of member states and political realities at the regional continental level, including the incomplete and often uncertain nature of the political integration. It is therefore imperative that the Commission overcomes these challenges, such as its inability to effectively address issues of poverty through socio-economic rights, serious or massive violations and the rights of the most vulnerable and marginalized. It is important for the Commission to develop consistent, substantiated and indigenous jurisprudence. A point to be raised that could be highly contentious and problematic for the future concerns climate change and the indigenous peoples who could be climate refugees. For now, the Inter- American Court of HR has not yet heard cases involving pollutions, contamination, environmental disasters, or cases involving climate change or climate refugees, but this may happen even sooner than we think.

¹¹⁵ (Tigre, 2021, p. 712), The judgement of this decision opens the door to new categories of claims in the Inter-American system, including the protection of the environment, environmental justice may find a new avenue for justiciability.

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