

**INDIGENOUS PEOPLES AND THEIR RIGHTS : WITH SPECIAL REFERENCE TO  
THEIR LAND RIGHTS AND THE RIGHT TO SELF-DETERMINATION IN  
INTERNATIONAL LAW : A COMPARATIVE STUDY WITHIN THE SOUTH AFRICAN  
LAND RIGHTS CONTEXT**

**BY**

**VULANI JOY GWENDOLINE BALOYI**

**B Iuris, LLB (UZ)**

**Diploma in International Law (University of Melbourne)**

**A DISSERTATION SUBMITTED IN PARTIAL FULFILMENT OF THE REQUIREMENTS  
FOR THE DEGREE OF MASTERS LEGUM IN THE FACULTY OF LAW AT THE  
UNIVERSITY OF ZULULAND**

**PROMOTOR : PROF M G ERASMUS  
DEAN: FACULTY OF LAW  
UNIVERSITY OF ZULULAND**

**EXTERNAL EXAMINER : DR T ROUX  
CENTRE FOR APPLIED LEGAL STUDIES  
UNIVERSITY OF THE WITWATERSRAND**

**DATE SUBMITTED : JANUARY 2000**

# TABLE OF CONTENTS

	PAGE
DEDICATION.....	[ii]
ACKNOWLEDGMENTS.....	[iii]
SUMMARY.....	[v]
OPSOMMING.....	[viii]
<b>CHAPTER 1</b> .....	<b>1</b>
1. INTRODUCTION.....	1
1.1 Introductory Remarks .....	1
1.2 On Land Rights.....	2
1.3 On Self-determination .....	7
1.4 Structure of Thesis .....	8
<b>CHAPTER 2</b> .....	<b>11</b>
2. HUMAN RIGHTS GENERALLY .....	11
2.1 Definition of the term 'Indigenous People' .....	11
2.2 Indigenous Rights : Generally .....	14
2.2.1 A Catalogue of Indigenous People's Rights as a Group .....	15
2.2.1.1 The Right to Existence.....	15
2.2.1.2 The Right to Non-discrimination .....	16
2.2.1.3 The Right to Culture .....	17
2.2.1.4 The Right to the Preservation of the Identity of the Group .....	19
2.2.1.5 The Right to Special Measures .....	19
2.2.1.6 The Right to Self-determination, Land and Natural Resources .....	22

	PAGE
<b>CHAPTER 3</b> .....	21
3. LAND RIGHTS AND THE IMPACT OF LAND DISPOSSESSION ON INDIGENOUS PEOPLES AND THE ENVIRONMENT .....	21
3.1 Land Rights .....	21
3.2 The Impact of Land Dispossession on the Environment and Indigenous Peoples .....	25
3.2.1 Summary of Some of the Disadvantages of Land Dispossession and Modern Industrialisation .....	40
<b>CHAPTER 4</b> .....	46
4.1 Self-Determination in general .....	46
4.2 The Definition of Self-determination and its Many Manifestations .....	48
4.3 Internal and External Self-determination .....	50
4.3.1 Internal Self-determination (The Protection of the People) .....	51
4.3.2 External Self-determination (The Protection of the States) .....	52
4.4 Basis of the Right of Self-determination for Indigenous Peoples .....	53
4.5 The Exercise of the Right of Self-determination (The Substantive Result of Self-determination) .....	54
4.5.1 External Status of Self-determination .....	54
4.5.2 Internal Status of Self-determination .....	54
4.6 Claims by Indigenous Peoples to Self-determination and Barriers to the Claims of Self-determination .....	55
4.6.1 The Peoples' Approach to the Right of Self-determination .....	55
4.6.1.1 The Problem of Defining the Term People .....	58
4.7 Self-determination and Decolonisation .....	61

	PAGE
4.8 Self-determination and Equality .....	61
4.9 Self-determination, Sovereignty and Statehood .....	63
4.10 Self-determination and Cultural Integrity .....	64
4.11 Self-determination and Secession .....	64
4.12 Self-determination and Territorial Integrity .....	67
4.13 Self-determination and Autonomy .....	67
<b>CHAPTER 5 .....</b>	<b>70</b>
<b>5. THE RELATIONSHIP BETWEEN SELF-DETERMINATION, LAND RIGHTS AND NATURAL RESOURCES .....</b>	<b>70</b>
5.1 Generally .....	70
5.2 Economic Development .....	72
<b>CHAPTER 6 .....</b>	<b>78</b>
<b>6. INTERNATIONAL FRAMEWORK FOR INDIGENOUS PEOPLE'S RIGHTS (Especially Rights Within the Scope of this Thesis i.e. Land Rights, Self-determination, Environment, Natural Resources, etc.) .....</b>	<b>78</b>
6.1 United Nations Framework and Indigenous Rights in General .....	78
6.1.1 On the Rights of Existence .....	78
6.1.2 On the Right to the Preservation of the Identity of the Group ..	80
6.1.3 On the Right of Non-discrimination .....	81
6.1.4 On the Right of Special Measures .....	82
6.2 The United Nations Framework on Land, Natural Resources and Environment.....	82
6.2.1 United Nations Working Group on Indigenous Peoples (Draft Declaration on the Rights of Indigenous Peoples)	84

	PAGE
6.2.2 Draft Declaration on Discrimination Against Indigenous Peoples .....	85
6.2.3 Lil'wat Nation - Introduction and Application for Membership Into the International League of the United Nations .....	88
6.2.4 Alternatives to Development: Environment Values of Indigenous Peoples .....	90
6.2.5 National Maori Congress .....	93
6.2.6 United Nations Working Group on Indigenous Populations ....	94
6.2.7 World Council of Indigenous Peoples: Land Rights of the Indigenous Peoples, International Agreements and Treaties, Land Reform and Systems of Tenure .....	95
6.2.8 World Council of Indigenous Peoples, Indigenous Philosophy and Land .....	97
6.2.9 Report of the Working Group on indigenous Populations on its Twelfth Session .....	99
6.3 The ILO Conventions Framework .....	104
6.3.1 The ILO Convention 107 of 1957 .....	104
6.3.2 The ILO Recommendation 104 .....	105
6.3.3 The ILO Convention 169 of 1969 .....	106
6.4 United Nations Framework on the Right to Self-determination for Indigenous Peoples .....	108
6.4.1 On Self-determination - Generally .....	108
6.4.2 On International Self-determination .....	121
6.4.3 On Self-determination and the Term Peoples .....	122
6.4.4 On Self-determination and Equality .....	123
6.4.5 On Self-determination and Cultural Equality .....	124

	PAGE
6.4.6 On Self-determination and Secession .....	125
6.4.7 On Self-determination and Decolonisation .....	125
6.4.8 On Self-determination and Territorial Integrity .....	126
6.4.9 On Self-determination, Sovereignty and Statehood .....	126
6.5 The United Nation's Framework on Self-determination, Land and Natural Resources .....	128
6.6 ILO Framework and the Right to Self-determination for Indigenous Peoples .....	130
6.6.1 ILO Convention 107 of 1957 .....	130
6.6.2 ILO Convention 169 of 1989 .....	132
6.6.2.1 On Special Measures .....	132
6.6.2.2 On Self-determination and Cultural Integrity .....	133
6.6.2.3 On Self-determination and the Term Peoples .....	133
6.7 The ILO Framework on Self-determination, Land and Natural Resources .....	134
6.8 The Inadequacies of the Present International Law in Recognising the Right of Self-determination for Indigenous Peoples .....	136
6.8.1 The Term 'Peoples' as a Barrier for the Recognition of Self-determination for Indigenous Peoples .....	136
<b>CHAPTER 7</b> .....	<b>139</b>
<b>PART I LAND RIGHTS : THE SOUTH AFRICAN LAW CONTEXT AND THE LEGISLATION TOWARDS LAND REFORM</b> .....	<b>139</b>
7.1 Historical Background .....	139
7.1.1 Introduction .....	139
7.1.2 Race Zoning as the Spatial Dimension of Apartheid .....	141

	PAGE
7.1.3 The Native Land Act 27 of 1913 .....	146
7.1.4 The Bantu Trust and Land Act No. 18 of 1936 .....	148
7.1.5 Analysis of the Existing Rights to Land, Natural Resources, Environment and Development in the Rural Race Zones/Homelands .....	149
7.1.6 A Revolution for Black Land Rights : Towards Land Reform ...	153
7.1.7 Why the Background .....	156
7.2 Redistribution of Land and the Doctrine of Aboriginal Title in South Africa .....	157
7.3 Land Reform in South Africa: the Post-apartheid Era .....	166
7.3.1 'Reform Era' of the Past Decade in South Africa .....	166
7.3.2 Post-apartheid Land Reform .....	171
7.4 Restitution of Land Under the Constitution .....	176
7.4.1 Constitution of the Republic of South Africa Act 200 of 1993 ..	176
7.5 Restitution of Land rights Act 22 of 1994 .....	184
7.6 Restitution of Land under the Aboriginal Title .....	190
7.7 Redistribution of Land .....	193
7.8 Land Rights Under the Constitution of the Republic of South Africa Act 108 of 1996 .....	194
<b>PART II THE APPLICATION OF INTERNATIONAL PARTICIPATION TO SOUTH AFRICA'S PROBLEMS .....</b>	<b>198</b>
7.9 National Self-determination in Africa .....	199
7.9.1 What is a National Self? .....	204
7.10 The South Africa Case on Self-determination .....	207

	PAGE
<b>CHAPTER 8</b> .....	211
8. Conclusion .....	211
8.1 Findings on Land Rights and the Impact of Land Dispossession on Indigenous Peoples and the Environment .....	211
8.1.2 Recommendations .....	213
8.2 Findings on Self-determination and Indigenous Peoples .....	214
8.2.1 Recommendations .....	217
8.3 Land Rights and Self-determination in South Africa : A Comparison .....	222
<b>ANNEXURE 1 : The Constitution of the Republic of South Africa Act 200 of 1993</b> ...	226
<b>ANNEXURE 2 : Restitution of Land Rights Act 22 of 1994</b> .....	233
<b>ANNEXURE 3 : Restitution of Land Rights Amendment Act 84 of 1995</b> .....	248
<b>ANNEXURE 4 : Land Reform (Labour Tenants) Act 3 of 1996</b> .....	249
<b>ANNEXURE 5 : Land Restitution and Reform Laws Amendment Act 78 of 1996</b> .....	252
<b>ANNEXURE 6 : The Constitution of the Republic of South Africa Act 108 of 1996</b> ..	260
<b>BIBLIOGRAPHY</b>	
Books .....	260
Articles .....	265
Acts .....	276
Cases .....	277
Dictionaries .....	277
Journals .....	278
United Nations Documents .....	280
International Labour Organisations (ILO) Conventions .....	283



# **DEDICATION**

TO MY SON ANDILE

For taking so much of your time son, this work is proudly dedicated to you.

## ACKNOWLEDGMENTS

- To the almighty God: Thank you Father for making even the most difficult things possible for me. With You all things are possible.
- To Prof M G Erasmus, my promoter: Thanks so much for your invaluable advice and assistance all the way up to the final stages of this thesis. Without your patience this work could not have come about. Thanks also for your support.
- To my son Andile: Ever since I conceived you, I never had time to actually bond with you. I was just trying to give you the best gift that a mother could give to the future of her child, i.e. better education. Don't worry now, its all over. Mummy will now dedicate the rest of her life to you son. Remember mummy loves you more than the whole world — and then some more!
- To my father Eric Baloyi: Thank you for being the best father in the whole world. Without your guidance and discipline I could not have managed to attain which I have.
- To my little brother Ponani Cassius: You are still my best friend you know. You are the only person who really understands my feelings. You believe in me. Thanks for everything dear brother, things we've shared from childhood and things that we still share today. You are one in a million. Most of all, thank you for being my brother.
- To my special friend Hlekulani Mathebula Sithole: Thanks so much for being such a special, faithful, loyal friend and for everything we've shared through thick and thin. You taught me what friendship means and for this reason I will forever value our friendship.
- To Prof G S Nzimande, Senior Lecturer, Faculty of Law, University of Zululand: Thank you so much for your support, encouragement, and for the fatherly advice. I'll never forget everything you've done for me.
- To all my colleagues at the Law Faculty, University of Zululand, 1996–1997: Thank you so much for all the support and encouragement.
- My alma maters, Unizul and the University of Melbourne, in particular the Law

Schools, should be credited for the strong legal foundation you gave me.

- To the Mkhwanazi family, the Mazibuko family and the Nkuna family: Thanks for the support and for standing by me when things were rough. You are like family to me.
- To Aunty Thoko: Thanks so much for taking care of my son so well whilst I did my studies. God bless you.
- To Kulani Zitha and Mr Sam Makamu: Thanks for helping me with research materials. That's what friends are for, helping each other.
- To all those who touched my life: Thank you so much for everything.
- Finally to Mrs S J Clarke: For typing this work so neatly and for the words of encouragement.

## SUMMARY

The problem of land rights for indigenous peoples is one closely linked to the right of self-determination. A problem which poses a barrier to such right is the meaning of the adjective "indigenous". While it is commonly used to denote that the subject is simply native to a place, its usage in referring to indigenous peoples in the context of international human rights is narrower. A definition that has been proposed, and which is generally used as a working definition for the purposes of international action, is the Martinez Cobo definition. According to this definition, indigenous peoples are also classified as minorities.

Other human rights closely connected to the right to land and self-determination for indigenous peoples are group rights, the right to existence, right to non-discrimination, the right to own culture, right to preservation of the identity of a group and the right to natural resources.

Land dispossession does not only have a negative impact on indigenous peoples, but on all humankind and also on the environment. Indigenous peoples also want to share in the natural resources of their land. Modern industrialisation for the purpose of economic development has also caused damage to the environment and to indigenous peoples. The impact of landlessness is a problem which needs to be addressed.

The right of self-determination is an important right for indigenous peoples. The five manifestations of such a right are discussed in Chapter 4. Self-determination has both an external and an internal aspect.

The problem of defining the term 'peoples' is said to be a barrier to the exercise of the right

of self-determination by indigenous peoples. Self-determination is related to aspects such as decolonisation, equality, sovereignty, statehood, cultural integrity, secession, territorial integrity and autonomy.

The relationship between self-determination, land rights and natural resources is dealt with in Chapter 5. International institutions such as the United Nations and International Labour Organisations have intervened in trying to solve the land rights and self-determination problems for indigenous peoples.

A comparative study within the context of the South African Law, covers the following aspects:

1. The historical background of land rights in South Africa.
2. The racial zoning of various parts of the Republic into homelands and the division of lands into locations, tribal-bought land, privately-bought land and Trust land.
3. The provisions of the Native Land Act of 1913 and the Bantu Trust and Land Act 18 of 1936.
4. Land Reform for Black Land Rights legislation towards such reform, and the provisions of the Freedom Charter of the ANC.
5. The Redistribution of land under the doctrine of Aboriginal Title.
6. Land Reform after 1994.

7. The provisions of both the 1993 and the 1996 SA Constitution Acts.

Part II of Chapter 7 deals with the exercise of the right to self-determination in South Africa.

The question as to what is a 'national self' is considered as compared to the international definition of the term 'peoples'.

Although the land rights and self-determination problem for indigenous peoples is a global problem which needs immediate legal attention, South Africa is also moving along with the provisions of various international instruments towards land reform. In search for a solution towards these problems, the effect of existing legislation towards land reform is analysed. It is clear that 'real' land reform cannot happen overnight.

## OPSOMMING

Die probleem van grondregte van inheemse bevolkings hou verband met die reg tot selfbeskikking. 'n Probleem in die toepassing van hierdie grondregte is die presiese betekenis van die term "inheemse bevolking". In die algemeen verwys die begrip net na 'n inboorling van 'n plek. Maar vir internasionale menseregte is die interpretasie meer beperk. Die definisie wat voorgestel, en oor die algemeen aanvaar word as 'n meganisme vir enige internasionale aksie, is die definisie van Martinez Cobo. Inheemse bevolkings word ook geklassifiseer as minderhede.

Ander menseregte wat nou verband hou met die reg tot grond en selfbeskikking vir inheemse bevolkings is groepsregte, die reg om te bestaan, die reg tot nie-diskriminasie, die reg op 'n eie kultuur, die reg op die beskerming van 'n groep se identiteit, en die reg tot natuurlike hulpbronne.

Die ontneming van grond het nie net 'n negatiewe effek op inheemse bevolkings nie, maar ook op die mensdom as geheel, en die omgewing waarin die mens lewe. Inheemse bevolkings wil graag deel hê aan die natuurlike hulpbronne van hulle grond. Industrialisasie en ekonomiese ontwikkeling het ook die omgewing en inheemse groepe skade aangedoen. *Die effek van geen grondbesit is inderdaad 'n probleem wat aangespreek moet word.*

Die reg op selfbeskikking is 'n belangrike reg van inheemse bevolkings. Die vyf aspekte van hierdie reg word in hoofstuk 4 bespreek. Selfbeskikking het beide 'n interne sowel as 'n eksterne effek. Die definisie van 'bevolking' is vir sommige 'n struikelblok in die uitoefening van die selfbeskikkingsreg van inheemse bevolkings. Selfbeskikking hou verband met dekolonisasie, gelykheid, soewereiniteit, nasieskap, kulturele regte, afskeiding

en territoriale integriteit en outonomie.

Die verhouding tussen selfbeskikking, grondregte en natuurlike hulpbronne geniet aandag in hoofstuk 6. Internasionale liggame soos die VVO en die Internasionale Arbeidsorganisasie het self probeer om probleme rakende grondregte en selfbeskikking van inheemse bevolkings op te los.

'n Vergelykende studie van die posisie in Suid Afrika dek die volgende:

1. Die historiese agtergrond van grondregte.
2. Die afbakening van gebiede volgens ras in tuislande, en die verdeling van grond in lokasies, stamgrond, private grond en trustgrond.
3. Die bepaling van die Naturelle Grondwet 27 van 1913 en die Bantoe Trust en Grondwet 1 van 1936.
4. Grondhervorming, wetgewing in dié verband, en die bepalings van die 'Freedom Charter' van die ANC.
5. Die herverdeling van grond ingevolge die leerstuk van die oorspronklike inwoners se titelakte.
6. Grondhervorming na 1994.
7. Die bepalings van beide die 1993 en die 1995 SA Konstitusies.



Deel II van hoofstuk 7 dek die uitoefening van selfbeskikking in Suid Afrika. Die vraag na wat bedoel word met 'bevolking' word bespreek en vergelyk met die internasionale definisie van die begrip.

Alhoewel grondregte en selfbeskikking van inheemse groepe 'n wêreld-wye probeem is wat dringende aandag van regslui moet geniet, beweeg Suid Afrika ook saam met die internasionale gemeenskap met sogenoemde grondhervorming. In 'n poging om 'n oplossing vir hierdie probleme te vind, word die huidige wetgewing in dié verband bespreek. Al wat seker is, is dat ware grondhervorming nie oornag kan geskied nie.

## **CHAPTER 1**

### **1. INTRODUCTION**

#### **1.1 Introductory Remarks**

Not only the rights of South African indigenous peoples, but the rights of indigenous peoples of the world as a whole have traditionally been ignored. It is for this reason that the writer will focus not only on the rights of South African indigenous people, but also on those of international indigenous peoples. Paramount of all rights, is the right to their ancestral lands and the right of self-determination. For indigenous peoples all other rights come after the ones I have mentioned above. Even here in South Africa, after indigenous peoples won their freedom, the first problem that they wanted to be solved or dealt with was the land problem. The land problem therefore remains a current issue in South Africa in spite of the advent of democracy. Ownership of land is the only way in which indigenous peoples of the world can maintain self-determination.

Therefore, the aim of this thesis will be to show that the problem of rights, especially that of land rights and self-determination, do not only affect South African indigenous people, but indigenous peoples of the world. This means that the study will be dealt with at an international law level, comparatively. The real reason why the rights to land and that of self-determination are dealt with simultaneously, is that ownership of land is

the only way in which indigenous people may be able to exercise their right of/to self-determination. Whilst all problems pertaining to rights are being solved, the problem of land rights remains a current issue which deserves or needs immediate legal attention.

Land dispossession does not only affect the indigenous populations, but the entire nation as such, and so-called development projects furthermore affect the environment and leave it barren for all. This study will also attempt to indicate the interests of indigenous peoples in natural resources.

The author will refer to books, journals and articles in order to share the views of other writers. The role of international instruments, such as the United Nations and the International Labour Conventions, will also be considered in this regard. Since this paper focuses on land problems of indigenous peoples at an international level and also of South African indigenous peoples comparatively, it will also deal with the provisions of sections of the Constitution of the Republic of South Africa Act 108 of 1996.

## **1.2 On Land Rights**

The "New South Africa" (South Africa after 27 April 1994) is a country where the issues of land rights and the human rights of indigenous peoples are presently the most controversial. Land rights and human

rights are issues so closely intertwined that they cannot be separated and so sensitive that they cannot be ignored. The present situation in the country served as a source of inspiration that led to the exploration of this controversial issue.

The land rights question is probably one of the most emotive issues for South African indigenous peoples. It is also a global problem. It was only recently that instruments of positive international law in respect of indigenous populations were ratified.<sup>1</sup> Traditional international law did not regard indigenous people as subjects of international law. But today issues concerning the situation of indigenous populations are given increasing attention at international level. This is a dimension of human rights which has been neglected in the past.<sup>2</sup> International instruments for the protection of people's rights have done little in so far as the fields of land and human rights are concerned.

The essential problem regarding indigenous populations is their lack of control over, or inadequate influence on, the political and economic institutions which determine their lives.<sup>3</sup> The question which now comes to the fore is whether the situation will change in South Africa now that the indigenous people<sup>4</sup> are in power? All instruments make provision for

---

1. Lerner (1991) 99.

2. Eide (1987) 12.

3. Eide (1987) 13.

4. For a clear definition of 'indigenous peoples' applicable to this thesis, refer to Chapter 2, 2.1.

the protection of human rights, including the rights of indigenous peoples, who are equally entitled to the rights envisaged by these instruments. They must have the right to the full and effective enjoyment of the fundamental rights and freedoms universally recognised in existing international instruments. Most writers seem to agree with this view. For example, Suagee <sup>5</sup> postulates that indigenous people are part of the human family and it should be recognised that they are entitled to human rights under international law as a matter of principle.

Recently an international movement has emerged recognising that indigenous peoples are indeed members of the human family and are entitled to human rights and dignity.<sup>6</sup> Whatever way these writers put it, the fact still remains that indigenous people are part and parcel of the human family and deserve to be treated as such. Legal recognition of certain indigenous rights should be granted.

Today we have many indigenous tribes fighting for their land and human rights. Hence, this is clearly a global problem. We have the Maoris of New Zealand, the Amerindians of South America, the Aborigines of Australia, the Laps, the Eskimos and many more. It is believed that it is difficult to determine whether there are indigenous populations in Africa

---

5. Suagee (1992) 681.

6. Suagee (1992) 673.

today, and what specific populations are to be included in this category.<sup>7</sup>

Indigenous people therefor constitute a major part of the world population. There are at least sixty identified tribes of indigenous people world-wide and they inhabit all continents.<sup>8</sup> According to Burger<sup>9</sup> there are an estimated 200 million indigenous people, totalling 4 percent of the global population and living in all continents. On the other hand, Lerner<sup>10</sup> holds the view that aborigines and tribal peoples today include some 300 million human beings. Green<sup>11</sup> however supports the view that it is difficult to determine which populations or groups should be considered to be 'indigenous'. Suagee<sup>12</sup> agrees with both Lerner and Burger, as quoted above, on the estimated number of indigenous people world-wide. He is of the opinion that the total population of indigenous people is estimated to be from 200 to 300 million people.<sup>13</sup> Indigenous people therefore constitute 4 to 5 percent of the world population. They, like all people, are also an essential part of the environment.

---

7. Eide (1987) 13.

8. Bailey (1990) 192.

9. Burger (1988) 101.

10. Lerner (1991) 100.

11. Green (1983) 339.

12. Suagee (1992) 679.

13. Suagee (1992) 679.

Colonisation is the principal root of indigenous people's sufferings. The distinction between populations as indigenous or non-indigenous reflects the legacy of the age of colonialism. This means that indigenous people of the world are a heritage of colonialism.<sup>14</sup> The concept of indigenous people is associated with colonialism and the aggression of foreign nations or powers. This resulted in the dispossession and isolation of these peoples.<sup>15</sup> The world's indigenous people have suffered at the hands of various colonial powers in the past, and are still victims of the present day economic, social and environmental policies. National histories need to be revised so that they describe accurately the impact of colonisation on indigenous societies. The colonial attitude was characterised by a strong sense of intellectual, moral and material superiority. To a large extent this colonial attitude still prevails. Indigenous people continue to be regarded by governments and institutions as being 'behind' and uncivilised.<sup>16</sup> They are nothing more than colonised peoples who were missed by the great wave of global decolonisation.<sup>17</sup> It is tragic and unfortunate that international law became a legitimising force for colonisation.<sup>18</sup> Actually, in as far as colonisation is concerned, one can summarily say that the general effect

---

14. Burger (1988) 100.

15. Gu Yijie, Chinese member of the Working Group of Indigenous peoples.

16. Burger (1988) 109.

17. Barsh (1986) 373.

18. Suagee (1992) 683.

of colonisation was to subject indigenous populations to the law of the conquering power as soon as a new territory was subdued.

### 1.3 On Self-determination

The concept of self-determination is part of international law's expanding lexicon of human rights.<sup>19</sup> It is one of the powerful concepts promoted by the United Nations. The subject of self-determination is closely connected to the position of indigenous peoples and also to such issues as minority rights. Traditional international law did not regard indigenous peoples as subjects of international law. It was generally accepted that the principle of self-determination could be invoked only for the liberation of colonial peoples in non-metropolitan territories.<sup>20</sup> Indigenous peoples were therefor not regarded as colonial peoples, as this form is understood in the United Nations era, and as entitled to self-determination as the right is interpreted in international law today.<sup>21</sup> The right of self-determination has become an integral part of customary international law and to an increasing extent has been accorded not only to peoples under colonial domination but also to those within the Afro-Asian Nations, the Middle East and the Americas.<sup>22</sup>

---

19. Anoya (1994) 321.

20. Bennett (1978) 50.

21. Lerner (1991) 99.

22. Bennett (1978) 51.



From the introductory part on land rights above we have seen that the estimate on indigenous populations, aborigines and tribal peoples today include some 300 million human beings <sup>23</sup> and that they inhabit all major regions of the globe. To ignore the rights of such a large number of peoples will be on a par with committing such cruelties as the Apartheid system inflicted on Black South Africans. It is for this reason that the author takes special cognisance of the rights of indigenous peoples and specifically their right to self-determination.

The chapter on self-determination is premised on the assumption that there is a general right to self-determination embodied in international law. The author approaches this thesis in the hope that it will challenge the readers to help make the principle of self-determination for indigenous peoples a reality.

#### **1.4 Structure of Thesis**

*This thesis consists of 8 chapters. Reference shall be made to textbooks, legal articles, court decisions and relevant statutes. Public opinion shall also form part of this work.*

Chapter 1 deals with the introductory part.

Chapter 2 deals with human rights in general, especially as they apply or

---

23. Lemer (1991) 100.

relate to the rights of self-determination and the right to land. Issues such as the right to existence, and the right of non-discrimination, the right to preservation of the identity of the group and the right to special measures will be considered.

Chapter 3 deals with land rights. The reason for this is because they are the rights which adversely affect the status of indigenous people in the international law context. The right to own land is an essential distinguishing feature applicable to indigenous people as against non-indigenous people who, seemingly, have usurped such rights. This right stems from the special and unique relationship which they share with the lands in which they live. The impact of land dispossession on the environment and indigenous people will also be dealt with.

Chapter 4 addresses the claims made by indigenous peoples to the right of self-determination. *Barriers to the legal recognition of the right to self-determination* will also be dealt with. Self-determination as it relates to concepts such as peoples, decolonisation, land and natural resources, equality, sovereignty and statehood, cultural integrity, secession and territorial integrity will also be discussed. The general approach or content of the right of self-determination will also be considered.

Chapter 5 considers the relationship between self-determination, land rights and natural resources.

Chapter 6 deals with the question as to how far instruments such as the United Nations Charter and the International Labour Organisation Conventions have dealt with the problems of self-determination and land rights. This means that this chapter examines international human rights protection of indigenous peoples, particularly in so far as the right to self-determination for indigenous peoples is concerned. This will be discussed within the context of the United Nations and International labour Organisation. The inadequacies of these instruments will be discussed, specifically based on the restricted interpretation of the term 'peoples' for the purpose of self-determination.

Chapter 7 deals with the issue of land rights and self-determination specifically based on the South African Law context and the new Constitution as well as some comparisons based on the approach found in the international context.

Finally, Chapter 8 concludes the discussion. In this regard the findings and evaluation of the whole discussion will be made. Recommendations will also be made and, finally, concluding remarks will be offered.

## CHAPTER 2

### 2. HUMAN RIGHTS GENERALLY

#### 2.1 Definition of the term 'Indigenous People'

Before one can embark on a discussion of indigenous peoples and their rights, it is important to first define who these indigenous peoples are. Defining indigenous peoples is difficult.<sup>24</sup> For this reason, it comes as no surprise that there is still no universally accepted definition of indigenous peoples.<sup>25</sup> *The existence of the word 'indigenous' is said to be an incident of history.*<sup>26</sup> As E Mompoin<sup>27</sup> explains, 'indigenous' depends on historical circumstances. Although there exists no commonly accepted definition of indigenous peoples, the UN Special Rapporteur Martinez Cobo's definition of indigenous peoples may serve as a point of departure:

Indigenous communities, peoples and nations are those which, having a historical continuity with pre-invasion and pre-colonial societies that developed in 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 the society and are determined to preserve, develop and

---

24. Lerner (1991) 215.

25. Brollman and Zieck (1992) 190.

26. Barsh (1986) 373.

27. Of the Centre for Human Rights.

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.<sup>28</sup>

Indigenous peoples argue that the definition would not be appropriate without representative indigenous participation. The definition of indigenous people comprises four contemporary elements, namely: pre-existence (often referred to as historical continuity), distinct cultural forms, non-dominance and self-identification,<sup>29</sup> with historical continuity being the most important element. Historical continuity may refer to one of the following factors:

- (a) occupation of the common ancestral lands,
- (b) common ancestry with the original occupants of the land,
- (c) a distinctive culture, language or
- (d) residence in certain regions of the country.<sup>30</sup>

Indigenous peoples are treated as minorities in certain circumstances so that there exists a certain relationship between them and other groups.

---

28. Jose Martinez Cobo, United Nations, Economic and Social Council, Commission on Human Rights, Sub-Commission on Prevention of Discrimination and the Protection of Minorities Study of the problem of Discrimination against populations 29, UN Doc. E/CN4/Sub. 2 1986/7/Add. 4, UN Sales No. E86, XIV.3 (1987).

29. Brollman and Zieck (1992) 191.

30. Lerner (1991) 216.

This is evident from the fact that the elements of distinct cultural forms and non-dominance, as endorsed in the definition of indigenous peoples, frequently feature in the definition of minorities as well. Minorities are defined as follows:

a group of persons living in a given country or locality, having a race-religion, language and traditions in a sentiment of solidarity, with a view to preserving their traditions, maintaining their forms of worship, ensuring the instruction and upbringing of their children in accordance with the spirit and traditions of their race and rendering mutual assistance to each other.<sup>31</sup>

However, the term 'minorities' seems to refer to ethnic minorities rather than indigenous minorities.

Although most indigenous peoples easily fit this definition, they object to being regarded as minorities, their argument being that the term denies them their separate and unique identity. Indigenous peoples of the world are claiming the right to be recognised as peoples rather than as minority populations.

The concept of populations is frequently included in the definition of indigenous groups. This is done so that no question of self-determination can arise.<sup>32</sup>

---

31. Bailey (1990) 7.

32. Show (1990) 27.

Indigenous experts maintain that the use of the term 'populations' is demeaning and should be replaced with 'people'. Thus the Martinez Cobo definition is too broad to achieve widespread acceptance, especially in as far as the right to self-determination is concerned. Self-determination constitutes the exercise of free choice by indigenous peoples, who must, to a large extent, create the specific content of the principle, in both its internal and external aspect expressions. This right may in fact be expressed in various forms of autonomy within the State.<sup>33</sup>

## **2.2 Indigenous Rights : Generally**

Indigenous peoples have experienced many periods of trial, and in many parts of the world have endured up to the present as united peoples.<sup>34</sup> They have for centuries been subjected to discrimination, exploitation, dispossession and relocation. The indigenous peoples of South Africa may serve as a good example in this regard. South Africa has also experienced the processes that lead to reservations, removals, allotment, assimilation, re-organisation and termination. This was done for political and economic motives.<sup>35</sup> The situation is even aggravated by the fact that the concept of the protection of indigenous people's rights is a new phenomenon.

---

33. Bryant (1992) 267.

34. Opekokew (1987) 2.

35. McCarquadale (1994) 4.

### **2.2.1 A catalogue of Indigenous People's Rights as a Group**

Indigenous peoples today are fighting for various principal rights. These rights constitute the main issues that concern indigenous peoples and therefore deserve special attention in international law. The focus is not solely on political rights but includes all the other categories of rights identified by indigenous peoples as essential to their survival. Amongst other rights these include the protection of their language and culture, a right to education in a manner consistent with local tradition, rights to other social services and, of course, rights to land and to/of self determination.

Therefor a tentative minimal catalogue of these rights of the group may include the following:<sup>36</sup>

#### **2.2.1.1 The Right to Existence**

*This is a right which is necessary for a group to remain alive.* For a group to remain alive as such, the physical existence of its members has to be ensured against attempts to destroy the group by the massive extermination of its members. Many Government officials and political figures around the world hope for the disappearance or assimilation of indigenous peoples.

---

36. Lemer (1991) 34.



This brings about the threat of cultural genocide.<sup>37</sup> Genocide is a well-known and terrible crime. This crime is too common, a part of indigenous people's history and a regrettable part of their present. In Australia, this was done by taking indigenous children away from their parents, encouraging marriages between indigenous peoples and Europeans, with the hope that with time indigenous peoples would disappear or assimilate forever. This was also an act of Australian Authorities. Indigenous peoples of Australia soon became minorities in their own country. The Aboriginal population was also encouraged to assimilate itself to the regime of the Australian Government. It is also within the last twenty years that public notice has been taken of the fact that native peoples have not been fully assimilated and that they are suffering serious economic and social discrimination.<sup>38</sup> Although some indigenous peoples do not face imminent threats to their survival as distinct peoples, many do, and the forces that threaten them are largely beyond their control.

#### **2.2.1.2 The Right to Non-discrimination**

*The recognition of group rights by International law is closely*

---

37. Lemer (1991) 34.

38. Bennett (1995) 17.

related to the notion of discrimination and to the principle of non-discrimination.<sup>39</sup> In actual fact, international law began as an attempt to protect groups discriminated against.<sup>40</sup> This right implies in a broad sense not only the right of formal equality, but also the prohibition of unequal treatment in a material, effective sense.<sup>41</sup> Discrimination against indigenous peoples stems from their distinct race, religion, language and traditions.

Apartheid in South Africa can serve as a perfect example of an instance of racial discrimination as an official policy of a government. Racial discrimination is still a major focus in international human rights discussions. Indigenous peoples need protection not only from racial discrimination, but also from any kind of discrimination. The law seems to deal harshly with those who are "different".

### **2.2.1.3 The Right to Culture**

The first basis of a right to culture can be found in a state's legal duty to guarantee the rights of minority populations, that is, groups defined by common bonds of culture, language or

---

39. Lemer (1991) 24.

40. Bennett (1978) 50.

41. Lemer (1991) 35.

religion within its borders.<sup>42</sup> However, indigenous peoples and their cultures have been attacked since their "discovery" and decolonization.<sup>43</sup>

The treatment of indigenous peoples has in certain instances been so severe that the effects have been referred to as "genocide" and as "holocausts". While the particular histories of different indigenous peoples differ, they have in common a history of conquest by another group and subordination within their present states, even where they may not normally be a minority.<sup>44</sup> Further, the tragedy of the treatment of indigenous peoples is not merely historical, it continues today.

Their common problems, however, are political and economic oppression as well as the loss of their lands, their cultural and ethnic traditions, and often their lives. These problems can be said to stem from the basic attitude of non-indigenous peoples that indigenous ways of life are backward and inferior and not appropriate for a "civilised" society.<sup>45</sup> Indigenous peoples have made repeated calls for the protection of their lives, their cultures

---

42. Bennett (1995) 11.

43. Burger (1987) 6; Cycon (1991) 761.

44. Cycon (1991) 761

45. Williams (1990) 21.

and their lands.

#### **2.2.1.4 The Right to the Preservation of the Identity of the Group**

Many indigenous peoples strive to preserve their identity in the modern world. This right includes the right to be different.<sup>46</sup> It also includes a wide range of specific rights and freedoms varying from group to group according to its nature and cohesive components. The degrees of cultural and linguistic autonomy to be enjoyed by groups will depend on the legal system of the respective state.<sup>47</sup>

#### **2.2.1.5 The Right to Special Measures**

These are measures needed for the maintenance of the identity of the group. Again, these will vary from group to group in accordance with its character. The nature and extent of such measures may depend on the degree of discrimination or disadvantages suffered by the respective group. These are measures are discussed in chapter 6 below.

---

46. Lerner (1991) 35.

47. Suagee (1992) 685.

#### **2.2.1.6 The Right to Self-determination, Land and Natural Resources**

Today, indigenous peoples of the world are seeking recognition of their right to self-determination. The abovementioned rights which entail economic, social, cultural, spiritual and political development are a manifestation of the exercise of the right of self-determination, a right with which this thesis is concerned. This right will be discussed in detail in Chapter 4.

It must be remembered that indigenous peoples have special needs and interests. This is the reason why their rights are characterised as *sui generis* or unique. Indigenous peoples are looking to the international community to protect their rights.

## CHAPTER 3

### 3. LAND RIGHTS AND THE IMPACT OF LAND DISPOSSESSION ON INDIGENOUS PEOPLES AND THE ENVIRONMENT

#### 3.1 Land Rights

In South Africa, the issue of land rights dates back to 1652, when Jan van Riebeeck arrived in the Cape and the Dutch East India Company asserted sovereignty over the area.

Indigenous people refer to the land as their "mother", who provides them with everything they need. Indigenous people cannot survive without land, they would die without it.<sup>48</sup> They also teach their children that the earth is their mother.<sup>49</sup>

The concept of *Terra Nullius* was introduced in order to deprive indigenous peoples of their land. *Terra Nullius*, meaning that a territory belongs to no one at the time of occupation, was accepted as a legal method of acquiring sovereignty over territory.<sup>50</sup> This doctrine regarded as *Terra Nullius* any territory inhabited by peoples whose civilisation was thought to be backward and whose political organisation did not correspond to western norms. Lands were occupied regardless of the

---

48. Lanhupuy (1982) 53.

49. Chief Seattle (1986) 48.

50. Bennett (1978) 4.

inhabited constitutes a *conditio sine qua non*, not only for the well-being and survival of indigenous peoples, but for the environment as well.<sup>56</sup> It is also a pre-condition for the preservation of the distinct cultural identity of the indigenous peoples. Land and culture are essential for the survival of indigenous peoples.<sup>57</sup> The particular relationship of indigenous people with the lands in which they live on may be described on a traditional basis. This traditional basis has two aspects, a geographical and a spiritual one.<sup>58</sup> The ways of life of indigenous peoples are tied to their ancestral territories. Indigenous peoples form ethnic minorities but are determined to remain distinct.<sup>59</sup> Governments should recognise that indigenous peoples possess some sovereignty over their aboriginal territories.

For example, indigenous peoples in fact have traditional views of land that, typically, do not envisage human sovereignty over it. Instead, people belong to the land.<sup>60</sup> Land is of spiritual, social, cultural and economic importance to indigenous peoples. Indigenous peoples have a natural and inalienable right to keep the territories they possess and to

---

56. Swebston (1985) 94.

57. Brolman and Zieck (1992) 190.

58. Brolman and Zieck (1992) 193.

59. Suagee (1992) 681.

60. Analytical commentary on the Draft Principles contained in the first Revised Text of the Draft Declaration on the rights of Indigenous Peoples (E/CN.4/Sub.2). Elaborated on by Chairman/Rapporteur, of the WAIP, at 10–15, U.N. Doc. E/CN.4/Sub.2/39 (1990).

claim the lands which have been taken away from them.<sup>61</sup> Indigenous peoples have over a long period inhabited the lands where they live and for this reason, have an identity separate from that of the dominant or majority population. In many countries ownership of land is not recognised. But in those countries where it is recognised, the legislation differs markedly e.g. as applied in Australia compared to Land Rights in South Africa. With the help of the states and governments concerned, international law should intervene and make standard provisions for the protection of land rights. The relationship between indigenous people and their land is a unique one. It is a relationship which essentially differs from that which non-indigenous people experience.

The nature of indigenous people's interests in land is very complex and therefore much attention has to be paid to the need to enforce rights to land for indigenous people. The law of the dominant culture must genuinely recognise and protect the interests of the indigenous group and their land if it is to achieve its purpose of allowing them to live according to their own land laws and customs.<sup>62</sup> Due to the *Terra Nullius* doctrine, indigenous lands were regarded as "vacant lands" and therefore belonging to the government. This led to indigenous people being dispossessed of their land, the impact of which will be discussed below.

---

61. Barsh (1986) 373.

62. Bailey (1993) 4.



### 3.2 The Impact of Land Dispossession on the Environment and on Indigenous Peoples

All men, whatever their religion or creed, are entitled by virtue of their humanity to respect for their possession. Francisco de Vitoria.

Customary land laws in countries where there are indigenous people have been drastically modified by statutes, the implications of which need to be addressed.<sup>63</sup> The way in which international environmental law evolves in the affected countries will determine whether the special and unique tribal cultures and their way of life will endure. Due to their close contact with and dependence on their natural environment, indigenous peoples have developed a unique and rich knowledge of conservation and understanding of the natural processes. Indigenous peoples should be involved in the control and planning of the use of natural resources. Allowing indigenous communities to participate in environmental management and to continue their harvesting practices is not to be viewed as a privilege. It is indeed an environmentally and socio-economically sound practice that will help to ensure harmony within local communities. Land tenure systems reflect the needs of a society.<sup>64</sup> It should be remembered that indigenous peoples do not treat the land as

---

63. Glavovic (1991) 67.

64. Glavovic (1991) 68.

a source of capital income.

The economic thrust of the western communities conflicts with indigenous peoples' ways of life and beliefs. This thrust is epitomised by the desire of governments and corporations to exploit the resources of the land.<sup>65</sup> The laws which are made by the dominant societies do not protect the indigenous peoples and are also contrary to their interests. Worst of all, these laws override their own world-view as well as the orientation of their lives. This is due to the fact that, for indigenous peoples, the significance of land is seated more in its symbolism than in its economic utility.

The logging industries, for example, have destroyed a way of life that had been enjoyed by a substantial group who, over centuries, lived in harmony with their natural forest resources. Grand scale deforestation has deprived the indigenous peoples of their livelihood. Although some of the peoples affected by land dispossession have been compensated, this may never materialise since these peoples do not need the land solely for economic purposes but, for something more than that. They need the land for their survival and subsistence. Each group of indigenous people has its own set of concepts and community practices. In order to ensure a viable livelihood, these peoples need their local laws and cultural expressions to be officially recognised — and not only a

---

65. Bailey (1993) 4.

cursory acceptance of local customs. The effect of land dispossession on most indigenous peoples is that they have low levels of education, high unemployment rates, poor standards of living, short life expectancies, high levels of illness and infant mortality and high rates of imprisonment, when compared to that of the dominant society. Peoples must not be deprived of their own means of subsistence.<sup>66</sup> Section 2 of the International Covenant on Economic, Social and Cultural Rights<sup>67</sup> prohibits deprivation of means of subsistence, but yet governments continue to do so. Governments continue to dispossess indigenous peoples of their sacred lands despite the fact that the world conferences to combat racism and racial discrimination have stressed and endorsed the right:

of indigenous peoples to maintain their traditional structure of economy and culture, including their own language, and also recognised the special relationship of indigenous peoples to their land and stressed that their land, land rights and natural resources should not be taken away.<sup>68</sup>

Indigenous peoples are regarded as economically and socially underdeveloped. There are still many government officials and political figures in all parts of the world who continue to regard indigenous peoples

---

66. Bailey (1993) 18.

67. UN Doc. A/Conf. 92/40, at 14 (1978).

68. UN Doc. A/Conf. 92/40, at 14 (1978).

as members of primitive cultures.<sup>69</sup>

Indigenous peoples want the right to make the decision insofar as industrialisation is apt to affect the lands and waters that comprise the traditional homelands upon which their ancient way of life depends. Many indigenous cultures, globally, have suffered severe cultural and social disruption because of the decimation of wildlife populations and profound changes in the natural environment caused by the dominant society. However, most indigenous peoples have not lost their spiritual connection to the world. They try to keep their cultures intact. They maintain connections to the earth which is fundamentally sacred in their eyes, and they know a great deal about stewardship that could be of benefit to the rest of humankind.<sup>70</sup>

Land dispossession is the result of the brutal technological capabilities of governments. All over the world, indigenous peoples are fighting for their lands and for their traditional ways of life. The economic, the cultural and religious world-views of indigenous peoples are based upon the environments in which they live.<sup>71</sup> The destruction of these environments renders the survival of these peoples as distinct societies difficult if not impossible. Despite the forces that threaten their survival, indigenous

---

69. Suagee (1992) 681.

70. Suagee (1992) 675.

71. Maybury-Lewis (1992) 35—62.

peoples in many parts of the world have somehow managed to carry on.<sup>72</sup>

To a large extent, the peoples of the industrialised and the industrialising world have the power to decide whether indigenous peoples will survive. There are valid reasons why the survival of indigenous peoples should be ensured. The western community can learn from their experience in balancing human needs with environmental preservation and from their knowledge of herbal medicine.<sup>73</sup> The main impact of land dispossession is that it deprives indigenous peoples of their means of subsistence. The provisions of section 2 of the international Covenant on Economic, Social and Cultural Rights, mentioned above, state that people may not be deprived of their means of subsistence. By "people" is meant all people, including indigenous peoples. One of the preliminary drafts of the 1992 working group supports this and provides as follows:

"Indigenous peoples have the right to maintain within their lands and other territories their economic, social and cultural structures, institutions and traditions, to be secure in the enjoyment of their traditional and other economic activities, including hunting, fishing, herding, gathering, lumbering and cultivation. In no case may indigenous peoples be deprived of their means of subsistence. They are entitled to just and fair compensation if they have been so deprived.

---

72. Burger (1988) 101.

73. Suagee (1992) 681.

The international recognition of rights will be a hollow victory for indigenous peoples unless the industrialised societies also achieve a transition from an environmentally destructive to an environmental sustainable view of development. Globally, the kinds of environmental damage that threaten the survival of indigenous peoples are driven by the ways in which the economic engines of industrialised and industrialising countries consume energy. The new ways of industrialisation have brought about environmental destruction and pollution. A continuation of such practices will, in the near future, cause a global environmental crisis. Such a crisis will be unavoidable unless we make some fundamental changes in the ways in which the global economy extracts resources from the earth and returns pollution to the air. Failure to do this will surely bring about the collapse of the natural systems that support human societies.<sup>74</sup> The global environmental crisis is also aggravated by the way in which industrialised peoples have lost their sense of connection to the natural world, something which the indigenous peoples are trying to maintain. Maybury-Lewis<sup>75</sup> says that indigenous peoples have not lost their spiritual connection to the natural world, especially where their cultures remain substantially intact.

The land is taken away from the original owners, usually for the purpose of industrialisation. Western peoples depend on mineral and other

---

74. Brown *et al* (1991) 4.

75. Maybury-Lewis (1992) 35—62.

resources for subsistence or for a living. Just as western peoples depend on industrialisation for subsistence, so do indigenous peoples depend on hunting, fishing, herding, gathering, lumbering and cultivation for their subsistence. They are therefore entitled to stay in their lands without disturbance. This would mean that all projects carried out within the territories of indigenous peoples that deprive them of their traditional ways of living, would constitute a violation of their human rights.

It does not matter whether such activities are part of a state- sponsored "development" project. Indigenous peoples believe that there is no separation between land and resources. They also believe that there is no separation between them and what used to be their country, and there will never be such a separation because of their spiritual belief and understanding.<sup>76</sup> Indigenous peoples must have the right to a territorial, cultural, economic and political environment in which they can develop their own way of life. They must be accepted as members of the community of Nations.<sup>77</sup> Article 25 of the Covenant of Economic, Social and Cultural Rights, refers to "The inherent right of all peoples to enjoy and utilise fully and freely their natural wealth and resources." The provisions of this section must be adhered to.

In other countries, such as South Africa, rights of indigenous peoples to

---

76. Lanhupuy (1982) 54.

77. Barsh (1986) 373.

the land are accommodated by setting aside areas for their exclusive use and occupation, but there is, however, no separate and discrete recognition of their right to harvest the fruits of their land.<sup>78</sup> Another problem that exists is that their customary rights to water, wild-life and the wilderness is not inherent. On account of environmental exploitation, tribal and indigenous peoples will need special attention because if such attention is denied indigenous peoples, they are threatened with virtual extinction. For this reason, their traditional rights should be recognised, they should be given a voice in formulation of policies about resource development in their areas. Shutkin<sup>79</sup> says that indigenous communities maintain an intricate and solitary relationship with the earth which is basic to their existence and culture. Ancient emotional, cultural, spiritual and religious considerations are present where the relationships with land are concerned. The land forms part of the indigenous peoples' existence.<sup>80</sup>

The relationship between indigenous peoples and the environment together with a history of continuing assaults upon their land as well as prospects of extinction due to global climate changes, compels a resort to human rights law for the protection of both the people and the environment.

---

78. Glavovic (1991) 67.

79. Shutkin (1991) 481.

80. UN. Submission on Prevention of Discrimination and Protection of Minorities, Study of the Problem of Discrimination Against Indigenous Populations U.N. Doc. E/CN. 4/Sub.2 1986/7 (1986) 28.



The issue of environmental and cultural protection elicits an examination of international human rights law.<sup>81</sup> Principles of international law have traditionally enshrined state dominion over both people and territory with no recourse provided to aggrieved individuals or groups within or without the state.<sup>82</sup> It would be reasonable for indigenous people to be accorded access to traditional lands for the purpose of hunting, fishing and gathering. Indigenous peoples depend on the tropical forests for their survival. As already mentioned above, the military rulers and economic elitists view most indigenous lands as unoccupied and unproductive and as a result these need to be developed and integrated into the national economy. The development of many economic activities has been extremely destructive, not only to the indigenous peoples but also for the ecological diversity and stability of the forest ecosystems.<sup>83</sup>

Most areas occupied by indigenous peoples are perceived to be rich in mineral resources. Due to this reason, the western people would not stop developing such areas for the mere sake of indigenous tribes who were holding back the development of the nation.<sup>84</sup> When making this kind of a statement, General Fernando never took into account the fact that indigenous peoples are also dependent on the land for their

---

81. Shutkin (1991) 484-5.

82. Shaw (1980) 6.

83. Pallemoerts (1986) 384.

84. Statement of General Fernando Ramos Fereira, quoted in S Davids, *Victims of the Miracle* (1977) 39.

economic survival and development. All he had in mind was the interest of his peoples. Inasmuch as the areas are rich in minerals, they also have wild-life upon which the indigenous peoples are dependent for their survival.

Deforestation is an additional consequence of the economic development of most countries in the world. Economic development left the indigenous peoples landless and the environment deforested. As years go by, this will result in an irreparable loss of genetic resources and serious ecological, hydrological and climatic effects.<sup>85</sup> This has caused economic and social problems for indigenous peoples. The effect of land dispossession on indigenous peoples makes it impossible to guarantee a long-term survival for inhabitants as independent and distinct peoples. *International environmental law has failed to protect adequately the land base of indigenous communities. Indigenous peoples are also deprived of effective control over the natural resources necessary for their independent economic subsistence and cultural survival, even within those lands to which they have formally recognised right of occupation.*<sup>86</sup>

Yunupingu<sup>87</sup> expresses the relationship between himself and the land. He further indicates what dispossession means to him as an indigenous

---

85. Pallermaets (1986) 376.

86. McRae (1991) 385.

87. Yunupingu in Lahupuy (1982) 54; As it is,

person. He says that he can only stand straight, happy and proud and not ashamed of his black colour because he still has his land: "without land I am nothing". Indigenous peoples know who they are because of the ancestral lands which they occupy. It is difficult for non-indigenous peoples to understand fully the affinity between indigenous peoples and their land and the pain that is brought to their communities through the loss of land and the destruction of their culture. Stanner<sup>88</sup> attempts to describe the situation by indicating that the white man's meaning for "home" can never match the indigenous peoples' meaning for "land". Despite land dispossession, most indigenous groups try hard to preserve the links with the traditional lands by maintaining the rituals and ceremonies which refer to those lands. In some groups the link with the land are highly adapted and modified, but this does not necessarily mean that the link is diminished.

The role of indigenous peoples in the creation and development of ecosystems is incontrovertible and their role in the maintenance and preservation of these areas must be seen as a vital factor in land management and environmental protection.<sup>89</sup> Without the protection of their lands indigenous tribes are hopelessly vulnerable to exploitation and lack the capital to build a viable future.<sup>90</sup> For indigenous peoples,

---

88. Stanner (1979) 11.

89. Strelein (1993) 380.

90. Bennett (1978) 29.

globally, land tenure is a prerequisite for their traditional styles of life and development. The protection of their land areas are essential for their survival. The importance of land is more than economic to them. Land is the very basis of the survival of indigenous peoples as a distinct cultural unit.<sup>91</sup>

There is a vast difference between the relationship which indigenous peoples have in the land and the relationship which other sectors of the population have. Indigenous peoples have suffered in the past and continue to suffer today because of the dispossession of their traditional lands.

One cannot deny the fact that states will not easily give up the right to expropriate the lands they consider essential to the interests of internal security and development, but the dilemma is that it is difficult to agree on a balance between the needs of security and development, on the one hand, and the interests of those who are subject to removal on the other.

Another problem which we are faced with is that reasons of national security and development are in many cases invoked abusively. It often happens that where mineral exploitation has taken place on the traditional lands of indigenous peoples, their natural habitat has been so severely damaged as to render it impossible to pursue their traditional life-styles. In the long run, indigenous peoples who are denied full legal personality

---

91. Bennett (1978) 29.

do not have the capacity to sue the state in the event of loss or injury.<sup>92</sup>

This is because some indigenous peoples know nothing about the concept of native title to lands which were originally owned by them. The imposition of artificial political demarcations and land allocations have caused adverse political, socio-economical and environmental consequences. All this was involved in the process of establishing the apartheid system,<sup>93</sup> particularly in South Africa. Indigenous peoples depend on and make good use of their natural resources. Although they make use of domestic stock and crops, they still rely on indigenous food sources.

Population pressure, social disruption, environmental degradation and outside influences are producing changes which are threatening the former state of balance maintained by indigenous peoples.<sup>94</sup> It is clear that indigenous peoples and their culture are dependent on the wilderness and direct access to natural resources. Indigenous peoples have a tradition of understanding nature. Their conservation awareness goes back to the foundations of society. Because they lived close to nature, they also lived in harmony with it and a balance was maintained between man and his environment. Indigenous peoples think that it is very good to maintain the traditional ways of living so as to protect the

---

92. Shutkin (1991) 485.

93. Glavovic (1981) 51.

94. Bruton (1987) 531.

future of their children. Access to land and wildlife is vital to indigenous peoples. Therefore it should be difficult to justify the setting aside of natural areas, such as the wilderness areas, and to demarcate reserves for strict protection in the interests, for example, of tourism.

The natural resources on which the indigenous peoples have traditionally depended, have been severely affected by wide-spread of environmental degradation brought about in the main by increased population pressure. The wilderness ethic should be applied to resource management. At the same time, traditional cultural values and harvesting rights by legal prescription should be respected. This will contribute immeasurably to the goal of conservation and appropriate human development in the world as a whole. Western influences and prescriptions have disrupted traditional cultures and values.<sup>95</sup>

The wilderness is of universal value to indigenous peoples. Due to their special relationship with the wilderness, indigenous peoples deserve special rights or treatment relative to the wilderness. A high percentage of indigenous peoples die of disease and homesickness after relocation or land dispossession. Indigenous peoples are guardians of their lands, which, over the centuries, have become inextricably bound up with their culture, spirit, identity and survival. Without the land base, their cultures will not survive.

---

95. Devenish (1987) 30.

Indigenous peoples are unable to prosper in the alien societies imposed upon them, and with their own culture demeaned, have become outcasts. Their traditional lands have been identified by governments, speculators, development banks and big-time farmers as areas replete in essential and valuable resources. Logging, mining and dam projects have disfigured and destroyed the land and displaced millions of indigenous inhabitants.<sup>96</sup> The mountains, forests and deserts occupied by indigenous peoples are considered vital in national and international policy making. The increased exploitation of the economic resources of the land is a serious threat to the future of indigenous peoples.<sup>97</sup> Due to their dependence upon the forests, indigenous peoples are irrevocably affected if there is destruction of this natural resource. Large-scale settlement of landless peasants in forested areas has also created tensions between the indigenous and non-indigenous populations, occasionally resulting in bloodshed. In practice many of the present developments concerning tropical forests have been environmentally disastrous, causing erosion of the soils which proved to be detrimental to the indigenous communities. The search for mineral resources has also attracted outsiders to indigenous land.

Exploration and extraction have taken place, almost without reference to the indigenous inhabitants and with even less concern about the resulting

---

96. Burger (1988) 101.

97. Burger (1988) 103.

impact. The impact of the so-called "developments" on indigenous people is not merely of an economic nature. The displacement and environmental degradation brought about by mining, deforestation, dam-building or unsuitable large-scale farming, may cause hardship, which also severs the vital link between indigenous peoples and the environment. When indigenous peoples are separated from their lands, the social and cultural cohesion of their communities is eroded. Strong feelings of attachment are broken when indigenous peoples are forced away from the land which is the resting place of their ancestors and the repository of all their sacred knowledge. The land is regarded as a living entity and many indigenous peoples feel physical pain if a familiar landscape is despoiled and scarred.<sup>98</sup>

### **3.2.1 Summary of Some of the Disadvantages of Land Dispossession and Modern Industrialisation<sup>99</sup>**

**Famine:** Famine is the result of overpopulation and poor agriculture. If one makes a closer examination of the relationship between population and food supply, one may agree with the following quotation from Meadows *et al.*<sup>100</sup>

---

98. Burger (1988) 103.

99. Dudley *et al* (1992) 11–37.

100. Meadow *et al* (1992).



If the present growth trends in the world population, industrialisation, pollution, food production and resource depletion continue unchanged, the limits to growth on this planet will be reached sometime within the next hundred years. The most probable result will be a rather sudden and uncontrollable decline in both population and industrial capacity.

### **Agricultural Improvements:**

- Not all agricultural modernisation has actually been an improvement for the majority of people in the world.
- Forcing farmers into growing a few, high-yielding crops is dangerous.
- Agricultural changes have caused environmental problems.
- Pesticides have direct effects on human health through acute or subacute poisoning. Many pesticides also have known or suspected chronic effects on health, including promotion of cancer and birth defects, neurological effects and damage to vital organs such as the liver and kidneys.  
This will not only affect the indigenous people, but the entire population as such.

**Fertilizers:** are also increasingly seen as a problem for health

and the environment.

**Soil erosion:** Intensive farming practices have also increased the chronic rate of soil erosion in many countries.

Therefore the main problems with intensive agriculture have been identified as:

- ◆ The environmental damage that it causes.
- ◆ Its attendant unsustainability, and
- ◆ the financial constraints that put it out of the reach of the poorer farmers and peasants.

### **Impact of Landlessness**

The landlessness problem is not just something that affects people's wealth or security; it also has direct effects on whether they live or die in times of food shortage, and on the environmental stability of the area concerned. The following critical land tenure issues are examined:

- (i) **Landless people have no land to produce food:** This may be said to be the first impact of landlessness. In most cases landless people are tenants or work on the land, but you'll find that they have virtually no access to land, and all are severely

at risk in times of drought, flood, war or other causes of food shortage.

- (ii) **Land that is available is overused:** As families expand in size and available land contracts, farmland is over-exploited causing loss of fertility, soil erosion and, if the family can afford them, overuse of agrochemicals. This increases erosion leading to increased flooding and siltation of dams. This also does not only affect the indigenous peoples, but the entire population as well as the environment.
- (iii) **Forests and other wild areas are cleared for farmland:** Controls and active encouragement of settlement of forests and wild areas result in landless peasants moving into forests on a large scale.
- (iv) **Farmers are forced onto more marginal land:** In arid regions of especially Africa and Asia, marginal and near landless farmers increase environmental stress on lands that need to be used with extreme care, if at all.
- (v) **Landless tenants have no reason to practice sustainable land usage:** A major problem with any attempts to decrease environmental damage is that people without any security of land tenure have little incentive to look after the long-term

ecological interests of land that they are renting.

- (vi) **Lack of tenure keeps land under cultivation:** One specific reason for over-use of land by tenant farmers is that they fear that leaving land fallow will result in them being dispossessed in favour of others who will use it more intensively.
- (vii) **Land use is more inefficient:** From the above discussion one may conclude that serious inequalities in land distribution impinge negatively upon most of the people as well as on the stability of the ecological environment.

Inequalities in land distribution also encourage damaging land-use patterns. They also reduce the incentive for people to look after land efficiently and carefully. Far from being only a major social issue, inequality also leads to fundamental environmental problems. As we shall see in chapter 7, land reform, the legally implemented redistribution of land to a greater number of people, is thus one of the key issues that need to be addressed by governments of different countries.

Finally one may conclude by saying that the search for natural resources has led to incursions into indigenous people's lands and profound changes within their societies. Indigenous peoples are not only victims of social and economic forces, but have also been drawn into political and

ideological conflicts. Indigenous peoples are therefore caught up in a global struggle and become its victims.<sup>101</sup> The dams, mines, settlement schemes and other projects on the indigenous lands have been highly destructive not only to the life-styles of the indigenous peoples, but also to the fragile habitat of which they are the careful guardians. One particular group of people must not enrich itself by murdering, enslaving and impoverishing other peoples. If damage is done to indigenous peoples, the land is eventually made barren for all. In the case of the environment, public policy concerns must be based on the future of humanity as a whole.

---

101. Burger (1988) 103.

## CHAPTER 4

### 4. SELF-DETERMINATION AND INDIGENOUS PEOPLES

#### 4.1 Self-determination in General

Self-determination, as a concept of international law, is broader and more encompassing than political participation rights.<sup>102</sup> Self-determination recognises not only the right simply to participate in political institutions developed by another state, but also peoples' rights to establish their own governing institutions. However, it is very difficult for indigenous peoples to advocate self-determination or self-government when they are effectively excluded from public affairs and do not have a forum in which to advance their aspirations or generate public support.<sup>103</sup>

Indigenous self-determination is, today, the most dynamic and evolving issue in international law.<sup>104</sup> It has also become part of political relations around the world.<sup>105</sup> It would be misleading to say that the content of self-determination under international law is clear at this stage.<sup>106</sup> All other human rights are considered to flow from the right of self-determination, because the protection of human rights against

---

102. Turpel (1992) 595.

103. Ibid.

104. Barsh (1988) 69.

105. McCorquodale (1994) 4.

106. Barsh (1988) 70.

government abuses depends entirely upon who governs.<sup>107</sup> In fact, self-determination stands above all other rights and forms the cornerstone of the whole structure of all human rights.<sup>108</sup> It can thus be said that self-determination is a right in itself and also a means through which all other rights can be secured.<sup>109</sup>

Self-determination is a pre-requisite for other human rights since there can be no genuine exercise of individual human rights without the realisation of the right to self-determination.<sup>110</sup> The exercise of the right of self-determination is the appropriate remedy for the oppression of a group as a group.<sup>111</sup> It is a right which allows the people to determine their political, economic, social and cultural destiny as they wish.<sup>112</sup> This means that the purpose of self-determination is to enable groups to prosper and transmit their culture as well as to participate fully in the political process and so be protected from being subjects of oppression. In other words, without self-government indigenous peoples are precluded from genuinely exercising individual human rights, as no institutions reflect their values while they continue to live under institutions

---

107. Barsh (1988) 69.

108. Opekokew (1987) 2.

109. Barsh (1988) 70.

110. Opekokew (1987) 6.

111. McCorquodale (1994) 5.

112. McCorquodale (1994) 5.

reflecting the values of other cultures. Self-determination is gaining importance in international law because of the growing sentiment that denying peoples' aspirations to establish their own institutions and governing themselves has been the major source of strife on this planet for the past two hundred years.<sup>113</sup>

#### **4.2 The Definition of Self-determination and its Many Manifestations**

Self-determination is defined as the right of "all peoples to freely determine their political status and freely to pursue their economic, social and cultural development."<sup>114</sup> Alfredson says that self-determination can mean and has been used to mean, many different things.<sup>115</sup>

First, it can stand for the right of any entity to determine its international status, that is, to establish a sovereign state, to merge with another state or to effect something in between. The exercise of self-determination by non-self governing territories could result in independence, free association or integration.<sup>116</sup> Nations, colonised peoples, other territories deprived of independence by means of foreign occupation, and various types of minorities have all at one time or another claimed this right which

---

113. Barsh (1988) 70.

114. Alfredson (1987) 53.

115. On the other hand Ronen (1979) 25–34 differentiated five types of quests for self-determination that have been dominant as national self-determination, class b self-determination, minorities self-determination, social self-determination and ethnic self-determination.

116. General Assembly of the United Nation Resolution (1960) 1541 (XV).



can be referred to as the right to external self-determination.

Second, self-determination can be interpreted as the right of a people to determine the form of its government and to participate in that government at all levels. This is usually referred to as the right to democratic governance.

Third, the self-determination concept can mean the right of a state or of a recognised territorial entity to maintain its national unity and territorial integrity as well as to govern its international affairs without external interference.

Fourth, self-determination can mean the right of a minority within or even across state boundaries to special rights, active and affirmative in nature, such as the right to cultural, educational, social and economic autonomy for the preservation of its group identity. Claims by indigenous peoples to communal or collective property rights to land and to natural resources, including sub-surface resources, could fall under this category.

Fifth, self-determination can mean the right of a state and of state populations to maintain and improve their cultural, social and economic identities and causes.

"It is for the people to determine the destiny of the territory and not the

territory the destiny of the peoples.”<sup>117</sup> What self-determination means in current practice, then, is that every culturally and historically distinct people should have the right to choose its political status by democratic means under international supervision.<sup>118</sup> Due to colonialism, indigenous peoples were forced to submit to European laws and institutions imposed upon them in their own homelands. These laws are alien to them. Indigenous peoples are racially, culturally and linguistically distinct from the non-indigenous population, and it is precisely those types of distinctions which the right of self-determination is designed to protect.<sup>119</sup>

Self-determination reflects, in a sense, that imperialism has been the major engine of bloodshed in the world, so that emancipating all peoples from foreign domination is the only way to reduce world tensions to the point where peace is possible.<sup>120</sup>

#### **4.3 Internal and External Self-determination**

The right to self-determination can either be external or internal. This discussion is closely linked to the historical meaning of the word self as it has originally been interpreted to mean the people of the state as

---

117. Western Sahara case as per Judge Billard ICJ Rep. (1975) 114.

118. Barsh (1988) 71.

119. Bennett (1978) 50.

120. Barsh (1988) 70.

opposed to the people of the nation.<sup>121</sup> "State" generally refers to a territory whose population is controlled by government with the capacity to enter into foreign affairs.<sup>122</sup> But self has been used in the context of peoples of colonial possession. Under international law, a "state" is an entity that has a defined territory and a permanent population, under the control of its own government, and that engages in, or has the capacity to engage in formal relations with other entities. In contrast, a nation is a group of persons determined by a set of objective and subjective criteria such as common ethnic background, shared history, language or religion and a subjective sense of common destiny,<sup>123</sup> which are factors applicable to indigenous people.

#### **4.3.1 Internal Self-determination (The Protection of the People)**

The right of self-determination in its internal meaning denotes the right of people to select their own form of government.<sup>124</sup>

It also concerns the right of peoples within a state to choose their own political status and the extent of political participation,<sup>125</sup> that is, it is constituted by "the right of the people to choose freely the form of government under which they wish

---

121. Koskenniemi (1994) 241.

122. Paxman (1989) 193.

123. Distain (1976) 103–5.

124. President Woodrow Wilson.

125. McCorquodale (1994) 4.

to live, and thereby to pursue freely their economic, social and cultural development.”<sup>126</sup> Although the state unit has become the principal international actor, rights of nations appear to be an emerging trend in international law.<sup>127</sup> Problems in according internal self-determination to indigenous peoples have arisen because the emerging states, who are proponents of western decolonisation, fear that acknowledgement of the right of self-determination of minorities will result in their own minorities demanding self-determination, thus causing fragmentation of the state.<sup>128</sup>

#### **4.3.2 External Self-determination (The Protection of the States)**

External self-determination entails the right of the people to be free from alien rule. It is the right of peoples to choose their status within the international community. It applies where the exercise concerns directly the territory of a state, its decisions, enlargement or change and consequently the state's international external relations with other states. The structure of the international legal system greatly favours the rights of states over the rights of nations.<sup>129</sup> Given the concept of

---

126. Jayawickrama (1993) 57.

127. Paxman (1989) 195.

128. Many boundaries in Asia and Africa may serve as examples in this regard.

129. Statute of the International Court of Justice Article 34, par 1.

sovereignty and the primacy of external self-determination, nations have had little, if any standing in the international order.<sup>130</sup>

#### **4.4 Basis of the Right of Self-determination for Indigenous Peoples**

There are two possible bases for the right of self-determination. The first basis initially stressed by indigenous peoples<sup>131</sup> was instrumental: That the (group) right of self-determination was necessary in order to achieve other fundamental (individual) human rights. This justification was made through the linkage of the present denial of human rights to indigenous peoples and their lack of self-government, and therefore of their freedom from oppression and their self-determination. Other separate justifications such as "that it was an inherent right of all peoples that could not be taken away" were raised.<sup>132</sup>

The second justification can be conceived in two ways:

- First, that the right of self-determination is there to guarantee inherent and inalienable individual rights.
- Second, self-determination can be seen as being directly

---

130. Paxman (1989) 195.

131. In Seventh Report of the Working Group on Indigenous Peoples, paragraph 28.

132. Ibid.

derived from the dignity of the human person.

#### **4.5 The Exercise of the Right of Self-determination (The Substantive Result of Self-determination)**

While the overall right of self-determination is flexible, this imprecision may provide an additional barrier to according the present right of self-determination to indigenous peoples.

##### **4.5.1 External Status of Self-determination**

In relation to the exercise of self-determination by states, the external component is simply the maintenance of the status quo — territorial integrity and full independence as a state.<sup>133</sup> Self-determination clearly envisages that the exercise of self-determination is not limited to complete independence. Independence is clearly the preferred outcome of self-determination.

##### **4.5.2 Internal Status of Self-determination**

The internal aspect of the legitimate aim of self-determination is the form of government chosen. Its legitimacy is closely connected with the process of exercising that choice. Where it has been thought that a people has been denied representative

---

133. Hannikainen (1989) 357.

government, the focus of the achievement of the people's self-determination has been internal, because it is the people as a whole that is considered to be the unit of "self" and not any particular part of the whole people. Thus, the political status of indigenous people is thus a matter to be solved internally, and presumably by recourse to constitutional law.

#### **4.6 Claims by Indigenous Peoples to Self-determination and Barriers to the Claims of Self-determination**

These are claims made by indigenous peoples so that their right to self-determination can be recognised. Yet, at the same time, these claims constitute the very barriers to the recognition of their right to self-determination.

##### **4.6.1 The "Peoples" Approach to the Right of Self-determination**

At the top are peoples — distinct cultural, historical and territorial groups entitled, by their very collective nature, to make collective decisions for themselves.<sup>134</sup> The question is whether indigenous groups are "populations" or "peoples" and what constitutes the meaning of the term "peoples" for the purpose of self-determination? If they are "peoples", do they have full rights of self-determination in international law? Governments

---

134. Barsh (1988) 69.

often have sought to narrow the definition of people in order to limit the number of groups entitled to exercise a claim to self-determination.<sup>135</sup> Consideration of self-determination questions involves the determination of whether the complainant constitutes a "people" under international law. This is a determination that involves controversial questions of politics, anthropology and law.<sup>136</sup> The issue is closely connected to the issue of political rights for indigenous peoples. If a group remains a distinct unit, although it has undergone change, it remains a people with all appropriate rights under international law.<sup>137</sup> This principle should equally apply to indigenous peoples.

Like all human rights norms, self-determination is presumably universal in scope and thus must be assumed to be of benefit to humanity as a whole.<sup>138</sup> Self-determination's linkage with the form people in international instruments, however, indicates the collective or group character of the principle.<sup>139</sup> In its plain meaning the term peoples undoubtedly embraces the

---

135. Daespi (1993) 5.

136. Turpel (1992) 595.

137. Opekokew (1987) 2.

138. Weston (1992) 17.

139. Anaya (1994) 321.



indigenous peoples of the world, who comprise a distinct community with its own social, cultural and political attributes rooted in history.<sup>140</sup> Many have interpreted the use of the term people in this connection as restricting the scope of self-determination.

The principle of self-determination is deemed to be concerned only with peoples in the sense of a linked universe normally defined as mutually exclusive communities entitled *a priori* to the full range of sovereign powers, including independent statehood.<sup>141</sup>

Indigenous people are unquestionably "peoples" in every social, cultural and ethnological meaning of the term.<sup>142</sup> Indigenous peoples, thus, are beneficiaries of the principle of self-determination. They are entitled to self-determination under international law, not because they meet some statehood-oriented threshold criterion of peoplehood, but rather because they are human beings.<sup>143</sup> They are human beings who, like those among the other sectors of humanity, possess and value

---

140. Anaya (1994) 324.

141. Ibid.

142. Daespi (1993) 3.

143. Anaya (1994) 325.

community bonds within a seamless global web of human interaction.<sup>144</sup> Concepts of self-determination that consider the norm to be concerned with peoples in the sense of narrowly defined, mutually exclusive territorial or ethnically homogenous communities should therefor be rejected.

#### **4.6.1.1 The Problem of Defining the Term People**

The issue of the definition of peoples is made relevant by two factors: first its use by international instruments proclaiming that all peoples have the right to self-determination.<sup>145</sup> Second, the claims made by states that indigenous peoples are not peoples and therefore do not have the right to self-determination.<sup>146</sup> Despite the references in international law to various rights of peoples, there is no definition of peoples or people in the international law.<sup>147</sup> The reason given is typically that peoples is too vague and imprecise and thus too difficult to define.<sup>148</sup>

The English language ascribes different meanings to people in different contexts. Both general and international law similarly

---

144. Anaya (1994) 325.

145. International Covenant of Economic, social and cultural rights and International Covenant on civil and political rights.

146. International Covenant of Economic, social and cultural rights and International Covenant on civil and political rights.

147. Crawford (1988) 5.

148. Brownlie (1988) 16; as we shall also see on the Chapter on instruments – Chapter 6.

ascribe different meanings to peoples in different legal contexts. For example Black's law dictionary<sup>149</sup> define peoples as "A state, as in the people of the State of New York. A nation in its collective and political capacity. The aggregate or mass of the individuals who constitute the state ... In a restricted sense, and as generally used in constitutional law, the entire body of those citizens of a state or nation who are invested with political power for political purposes."

In the context of self-determination, the ordinary meaning of people relates to "a specific type of human community sharing a common desire to establish an entity in order to secure a common future."<sup>150</sup> In ordinary usage the types of human community that are relevant are thus those that are "united by common culture, tradition, or sense of kinship, that typically have a common language, institutions, and beliefs."<sup>151</sup> This definition is indeed broad enough to encompass a tribe, race, nation and state.<sup>152</sup>

Scholarly approaches to the definition of peoples stress that the

---

149. 1135 (6<sup>th</sup> ed) 1990.

150. Hector Gross Espiell, *The right to self-determination : Implementation of United Nations resolutions*, para 50, U.N. Doc. E/CN.4/sub. 2/405/Rev. 1 (1990).

151. Webster's ninth New Collegiate Dictionary (1983).

152. Webster's New Collegiate Dictionary (1959).

following types of requirements must be met before a group of individuals may be considered to be a people in the context of self-determination, namely objective and subjective requirements.<sup>153</sup>

The objective requirements encompass such factors as common language, culture, religion, race or ethnicity, territory, and history. The subjective requirements concern the collective state of mind: The way the relevant ethnic and other identities have been created, consciousness as a distinct people and a political will to exist as a distinct people.<sup>154</sup> In reality, the subjective and objective elements are related as "people will construct and negotiate their national identity by drawing on certain elements: such as language, culture, religion, history, etc."<sup>155</sup> Therefore the important issues for those applying the right of self-determination is thus how the definition of peoples in international law is arrived at and why it excludes groups to satisfy the ordinary meaning of the word.

---

153. Dinstein (1976) 104.

154. Dinstein (1976) 104.

155. Dinstein (1976) 104.

#### 4.7 Self-determination and Decolonisation

Decolonisation provides a point of reference for understanding the scope and content of self-determination.<sup>156</sup> Self-determination is widely acknowledged as the normative ground for the decolonisation process. It is erroneous, however, to go so far as to equate self-determination with the decolonisation regime, the reason being that, in most instances where "self" is equated with decolonisation, it is usually found that indigenous peoples are not entitled to self-determination or benefited by self-determination. Decolonisation prescriptions do not within themselves embody the substance of the principle of self-determination, but rather they correspond with measures to remedy a *sui generis* deviation from the principle existing prior to a condition of colonialism in its classical form.<sup>157</sup>

#### 4.8 Self-determination and Equality

Closely linked to the concept of discrimination, is the concept of equality as it applies in the context of self-determination. Self-determination is identified as a universe of human rights precepts concerned broadly with peoples and grounded in the idea that all are equally entitled to be in control of their own destinies.<sup>158</sup> The principle that nations should enjoy

---

156. Anaya (1994) 325.

157. Anaya (1994) 325.

158. Anaya (1994) 320.

equal rights, including that of self-determination, has been applied to national groups which do not identify themselves with the population of a dominant or surrounding state.<sup>159</sup> This will include indigenous peoples as well. Indigenous peoples have frequently been denied legal equality with other members of the state.

The principles of self-determination and equality appear to conflict with each other. The conflict is based on the argument illustrated by a question such as: 'How can people be both equal before the law, and entitled to establish their own institutions?'<sup>160</sup> It is sometimes argued that the principle of equality must come first: as long as everyone has the same individual rights, the principle of self-determination has no application.

Equality should be applied to the rights of peoples as well as individuals, however. Not only do individuals within a state have the right to equal treatment under the laws of that state, but all peoples, that is to say, all distinct cultural communities, have an equal right to collective identity and self-determination. It is unacceptable to discriminate against a particular geographic and cultural entity by saying that its culture is wrong, its race is wrong, it is not technologically advanced enough, or for any other reason that implies that it is less entitled to freedom than other groups.

---

159. OpekoKew (1987) 1.

160. Barsh (1988) 72.

If the United Nations applies the principle of equality justly, then it must mean not only equality of individuals but the equality of peoples.<sup>161</sup> To say that one culturally distinct group is 'indigenous' and as such does not have the right to self-determination, is a form of racism and discrimination. Collective rights must apply equally to all peoples regardless of culture and regardless of race. However, equality rights will not protect indigenous peoples or minorities against assimilationist campaigns by states. Equality of rights and the right to self-determination are two complementary aspects of one standard of conduct, the essential element being the free will and genuine expression of the free will of people. It can therefore be said that the concepts of equal rights and self-determination are inseparable, for the right to equality prohibits people from exercising domination over another while the right to self-determination means that one people is equal to another.<sup>162</sup>

#### **4.9 Self-determination, Sovereignty and Statehood**

Self-determination in its most extreme form is simply full sovereignty, that is, independent statehood. Because the principle of state sovereignty forms the basis of state identity in the present international legal and political system, and because states are desperately concerned with preserving identity, state sovereignty is given priority over other,

---

161. Barsh (1988) 73.

162. Opekokew (1987) 6.

competing claims, even when those claims are matters of fundamental human rights.<sup>163</sup>

#### **4.10 Self-determination and Cultural Integrity**

A central aspect of self-determination, particularly in its ongoing aspect, is the ability of groups to maintain and to freely develop their cultural identities.<sup>164</sup> While in principle the cultural integrity norm can be understood to apply to all segments of humanity, the norm has developed remedial aspects particular to indigenous people in the light of their historical continuity and continuing vulnerability.<sup>165</sup> The cultural integrity norm has developed to entitle indigenous groups to affirmative measures in order to remedy the past undermining of their cultural survival and to guard against continuing threats in this regard. It is not sufficient, therefore, that states simply refrain from coercing assimilation of indigenous peoples or abandonment of their cultural practices.<sup>166</sup> The cultural integrity of indigenous peoples should be respected.

#### **4.11 Self-determination and Secession**

As we have seen, the right to self-determination has different interpretations. For some, it invokes the right to secession in order to

---

163. Iorns (1992) 203.

164. Anaya (1994) 435.

165. Anaya (1994) 435.

166. Ibid.



establish a different sovereignty.<sup>167</sup> In the post-colonial era, where the issue is the secession of a contiguous country which forms part of the universally recognised state, the inherent tension between the principles of self-determination and national unity has proved much more problematic.<sup>168</sup> There is also a fallacious argument that one of the supposed dangers of self-determination is that it might encourage secessions.<sup>169</sup> In this regard, according to Lenin, the right of people to secession and the formulation of independent states is, in fact, the very essence of the right to self-determination.<sup>170</sup> The right of secession is one mode of implementing the realisation of the right of self-determination of peoples and nations.<sup>171</sup>

The denial of the right of secession would be inconsistent with the maxim of interpretation of treaties that *ut res magis valeat quam pereat*, meaning literally that "the thing rather have effect than be destroyed."<sup>172</sup> Secession may be an appropriate remedy in limited concepts where substantive self-determination for a particular group cannot otherwise be ensured.<sup>173</sup>

---

167. Lerner (1991) 36.

168. Hannum (1993) 3.

169. Prtzelacsnik (1994) 104.

170. Prtzelacsnik (1994) 99.

171. Prtzelacsnik (1994) 100.

172. Black's Law Dictionary 1386 (1979).

173. Butchett (1978) 222.

Some writers are of the view that self-determination could take the form of various degrees of autonomy and in extreme cases, secession.<sup>174</sup>

Others are of the view that the claim by minority groups to secede from a state of which they form part (or to unilaterally withdraw from the state's political arrangements) do not slot into any of the traditional categories of self-determination.<sup>175</sup>

If all reasonable, international, legal and diplomatic measures fail to protect the peoples concerned from the state, a people may perhaps be justified in exercising the right of self-determination to the extent of creating a new state for the sake of their own safety and security.<sup>176</sup> On the other hand, Simpson<sup>177</sup> argues that there might be a new customary rule, *lex ferundo*, building around the right to secede through referendum or where human rights abuses in the seceding entity are particularly grave. He further argues that these may be a precursor of a new development in international law. Many writers argue that a right of self-determination, if posited on human rights criteria, could come to be conceived of as an exercise of the ultimate collective human rights. The question as to whether the right of self-determination includes the right of secession by indigenous or minority groups and whether such groups can

---

174. Juviles (1993) 71.

175. Foreign Affairs and Trade Position Paper on self-determination (1991).

176. Daespi (1993) 7.

177. Simpson (1991) 8.

legitimately claim a right to self-determination, can thus be answered in the affirmative.

#### **4.12 Self-determination and Territorial Integrity**

Self-determination, particularly where it involves any measure of international personality, is thought to violate the territorial integrity of a sovereign state.<sup>178</sup> The explicit concern for the respect of territorial integrity and national unity may confirm that where the territorial integrity of the state is involved, the right to self-determination does not apply in principle.<sup>179</sup> Therefore, the powers of indigenous self-determination should not be framed in a way that threatens the functional integrity of the state,<sup>180</sup> as this will deny indigenous peoples their right to self-determination.

Precepts of state territorial integrity and political unity will properly constrain a self-determination remedy only to the extent that such precepts ultimately promote a peaceful, stable and humane world.<sup>181</sup>

#### **4.13 Self-determination and Autonomy**

The creation of the right of autonomy for indigenous peoples is suggested

---

178. Ioms (1992) 203.

179. Ioms (1992) 253.

180. Bryant (1992) 296.

181. Anaya (1993) 164.

by the U.N, Special Rapporteur, Jose R Martinez Cobo in his study of the problem of discrimination against indigenous populations.<sup>182</sup> He argues that "accordingly governments must abandon their policies of intervening in the organization and development of indigenous peoples and must grant them autonomy, together with the capacity for managing the relevant economic processes in the manner which they themselves deem appropriate to their interests and needs."<sup>183</sup> Cobo<sup>184</sup> uses the term autonomous, in the sense of possessing a separate and distinct administrative structure and judicial system determined by and intrinsic to that people or group.<sup>185</sup> The primary requirement of any arrangement is that it ensures that all human rights of indigenous peoples are protected. The focus will therefore not only be on political rights, but will include all other categories of rights identified by indigenous peoples as essential for their survival. Therefore the cornerstone of a right to autonomy is that, through relative independence, the other rights are more easily protected from abuse by the national government. Hannum<sup>186</sup> specifically recognises that indigenous societies may have their own governmental structures that are different from the separation of the "powers" model. He further recognises that, in this situation, "the

---

182. Paras 379—381, U.N. Escor, U.N. sub-commission on prevention of discrimination and protection of minorities, U.N. Doc. E/UN.4/sub. 2/1986/7 Add. 4.

183. Cobo (1986) par 261.

184. Cobo (1986) par 265.

185. Cobo (1986) par 273.

186. Hannum (1990) 81.

preservation of such traditional structures may be the best means of guaranteeing effective autonomy. So long as the members of the indigenous communities desire to maintain their form of government, those structures should normally be immune from intervention of outside authority."<sup>187</sup> Hannum further stresses that "the state must adopt a flexible attitude which will enable the autonomous region to exercise real power, precisely when that exercise of power runs counter to the state's inherent preference for centralization and uniformity."<sup>188</sup>

Having discussed all the concepts with which the principle of self-determination of indigenous peoples has been linked, one can say that these concepts reflect the broad political aspirations of indigenous people, and that they also appear to be inseparable.

---

187. Hannum (1990) 81.

188. Hannum (1990) 83.

## CHAPTER 5

### 5. THE RELATIONSHIP BETWEEN SELF-DETERMINATION, LAND RIGHTS AND NATURAL RESOURCES

#### 5.1 Generally

When indigenous peoples press for collective land rights they frequently do so under the banner of the "right of self-determination."<sup>189</sup> However, the relationship between the concept of self-determination and that of collective land rights is complex.<sup>190</sup> Despite this complexity, the importance of land to the survival of indigenous cultures is widely acknowledged.<sup>191</sup> Territorial security, including control of natural resources, is part of the right to self-determination. Self government and land are, therefore, properly viewed as inseparable. The concept of land for indigenous peoples is intertwined with the issue of economic rights. The most fundamental issue for indigenous peoples is the economic right to ownership of traditional lands and resources, another continuing controversy in various parts of the world.

Inasfar as the issue of land is concerned, indigenous peoples often do not have the right of self-determination or the right to use natural resources, as other people do. They are only accorded two collective human rights

---

189. Buchanan (1993) 100.

190. Buchanan (1993) 105.

191. Anaya (1994) 346.

in international law, that is, the right to physical existence and the right to preserve a separate identity.<sup>192</sup> Greater land rights and self-determination for indigenous peoples should be advocated in the fields of natural resources management and development.<sup>193</sup>

Indigenous people, more than other ethnic groups, rely on their connection to the territory of their ancestors to reproduce their specific cultures. As such they, more than other groups, require the protection of territory that the right to self-determination confers but that mere human rights, for example, would not do.<sup>194</sup> Even if an indigenous group does not enjoy self-determination in the extreme sense of independent statehood, it may nonetheless achieve other forms and degrees of self-determination through exercising collective property rights. Collective land rights are one important dimension of self-determination for indigenous people.<sup>195</sup>

In addition to the right of a people to "freely determine their political status",<sup>196</sup> the right of self-determination entails the right of a people to

---

192. Opekokew (1987) 2.

193. Barsh (1993) 278.

194. Lam (1992) 621.

195. Buchanan (1993) 106.

196. International Covenant on Economic, Social and Cultural Rights Art. 1, G A Reg. 2200, UN GAOR, 21<sup>st</sup> Session, Supp. No. 16, 49 UN Doc. A/6315 (1966).

"freely pursue their economic, social and cultural development".<sup>197</sup> These aspects are said to derive from the free exercise of political self-determination.

The rights of peoples to social development and to cultural development<sup>198</sup> do not pose barriers to the achievement of political self-determination for indigenous peoples in the way that the right to economic development does. For example, the denial of a right of self-determination for a people has not been justified on the basis of cultural or social development, whereas it has been denied on the basis of the right to economic development.

## **5.2 Economic Development**

This section will focus on economic development. The right to economic development has two aspects:

- The use of natural resources and
- Economic growth.

The use of natural resources and economic growth are intertwined. But the first one, that is, natural resources, poses a further obstacle to

---

197. International Covenant. Article 1 (1). See footnote 252.

198. The UNESCO Declaration of the Principles of International Cultural Co-operation, Nov. 4, 1966, UNESCO, Records of the General Conference, 14 Sess. 86-89 (1966), and General Assembly Resolution 3148 (XXVII) of 14 December 1973).



granting the right of self-determination to indigenous peoples within states.

The link between the entitlement to the natural resources within one's territory and the self-determination of the people of that territory was most clearly made during the discussion in the 1950s of the inclusion of a right to self-determination in the International Covenants.<sup>199</sup>

This led to the establishment of a Commission on Permanent Sovereignty Over Natural Resources to study the status of such sovereignty and to make recommendations for its strengthening.<sup>200</sup> The principle of a people's sovereignty over the natural resources within its territory was subsequently affirmed in numerous General Assembly Resolutions<sup>201</sup> and explicitly included in Article 1 of the International Covenants.<sup>202</sup> While the Charter provides a general, authoritative statement of these rights, the two primary international instruments today concerning sovereignty over natural resources are the U.N. General Assembly Resolution on

---

199. G.A. Res. 626 of peoples freely to use and exploit their natural resources is inherent in their sovereignty; and G.A. Res. 1314 (XIII) of 12 December 1958 ("The right of peoples and nations to self-determination ... includes permanently sovereignty over their natural wealth and resources".)

200. G.A. Resolution 1314 (XIII) of 12 December 1958.

201. The General Assembly recommended "that the sovereign right of every State to dispose of its wealth and its natural resources should be respected, in conformity with the rights and duties of states under international law." G.A. Res. 1720 (XVI) of 19 December 1961; Permanent Sovereignty over Natural Resources, G.A. Res. 1803, U.N. GAOR, 17<sup>th</sup> Sess., Supp. No. 17, U.N. Doc. A/5217 (1962).

202. "All peoples may, for their own ends, freely dispose of their natural wealth and resources ... In no case may a people be deprived of its own means of subsistence."

Permanent Sovereignty Over Natural Resources,<sup>203</sup> and Resolution 3281 (XXIX), containing the Charter of Economic Rights and Duties of States.<sup>204</sup>

Resolution 1803 declares, *inter alia*, that the "violation of the rights of peoples and nations to sovereignty over their natural wealth and resources is contrary to the spirit and principles of the Charter of the United Nations and hinders the development of international co-operation and maintenance of peace".<sup>205</sup> Article 2 (1) of the Charter of Economic Rights and Duties of States provides that "every State has permanent sovereignty over its natural wealth and resources and has the inalienable right fully and freely to dispose of them".<sup>206</sup> Article 1 (1) provides that "every State has and shall freely exercise full and permanent sovereignty including possession, use and disposal, over all its wealth, natural resources and economic activities."<sup>207</sup>

The various resolutions make it clear that sovereignty over resources is one aspect of the overall sovereignty of the State. When linked with the principle that a people have inherent sovereignty over the resources in its territory, this implies that the ultimate goal of self-determination for a

---

203. G.A. Res. 1803, U.N. GAOR, 17<sup>th</sup> Sess., Supp. No. 17, at 257. U.N. Doc. A/5217 (1962).

204. Charter of Economic Rights and Duties of States, January 15, 1975, I.L.M. 251.

205. G.A. Res. 1803, U.N. GAOR, 17<sup>th</sup> Sess. Supp. No. 17, at U.N. Doc. A/5217 (1962).

206. Charter on Economic Rights and Duties of States, January 15, 1975, 14 I.L.M. 251.

207. Ibid. Charter on Economic Rights and Duties of States, January 15, 1975, 14 I.L.M. 251.

people that only comprises part of an existing state is secession.<sup>208</sup>

If secession is not treated as a claim of full self-determination, and some attempt is made to accord more autonomy within the state, even if the use of some resources may be negotiated, sovereignty over natural resources is accordingly denied to the part and retained by the whole.

The concept of sovereignty over resources also poses barriers to the self-determination of indigenous peoples. The reason for this is that a territorially defined people is entitled to sovereignty over the resources within its territory and sovereignty denies them the right of any particular part of the whole to exercise self-determination.<sup>209</sup> This is because the foregoing would entail claiming part of those resources for its sole benefit, whereas it is the people as a territorially-defined whole that has the right to the use of the resources of the territory.<sup>210</sup>

Further, the right of the people as a whole not to be deprived of their means of subsistence means that, where the resources in question are necessary for the economic development of the whole of the people, it is even clearer that a part of the whole is unable to claim those resources for its sole benefit. An example of an instance where the issue of

---

208. Iorns (1992) 283.

209. Iorns (1992) 284.

210. Article 1 (2) International Covenants.

sovereignty over resources played a large role in the denial of a part of a state to exercise self-determination, is the case of Katanga's attempted secession from the (Belgian) Congo.<sup>211</sup>

Briefly, it may be postulated that the factor prompting the claim for separate self-determination was precisely that Katanga had large amounts of natural mineral resources that the people of Katanga wanted to exploit.<sup>212</sup> This, in addition to the fact that these resources were the primary natural resources of the whole Congo, were the very factors that operated to deny the people of Katanga an entitlement to secede and thereby take the resources with them. It is said that it is due to the Katanga example that most people attempting to develop theories of secession give as a factor going against a right of secession in a particular instance, any resulting economic non-viability of the remaining part of the state. It is furthermore stated that, where it is the intent of the resource-rich part of the state to benefit from the exploitation of those resources and to deprive the rest of the state of such benefits, there is even more reason to deny a right of secession to that part.<sup>213</sup>

One may finally conclude that the barriers posed by the territorial definition of a people and by their sovereignty over the resources of that

---

211. Buchheit (1978) 141-53; Young (1965); Gerard (1966).

212. Buchheit (1978) 152.

213. Iorns (1992) 285.

territory can be regarded as part of the overall barrier that the concept of sovereignty poses to the self-determination of indigenous peoples currently situated within states as well as other accepted political units.

## **CHAPTER 6**

### **6. INTERNATIONAL FRAMEWORK FOR INDIGENOUS PEOPLE'S RIGHTS (Especially Rights Within the Scope of this Thesis i.e. Land Rights, Self-determination, Environment, Natural Resources, etc.)**

This section deals with the efforts made at an international level to ensure respect for indigenous people's rights. Reference will only be made to the rights dealt with in this paper, that is, land rights, self-determination, right to natural resources and the environment.

International law did not concern itself with indigenous groups and their status until recently.<sup>214</sup>

#### **6.1 United Nations Framework and Indigenous Rights in General**

##### **6.1.1 On the Right of Existence**

Indigenous peoples should be protected against unprecedented pressures which threaten their cultural identity and even their existence. The Genocide Convention was the answer by the international community to the assault upon the right of existence of some other groups.<sup>215</sup> "The convention was manifestly adopted for a purely humanitarian and civilising

---

214. Lerner (1991) 23.

215. Convention on the Prevention and Punishment of the Crime of Genocide 1948.

purpose".<sup>216</sup>

The origins of the Genocide Convention show that it was the intention of the UN "to condemn and punish genocide as 'a crime under international law' involving a denial of the right to existence of the entire human rights groups, a denial which shocks the conscience of mankind and results in great losses to humanity".<sup>217</sup>

The main significance of the Genocide Convention lies in the assertion by the international community of the universal duty to protect the existence of the groups, by declaring genocide to be an international crime irrespective of the circumstances in which it is committed. The prohibition of Genocide is seen today as part of the *jus cogens*.<sup>218</sup> The Genocide Convention has exercised little influence in preventing clear-cut genocidal situations in various parts of the world during the past few decades.<sup>219</sup> It is clear that the convention needs updating. But, despite its shortcomings, the Genocide Convention remains one of the basic instruments in the protection of group rights,

---

216. As stated by the International Court of Justice.

217. Reservations to the Convention of Genocide Case ICJ Reports (1970) 15-69, 23.

218. Lerner (1991) 141.

219. Ibid.

dealing, as it does, with the basic right of groups to maintain their existence.

To date, article 7 of the 1993 Draft Declaration on Indigenous Peoples<sup>220</sup> also provides that, "Indigenous peoples have the collective and individual right not to be subjected to ethnocide and cultural genocide."

#### **6.1.2 On the Right to the Preservation of the Identity of the Group**

In this regard, the Draft Declaration on Indigenous Peoples<sup>221</sup> affirms that indigenous peoples are equal in dignity and rights to all other peoples, recognising the right of all peoples to be different, to consider themselves different, and to be respected as such.<sup>222</sup> The Declaration on the Rights of Persons belonging to National or Ethnic Religious or Linguistic Minorities also addresses the protection of minority identity.<sup>223</sup> This means that the right reflects the importance given to communities, collective and families in many societies and the general inherent communal activity of humans. The purpose of the

---

220. United Nations, Economic and Social Council, Commission on Human Rights, sub Commission of the Prevention of Discrimination and Protection of Minorities, Report on the Discrimination Against Indigenous Peoples 29, E/CN.4/sub.2/1993/29/Annex 1.

221. Ibid.

222. Ibid.

223. Hannum (1993) 1.



protection of this right is to enable communities as communities to prosper and transmit their culture as well as to participate fully in the political, economic and social process, thus allowing the distinct character of a community "to have this character reflected in the institution's government under which it lives."<sup>224</sup>

### **6.1.3 On the Right of Non-discrimination**

International instruments adopted in recent years followed the orientation discussed above<sup>225</sup> on the right of non-discrimination firmly grounded in doctrine and in jurisprudence. The Convention on Racial Discrimination and the Declaration on Religious Intolerance and Discrimination are at this stage the most important general instruments to that effect. It has been observed that:

Neither the law or any of the agencies concerned appears as yet to have dealt effectively with the component of racial discrimination which is almost invariably an important factor affecting the treatment of indigenous peoples.<sup>226</sup>

As a result there is now a major Study of the Problem of Discrimination Against Indigenous Populations!

---

224. Brownlie (1991) 7.

225. Chapter 2.2.1.2.

226. Bennett (1978) 49.

#### **6.1.4 On the Right to Special Measures**

– International instruments have admitted the legitimacy of such measures which ensure the maintenance of a group. Among these instruments is the Convention on Racial Discrimination. The ILO Convention <sup>227</sup> also requires the development of “special measures” to safeguard indigenous “persons, institutions, property, labour, cultures and environment,” and specifies that the measures be consistent with “the freely expressed wishes of the peoples concerned.” <sup>228</sup>

### **6.2 The United Nations Framework on Land, Natural Resources and Environment**

States have a particular responsibility for the realisation of universally recognised standards for the protection of indigenous land rights and the environment. It is also the primary task of all states and International organisations to eliminate from the life of society evils such as colonialism. To protect indigenous peoples’ land rights and environment, there is a need for international cooperation. If international cooperation can be achieved, then the continued survival of mankind and the preservation of nature will be ensured.

---

227. Of 1969 Article 4 (1).

228. Ibid.

The view that special instruments on the protection of indigenous land rights and to environment are needed is gaining increased support. This will be evident from the discussion on various documents submitted to the United Nations by several indigenous representatives throughout the world. International standards on the land rights of indigenous populations must address several different questions. The subjects that should be addressed by international instruments include the ownership and control of land, including its delimitation and restitution for land lost by those populations and the acquisition of further land where necessary, rights to subsoil and other natural resources, removal of indigenous and tribal peoples from the lands they occupy and the transmission of ownership.<sup>229</sup>

Several international instruments contain standards of general relevance to indigenous land rights and the environment and deal directly with the situation. Of particular importance are the United Nations documents and both the 107 and 169 International Labour Organisation Conventions. These will be discussed below.

The founding of the United Nations marked the beginning of a new era in International law in that international human rights law emerged.<sup>230</sup>

Indigenous peoples also want to enjoy the benefits of this new era and

---

229. Swepston and Plant (1985) 96.

230. Burger (1988) 107.

are calling on the United Nations to recognise their land rights and to protect the environments in which they live. Documents presented to the United Nations by various indigenous tribes and representatives would show that, globally, indigenous peoples have common interests and aspirations. Most of all they have experienced common suffering.

#### **6.2.1 United Nations Working Group on Indigenous Peoples (Draft Declaration on the Rights of Indigenous Peoples)**

The Working Group emerged after the law acknowledged the fact that the existing international law was not adequate to protect the rights of indigenous peoples.<sup>231</sup> In its discussions, the Working Group also focussed on the cultural, territorial and environmental protection of the indigenous peoples. It was an important opportunity for the United Nations to study the situation of indigenous peoples, whose cultures have for so long been ignored, and to make a contribution to international efforts for world peace and prosperity.<sup>232</sup>

The Working Group proposed that "the special relationship of indigenous peoples to their land and, that their land, land rights and natural resources should not be taken away from them".<sup>233</sup>

---

231. Suagee (1992) 686.

232. Suagee (1992) 689–91.

233. Suagee (1992) 686.

The Working Group also made mention of the fact that indigenous nations and peoples are entitled to permanent control and enjoyment of their aboriginal ancestral-historical territories.

### **6.2.2 Draft Declaration on Discrimination Against Indigenous Peoples<sup>234</sup>**

The purpose of discussing the provisions of the Working Groups is to show that, despite provisions having been made with regard to land rights and environmental protection for indigenous peoples, submissions are still made, which prove these provisions to be inadequate to meet their needs. The Draft Declaration as agreed upon by the members of the Working Group at its eleventh session, contains amongst other things:

- concern that indigenous peoples have been deprived of their human rights and fundamental freedoms, resulting, *inter alia*, in their colonisation and dispossession, thus preventing them from exercising, in particular, their right to development in accordance with their own needs and interests;

---

234. United Nations, Economic and Social Council, Commission on Human Rights, Subcommission on the Prevention of Discrimination and the Protection of Minorities, Report on the Discrimination Against Indigenous Peoples, 29 E/CN.4sub.2/1993/29/Annex 1.

- recognition of the urgent need to respect and promote the inherent rights and characteristics of indigenous peoples, especially their rights to their lands, territories and resources;
- a conviction that control by indigenous peoples over developments affecting them and their lands, territories and resources will enable them to maintain and strengthen their institutions, cultures and traditions, and so serve to promote their development in accordance with their aspirations and needs;
- a recognition, also, that respect for indigenous knowledge, cultures and traditional practices contributes to sustainable and equitable development and proper management of the environment.<sup>235</sup>

With due regard to the latter considerations and recognitions, the Working Group solemnly proclaimed the following United Nations Declaration in as far as the land and environmental issues for indigenous peoples are concerned:

- (a) Indigenous peoples have the collective and individual right

---

235. Ibid, paragraphs 5—8.

not to be subjected to ethnocide and cultural genocide, including prevention of and redress for any action which has the aim or effect of dispossessing them of their lands, territories and resources.<sup>236</sup>

(b) Indigenous Peoples have the right to maintain and strengthen their distinctive spiritual and notarial relationship with their lands, territories, waters and coastal seas and other resources which they have traditionally owned or otherwise occupied or used, and to uphold their responsibilities to future generations in this regard.<sup>237</sup>

(c) Indigenous peoples have the rights to own, develop, control and use the lands, air, waters, coastal seas, services, flora and fauna and other resources which they have traditionally owned or otherwise occupied or used. This includes the right to the full recognition of their laws, traditions and customs, land tenure systems and institutions for the development and management of resources, and the right to effective measures by States to prevent any interference with, alienation of or encroachment upon these rights.<sup>238</sup>

---

236. Ibid Article 7 (b).

237. Ibid Article 25.

238. Ibid Article 26.

(d) Indigenous peoples have the right to the conservation, restoration and protection of the total environment and the productive capacity of their lands, territories and resources, as well as to assistance to this purpose from states and through international co-operation.<sup>239</sup> Indigenous peoples have the right to determine and develop priorities and strategies for use of their lands, territories and other resources, including the right to require that states obtain their free and informed consent prior to the approval of any project affecting their lands, territories and other resources, particularly in connection with the development, utilisation or exploitation of minerals, water and other resources.<sup>240</sup>

### **6.2.3 Lil'wat Nation – Introduction and Application for Membership Into the International League of the United Nations<sup>241</sup>**

As already mentioned in Chapter 3,<sup>242</sup> international law has done little in so far as land rights for indigenous peoples and environmental protection are concerned. Therefore indigenous peoples feel that it is high time to fight for their land rights and

---

239. Ibid Article 28.

240. Ibid Article 30.

241. Document submitted to the United Nations Geneva, Switzerland from St'at'imx Nations of Chiefs.

242. Chapter 3, 3.2.



the protection of the environments in which they live. They want to protect their Mother Earth and its peoples from severe exploitation and destruction.

Within the Stl'atl'imx territory, people depend on the natural wealth of the territory to survive. Through their customs and traditions, they educate their peoples to respect the land, environment, wildlife and fellow man. Their laws and traditions are aligned with the natural laws of the land and environment.

These people believe that man's laws must always coexist with the laws of nature. The people of Stl'atl'imx feel duty-bound to protect their land, peoples and environment from severe exploitation and destruction caused by pollution and poor harvesting practices that deplete their natural resources.

Having learnt that the philosophy and purpose of the United Nations is similar to theirs, they therefore urge the United Nations to help them achieve their goal (i.e. the goal of protecting their people and environment from exploitation and destruction). They wish to have their land back, which has been their home since time immemorial.

#### 6.2.4 Alternatives to Development: Environmental Values of Indigenous Peoples <sup>243</sup>

It was, earlier on, stated in this study that nature is a real environment which must be accepted. Through experience and through different rituals, indigenous peoples have learnt to live in harmony with nature. Not until the intervention of European political states was the harmony between human beings and nature upset. The balance between the natural and the supernatural was, and continues to be, violently disrupted by those who would seek short term benefits by extracting natural resources at rates, and in amounts, greater than can be naturally replaced. Native peoples live close to the natural as well as the supernatural world, and for this reason a relative balance is maintained through limited growth and consumption.

The new goals set for exploitation and exploration, place new pressures on the fragile ecology and threaten the long-term future of human kind. The belief that both plants and animals, and even other natural phenomena are regarded as having souls and spirits is one of the most important features of indigenous beliefs that ensure respect for the environment. It is in the maintenance of balance between of the natural world

---

243. Environment Workshop — Northwest Regional Conference on the Emerging International Economic Order. Seattle, Washington, U.S.A.

and the supernatural world that indigenous peoples realise that life taken must be restored. Like their ancestors, indigenous people strive to continue to maintain the balance between the natural and supernatural worlds.

Indigenous peoples have, by virtue of their way of life, protected and preserved the lands, waters, plants and animals that represent the last major undeveloped resources in the world.

Using indigenous resources is most often not a choice made by an indigenous group, but the decision of a political state, transnational corporation, or other economic interest group.

Political States like Brazil, South Africa, the United States and Denmark have come into existence and continue to exist because of their exploitation of indigenous natural resources.

The cost of such exploitation by all political states have been the lives of in excess of 27 000 000, indigenous peoples worldwide.

Since 1850 damage has been done to rivers, land and streams. Even the atmosphere has been seriously harmed. The trend towards increasing exploitation continues even though the consequences are increasingly clear.

In South Africa, the indigenous populations have been squeezed into territories much too small for their well-being,

whilst vast areas are being developed for a small minority. Tribal resources have been the target of exploitation. Indigenous groups are either ignored, pushed aside, or killed so that their resources will become available to political states in need of trade materials or goods for general consumption. The needs and interests of political states and indigenous groups are in many ways dramatically opposed to one another. Political states view uncontrolled growth and progress as the highest ideals, while indigenous groups regard balance and limited growth as essential to their livelihood. To all appearances, these ideas cannot be reconciled. These differences, however, must be reconciled or a great deal of humankind will not survive.

A new economic order must be established. This new economic order must bring about the protection and preservation of nature and a restored balance. A new international order will benefit mankind. It is therefore recommended that:

- national governments and international organisations must recognise and support tribal rights to traditional land, cultural autonomy and full local sovereignty;

lower life expectancy. Pollution of lands, waters, and atmosphere caused by the industries is also a major concern.

One of the major objectives of the National Maori Congress is to provide a national forum for participating tribes to address environmental issues within the Maori framework, and to advance a unified national Maori position on significant policy matters both nationally and internationally.

#### **6.2.6 United Nations Working Group on Indigenous Populations<sup>245</sup>**

The lack of protection of the indigenous peoples is exacerbated by their unfamiliarity with different mechanisms to protect and defend human rights at both national and international levels.

The invasion of their territories and the destruction of their resources are endangering the physical and cultural integrity of several indigenous villages and communities. The deforestation of hectares of tropical forest has endangered communities. The exploitation of forest territories belonging to these communities will create grave difficulties for these indigenous peoples who have inhabited them since time immemorial. The opening of coal mining threatens these peoples, since they will be evicted

---

245. 11<sup>th</sup> Session 1992 — Geneva. Venezuelan National Indian Council.

from their lands and exposed to coal dust pollution. This exploitation of mineral resources will not only threaten the lives of the indigenous community, it will also cause the disappearance of rivers. The rice cultivation project on the land would not only rob this community of its land, but also pollute its environment with pesticides.

**6.2.7 World Council of Indigenous Peoples: Land Rights of the Indigenous Peoples, International Agreements and Treaties, Land Reform and Systems of Tenure<sup>246</sup>**

This document starts off by indicating that, traditionally, indigenous nations had absolute power over their territories, their resources and their lives. Each nation had absolute control over the resources and the products of its land. When the colonisers arrived upon the scene, they gradually assumed political control over the lands and indigenous peoples. Today, throughout the world, indigenous peoples wish to provide an indigenous interpretation of what land rights, international agreements, land reform and systems of land tenure mean to them.

Indigenous peoples find it impossible to discuss indigenous land

---

246. Presented to NAO Conference on Indigenous Peoples and the land 1981.

rights without referring to a history of dispossession, colonisation and degradation. The issue of land rights has not received the attention that it deserves. It is easy to overlook the fact that land rights mean to indigenous nations something totally different from the meaning used by government officials and non-indigenous populations. On behalf of the indigenous nations, the World Council of Indigenous Peoples made the following recommendations pertaining to land rights and the environment:

- That the international community recognises sovereignty and entitlement to traditional lands;
- that the United Nations recognises the treaties that indigenous nations around the world have signed as binding under international law.

Since time immemorial indigenous nations have practised land tenure and land reform. Traditionally their survival as indigenous peoples depended on their knowledge of nature and of the environment, and upon their ability to be producers and responsible users of land and its resources. This knowledge must be respected by the international community for the sake of all human survival.

### **6.2.8 World Council of Indigenous Peoples, Indigenous Philosophy and Land<sup>247</sup>**

For indigenous peoples the subject of land cannot be discussed without first achieving an understanding of its cultural and traditional significance. Indigenous peoples feel that for non-indigenous peoples to understand their relationship with land, it is their responsibility to provide an analytical view of indigenous philosophy and their relationship to their land. To indigenous peoples in all parts of the world the land is sacred. The land provides the sustenance of all life. The land must be respected, carefully used, and meticulously restored. The concept of the land being sacred is the basis of indigenous religion. Indigenous peoples are taught from the day that they learn to walk to respect nature and its relationship with all elements of our universe. Their knowledge of their environment and universe, is extensive. To indigenous peoples the land and the people are inseparable. They claim that it is impossible to talk about one without referring to the other. Peoples stem directly from the land. The land is seen as a mother figure because she gives life, she is the provider, the protector and the comforter. When the land suffers, its inhabitants suffer too. In many parts of the world, people suffer because they have

---

247. Presented to international NAO Conference of Indigenous Peoples and the land 1981.



abused the land.

Mapuche Indians are the indigenous peoples of Chile. The extent of these peoples' identity is their relationship to the land.<sup>248</sup>

Without land there could be no Mapuche people. "Mapuche" means people of the earth. Due to the lack of international standards to protect land rights for indigenous peoples and the environment, some indigenous peoples have taken matters into their own hands in order to protect their forests and homelands against destruction. The forest is like a 'mother' home for indigenous peoples, and for this reason some are even prepared to protect it at the cost of their lives.<sup>249</sup>

Indigenous peoples' respect of nature and its relationship with their environment is, obviously, their whole life.

To the majority of people in the dominant societies, land is usually viewed as a commodity to be bought and sold for profit, fenced in, paved and dug up. Private ownership is the cornerstone of the industrial society. Land is a means to an

---

248. 1979 Fact-finding mission sent to Chile by the Inter Church Committee on Human Rights in Latin America, to study the effects of the new Indian Law upon the Mapuche Indians.

249. Ibid 4. "Bhatiya", woman sang.

end, a thing to be exploited. In contrast the view of land held by the industrial societies with that of indigenous people, the land is the unifying force in their lives – social, political, spiritual, cultural and economic – and to separate the people from their land is to deny them of their peoplehood.”<sup>250</sup>

#### **6.2.9 Report of the Working Group on Indigenous Populations on its Twelfth Session.**<sup>251</sup>

Paragraph 69 of this report includes the concerns of indigenous representatives when they speak of the disappearance of the possibility of engaging in reindeer peoples’ traditional subsistence activity, due to environmental degradation of the land, which led to impoverishment and difficult social conditions.

In order to overcome this problem it was suggested that consultation mechanisms should be established, indigenous land resource rights recognised and indigenous subsistence lifestyles secured.<sup>252</sup> The World Bank should make sure that development programs do not adversely affect the indigenous peoples, should share experience with indigenous people and

---

250. A report given at a conference in June 1978 by the World Council of Churches in which they have summarised the unique relationship between indigenous peoples and their land.

251. United Nations Economic and Social Council, Commission on Human Rights, sub-commission on the Prevention of Discrimination and Protection of minorities. Report on the Discrimination against Indigenous Peoples 30, E/CN. 4/Sub.2/1994/38.

252. Ibid, par 71.

should support indigenous development projects. Such a policy makes good economic, environmental and developmental sense.

Of particular importance to the indigenous peoples is the loss and seizure of lands. Circumstances leading to the loss of lands were numerous. Constitutions and laws that specifically allowed the seizure of land, for example by not recognising the notion of collective ownership or by declaring all untitled lands, in reality used by indigenous peoples, to be state property. Despite "legal protection", lands had been taken away. For example, in South Africa, lands are taken away for the establishment of game reserves and natural parks. In most cases, such as the latter, no compensation has been provided.

Seizure of lands were, in certain circumstances, done in violation of treaty rights. Most acts concerning land rights and the environment have been passed without indigenous views being incorporated.<sup>253</sup> With regard to land and resources, there are legal and environmental consequences of extraction of surface and subsurface resources. This will result in environmental degradation. The environmental degradation is caused by mining, logging, the building of dams and other

---

253. Native Title Act 1993 (Australia) : Ibid par 77.

industrial activities on indigenous lands, frequently undertaken by multinationals on government contracts. In most cases the rate of deforestation caused by the logging industry is much greater than could be sustained environmentally. The ecological consequences of the building of hydro-electric stations should also be considered. The impact will render the peoples concerned "ecological refugees". Treaty rights of indigenous peoples are either directly or indirectly violated through the taking of land, industrial activities causing damage, unilateral extinction and the imposition of national legal regulations.

Several indigenous organisations are concerned about the lack of implementation of laws or programs aimed at securing their position or improving indigenous people's situation especially with regard to land demarcation and treaty rights. Implementation is carried out by non-democratic civil servants and land claims are delayed at national and regional levels. Indigenous peoples are also concerned about their problems being solved by "outsiders", without the consultation of indigenous representatives and of the total absence of legal machinery to redress their grievances.

From the discussion of these documents submitted to the

United Nations by various indigenous representatives, one can draw the conclusion that, throughout the world, indigenous peoples are experiencing the same problems in so far as their land rights and environmental protection are concerned. For this reason, those responsible for international standards must consider the situation of these peoples.

The common problems which indigenous peoples require the implementation of international standards to consider are the following:

**Colonisation:** Indigenous peoples are concerned about the fact that the idea of colonisation was used to justify the dispossession of their lands which have been their homes since time immemorial. This concept may no longer be used to occupy their land.

**Mother Earth:** Indigenous peoples regard the land as their mother in all aspects of their lives. They believe that the land and people are inseparable. It is impossible to talk about the land without referring to indigenous peoples and vice versa. They therefore call upon those who set international standards to recognise their unique and special relationship to their lands.

**Environmental Protection:** Indigenous peoples are

concerned about the exploitation of their lands for the purposes of gaining resources and securing development projects. These practices have left the environment deforested and polluted. With time this will cause environmental degradation which will render mankind's survival impossible. Indigenous peoples urge that the environment must be protected as well.

**Interests of indigenous peoples with regard to land:**

Contrasting the interests of both the indigenous and non-indigenous peoples to land, it becomes clear that the indigenous people need the land for long-term benefits while the non-indigenous need it for short-term benefits.

**Participation:** Of particular importance, is the fact that indigenous peoples want to participate in the making of laws which affect them, their land rights and their environments. This will enable international standards to meet their needs and also ensure the survival of all mankind.

## 6.3 The ILO Conventions Framework

### 6.3.1 The ILO Convention 107 of 1957<sup>254</sup>

The International Labour Organisation was created in 1919.<sup>255</sup>

Since its creation, the ILO has been concerned with the problems of indigenous peoples in independent countries. It also formulated the only binding international standards on indigenous land rights and the environment.<sup>256</sup> It is unfortunate that these international binding standards on land rights and the environment do not deal much with the protection of the environment.

The purpose of the ILO Convention 107 was to lay down rules with regard to the protection and integration of indigenous and other tribal and semi-tribal populations in independent countries.

It aimed at establishing rules which may raise the level of indigenous peoples to match that of the more advanced national communities.

Article 11 makes provision for the recognition of the right of ownership of the land traditionally occupied by indigenous

---

254. Convention concerning the Protection and Integration of Indigenous and other Tribal and semi-tribal populations in Independent countries in ILO Convention 107, Recommendations 104, and conclusions of the Meeting of Experts, 1987.

255. Brollmann (1992); Swepstone & Plant (1985) 92.

256. Barsh (1986) 370.

peoples. The Convention contains provisions which have been harshly criticised by the indigenous peoples. They have no wish to necessarily become part of the dominant societies in which they find themselves. The most important criticism is that it did not give much satisfaction to indigenous aspirations, particularly in connection with land rights as a necessary condition to enable them to continue their traditional life styles.<sup>257</sup>

### 6.3.2 The ILO Recommendation 104<sup>258</sup>

The recommendation provides for legislative or administrative measures to be adapted to regulate the conditions, *de facto* or *de jure*, under which the populations concerned use the land.<sup>259</sup>

It further provides that the populations concerned should be assured of a land reserve adequate for the needs of shifting cultivation so long as no better system of cultivation can be introduced.<sup>260</sup> The recommendation provides that, administrative arrangements should be made, either through government agencies specially created for the purpose or

---

257. Lemer (1991) 105.

258. Recommendation concerning the Protection and Integration of Indigenous and other tribal and semi-tribal populations in Independent countries. See footnote 390.

259. Ibid Part II, Section 2.

260. Ibid Section 3 (1).



through appropriate co-ordination of the activities or other government agencies, for ensuring effective possession and land use of other natural resources by members of the populations.<sup>261</sup>

### **6.3.3 The ILO Convention 169 of 1969<sup>262</sup>**

The aim of the Convention 107 of 1957 did not satisfy the demands of the indigenous peoples. To be able to retain and preserve their culture, a first priority is the protection of the territorial basis of their culture, that is the land traditionally occupied. The 1969 ILO Convention is a partial revision of the 1939 Convention. It stresses the need and appropriateness to develop "new international standards."

The General Conference of the International Labour Organisation called attention to the distinctive contributions of indigenous and tribal peoples to the cultural diversity and social and ecological harmony of mankind and to international co-operation and understanding. Special measures shall be adopted as appropriate for safeguarding the persons and environment of the peoples concerned.<sup>263</sup> Such special

---

261. Ibid Section 36 (b).

262. Convention Concerning Indigenous and Tribal peoples in Independent Countries (United Nations).

263. Ibid, Article 4 (1).

measures shall not be contrary to the freely expressed wishes of the people concerned.<sup>264</sup>

Governments shall ensure that, whenever appropriate, studies are carried out of the co-operation of the peoples concerned to assess the environmental impact on them of planned development activities.<sup>265</sup> Governments shall also take measures, in co-operation with the people concerned, to protect and preserve the environment of the territories they inhabit.<sup>266</sup>

The rights of the peoples concerned to the natural resources pertaining to them shall be specially safeguarded.<sup>267</sup> These rights include the right of these peoples to participate in the use, management and conservation of these resources. The use of the term "lands" includes the concept of territories, which covers the total environment of the areas which the peoples concerned occupy or otherwise use.<sup>268</sup>

The provisions of Convention 169 are better than those of Convention 107 in that they do include to a large extent both the

---

264. Ibid Article 4 (2).

265. Ibid Article 7 (3).

266. Ibid Article 7 (4).

267. Ibid Article 15 (1).

268. Ibid Article 13 (2).

protection of the indigenous land rights and their environment.

But the question still remains: Are they fully applied to the indigenous peoples?

#### **6.4 United Nations Framework on the Right to Self-determination for Indigenous Peoples**

In as far as international standards are concerned, the right of self-determination has been declared in a number of treaties and instruments.<sup>269</sup> It is now part of customary international law and some jurists and governments have argued that it forms part of the *ius cogens*.<sup>270</sup> This view is also accepted by Hector Gros Espiell, who states that, "today no one can challenge the fact that, in the light of contemporary international realities, the principle of self-determination necessarily possesses the character of *ius cogens*".<sup>271</sup>

##### **6.4.1 On Self-determination – Generally<sup>272</sup>**

For a long time indigenous peoples have pleaded to have their right to self-determination recognised at the United Nations.

The idea of a principle of a right of self-determination for

---

269. McCorquodale (1994) 4.

270. e.g. Brownlie (1991) 513; (1991) 513; where he states that the right is generally accepted as a principle of international law and could even form part of the *ius cogens*.

271. Espiell (1980).

272. See also Thornberry (1994) 175.

indigenous people is now firmly embedded in the global consciousness.<sup>273</sup> Self-determination is a generally applicable norm of the highest order within the applicable international system.<sup>274</sup> Today a multitude of indigenous, ethnic and other groups have invoked the concept of self-determination in formulating demands against actual or perceived oppression of the status quo.<sup>275</sup>

As we have seen from the foregoing discussions, indigenous peoples have made repeated calls for the protection of their lives, cultures, their lands and ultimately, for the recognition of their right to self-determination.<sup>276</sup>

While the plight of indigenous peoples around the world have increasingly received international attention, particularly over the last ten years, many claims of indigenous peoples have, to date, been rejected and denied. The most prominent of these rejected claims has been the claim by indigenous peoples to self-determination.

From as early as 1911, indigenous peoples have pleaded with

---

273. Anaya (1993) 132.

274. Brownlie (1991) 515.

275. See also Halperin (1992) 123—160.

276. Iorns (1992) 201—202.

the international community to recognise their right of self-determination. This is evident from the Lil'wat Nations' Introduction and Application for Membership into the International League of Nations where it was stated that "We declare that we are and intend to remain ... self-determined".<sup>277</sup>

Hannum<sup>278</sup> is of the view that neither the Covenant of the League of Nations<sup>279</sup> nor the United Nations Charter considers self-determination or related issues in great detail. The Covenant of the League of Nations introduced the Mandate System.

The United Nations have traditionally accorded only minority or ethnic status to indigenous peoples.<sup>280</sup>

Traditionally, the United Nations has not recognised indigenous peoples as national groups with a right to self-determination. However, in 1960, United Nations Resolution 1541 established guidelines for deeming a territory to be a colony in need of United Nations assistance to promote its right to self-determination. For its indigenous peoples it has also provided

---

277. Document submitted to the United Nations. Geneva, Switzerland by the Stl'alt'emx Nations and Chiefs.

278. Hannum (1993) 22.

279. Article 22.

280. Opekokew (1987) 2.

the internationally agreed basic principles of international law and has, hence, also clarified the content of the right of self-determination which provides that:

subjection of people to alien subjugation, domination and exploitation constitutes a violation of the principles of land rights and self-determination of peoples, as well as a denial of fundamental human rights, and is contrary to the Charter of the United Nations.

The African Charter on Human Rights and Peoples' Rights confirms this by its provision that the right of self-determination is "the right to free colonised peoples from the bonds of domination".<sup>281</sup> The recognition of the right to self-determination, particularly, has indicated signs of growing awareness within the United Nations, of the need to improve upon its previously indifferent contribution to the indigenous cause.

The self-determination of peoples is a central principle of the United Nations Charter.<sup>282</sup> Affirmed in the UN Charter and other international legal instruments, self-determination was the normative grounds by which the territories of Africa, Asia and

---

281. Article 20 (2).

282. Feith and Smith.

elsewhere broke the formal bonds of colonialism and became independent states.<sup>283</sup> Self-determination of peoples is also now featured in the United Nations Charter as among the organisation's founding principles.<sup>284</sup>

The United Nations Trusteeship systematically continued the Mandate System of the League of Nations<sup>285</sup> but with somewhat of a measure of oversight of the powers and a broader general objective of promoting the "progressive development" of the trust territories "towards self government of independence as may be appropriate to the particular circumstances of each territory and its peoples and the freely expressed wishes of the peoples concerned".<sup>286</sup>

Far more innovative was the Charter's declaration regarding non-self-governing territories.<sup>287</sup> For the first time, the international community attempted to address the situation of territories whose peoples had not yet attained a full measure of self-government. The commitment was not to grant

---

283. Declaration on the granting of Independence of Colonial People, GA Res. 1514, UN, GAOR, 15<sup>th</sup> Session, Supp. No. 16 at 66 UN DocA/4684 (1961).

284. United Nations Charter 1945 Declaration Regarding Non self-governing Territories Articles 1, 53, 56, 73—74.

285. Mentioned above.

286. Hannum (1993) 5.

287. Ibid, Articles 73—4 of the Charter.

independence, but "to develop self-government, to take due account of the political aspirations of the peoples, and to assist them in the progressive development of their free political institutions, according to the particular circumstance of each territory and its peoples, and their varying stages of advancement". Article 1 of the Charter provides that the purposes of the United Nations are:

- 1 ...
2. ... To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace.<sup>288</sup>

Article 55<sup>289</sup> furthermore states that:

With a view of the creation of the conditions of stability and well being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples.

From one declaration to another, as we shall see in the discussion that follows, the message is the same, namely that all peoples have the right to self-determination and that indigenous peoples have the right to freely determine their

---

288. Found in Hannum (1993) 6.

289. of the Charter of the United Nations; Ibid.



political status and freely to pursue their economic, social, and cultural development.<sup>290</sup> The Human Rights Committee has also affirmed the importance of self-determination "because its realisation is an essential condition for the effective guarantee and observance of individual human rights and for the promotion and strengthening of those rights".<sup>291</sup>

The International Covenant on Civil and Political Rights, to which the United Nations is also party, holds out self-determination as a "right" of "all peoples".<sup>292</sup> Another major international human rights instrument that affirms the principle or right of self-determination for indigenous nations is the International Covenant on Economic, Social and Cultural Rights<sup>293</sup> which provides that:

1. All peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.
2. ...

---

290. Opekokew (1987) 1.

291. General Comment 12 [21<sup>st</sup> Session (1984)].

292. International Covenant on Civil and Political Rights Article 1 GA Resolution 2200, UN GAOR, 21<sup>st</sup> Sess, Supp NO> 16, 53, UN Doc A/6316 (1966).

293. International Covenant on Economic, Social and Cultural Rights Article 1, GA Res. 2200, UN GAOR, 21<sup>st</sup> Sess, Supp No. 6, 49, UN Doc. A/6316 (1966).

3. The States parties to the present covenant, including those having the responsibility for the administration of non-self-governing and Trust Territories, shall promote the realisation of the right to self-determination, and shall respect that, in conformity with the provisions of the Charter of the United Nations.<sup>294</sup>

The ICCPR and the ICECR are in agreement with the Universal Declaration of Human Rights as important instruments of universal application.

The Declaration on Friendly Relations<sup>295</sup> includes a great deal of material not directly related to self-determination or minority rights.<sup>296</sup> The relevant provisions largely reiterate principles similar to those proclaimed in Resolution 1514, including statements regarding the right of "all peoples" to self-determination.<sup>297</sup>

Following the adoption of the Declaration on the Right to Development,<sup>298</sup> the United Nations held a Global Consultation

---

294. Ibid.

295. Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, GA Res. 2625 (XXV), Annex, 25 UN GAOR, Supp. (No. 28), UN Doc. A/5217 (1970) 21.

296. Hannum (1993) 36.

297. Ibid.

298. United Nations Declaration on the Right to Development, GA Res. 41/128, Annex UN GAOR, 41<sup>st</sup> Sess, Supp No. 53 at 186, UN Doc. A/41/53 (1986).

on the Realisation of the Right to Development as a Human Right. It concluded that a peoples' right to decide its own priorities is an element of their right to development, and is consistent with the right to self-determination.<sup>299</sup> The right to development and the right to self-determination, are inseparable, but consistent with the principle of self-determination, development must not be imposed on indigenous communities without "their free and informed consent".<sup>300</sup>

The right of self-determination has been regarded by indigenous peoples as a prerequisite to the exercise of all other rights and that by international recognition of such a principle, unilateral actions by states will continue to have destructive effects on indigenous communities. From the outset, the Working Group and its mission to the Draft Declaration, comprised of indigenous peoples, have aggressively advocated the recognition of the right of self-determination. The position of the indigenous peoples has been that the Declaration must contain clear and explicit recognition of the fundamental right of self-determination, without discrimination or any other

---

299. Global Consultation on the Realisation of the Right to Development as a Human Right, UN. Doc. E/CN.4/1990/9, par 45 (1990).

300. Sambo (1993) 28.

limitation.<sup>301</sup> Therefore, the Working Group Draft Declaration of Indigenous Rights<sup>302</sup> was drafted with the hope that it could advance the intermediate indigenous goal of holding states accountable to international standards of respect and protection for indigenous peoples, lands, resources and culture.<sup>303</sup>

Self-determination is the "most strident and persistently declared demand" that was voiced before the Working Group.<sup>304</sup>

The Working Group recognised a right of self-determination in its Draft Declaration and presently provides as follows:

Indigenous peoples have the right to self-determination in accordance with International Law. By virtue of this right, they freely determine their relationship with the states in which they live in a spirit of coexistence with other citizens and freely pursue their economic, social and cultural and spiritual development in conditions of freedom and dignity.<sup>305</sup>

The Draft Declaration of the World Council for Indigenous Peoples highlights self-determination in Articles 1—4, which signify that this is the most important inherent right of

---

301. Ibid 23—4.

302. United Nations, Discrimination Against Indigenous Peoples: Report of the Working Group on Indigenous Populations on its ninth session at 2, UN. Doc. E/CN.4/Sub.2/1991/40.

303. Lam (1990) 693.

304. Williams (1990) 693.

305. Draft Declaration Article 31.

indigenous peoples.<sup>306</sup> Article 1 reads:

All peoples have the right to self-determination. By virtue of that right indigenous peoples may freely determine their political status and freely pursue their economic and cultural development.

As phrased, the right to self-determination amounts to the right to make decisions.<sup>307</sup>

Article 3 goes on to say:

One manner in which the right of self-determination can be realised is by the free determinates of an indigenous people to associate their territories and institutions with one or more states in a manner involving free association, regional autonomy, home rule or associate statehood as self-governing units. Indigenous peoples may freely determine those relationships after they have been established.<sup>308</sup>

The 1993 Draft Declaration of Indigenous Peoples<sup>309</sup> also acknowledges "that the Charter of the United Nations, the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights

---

306. Opekokew (1987) 1.

307. Lam (1992) 608.

308. Draft Declaration.

309. Discussed above under the right to preserve identity.

right to self-determination.<sup>311</sup>

With the emergence of the Working Group on Indigenous Peoples, indigenous peoples are finally being afforded the opportunity at international level, to speak out about their fundamental rights and the need for international measures to encourage those rights. The international community is therefore being urged and encouraged to provide for the inclusion of indigenous rights within the international human rights framework. The reason for this is that, although the right of self-determination is repeatedly endorsed in various international instruments, it is not really applicable to indigenous peoples as such.

From the provisions of various international instruments and the concerns of indigenous representatives, the application of the right of self-determination for indigenous peoples, as discussed above, it would appear that in international law self-determination is limited to the following categories of cases:<sup>312</sup>

- The right of the people of an existing State to choose freely their own political system and to pursue their own

---

311. Ibid 18.

312. Foreign Affairs and Trade Position Paper on Self-determination 1991.

economic, social and cultural development;

- as the legal foundation for decolonisation; and
- as a source of individual human rights.

#### **6.4.2 On International Self-determination**

The Colonial Peoples Declaration,<sup>313</sup> by itself, cannot be used to affirmatively establish the right to self-determination of nations, since nowhere in its text is the concept of political rights of minorities specifically mentioned. However, the Colonial Peoples Declaration does state "that all peoples have an inalienable right to complete freedom, the exercise of their sovereignty and the integrity of their national territory". This wording, which seems to favour national self-determination, is contradicted by the traditional reading in which "peoples" means people of a state, not people of the nation.<sup>314</sup> However, the Colonial Peoples Declaration has been interpreted by many states to allow some nations the international political right of self-determination.<sup>315</sup>

---

313. Declaration on the granting of Independence to Colonial Countries and Peoples, GA Res. 1514 (XV), 15 UN GAOR Supp. (No. 16) at 66, UN Doc. A/4684 (1960), thereafter referred to as the Colonial Peoples Declaration.

314. Nanda (1981) 275.

315. Paxman (1989) 197.

### 6.4.3 On Self-determination and the Term Peoples

The term peoples as used in international instruments in association with self-determination<sup>316</sup> indicates the collective group context within which the norm operates, the constitution and functioning of the political order. The term can also be viewed as an affirmation of the value of community bonds within and among groups.<sup>317</sup> As already mentioned above, the characterisation of self-determination as a right of peoples does not ignore the individual as an important beneficiary of the norm.<sup>318</sup>

During the drafting of the Draft Declaration on Indigenous Peoples, the implication of the use of the word "peoples", plural, or "people" singular was discussed.<sup>319</sup> Some indigenous representatives were of the view that the use of the word "peoples" in the plural would give rise to an interpretation that indigenous peoples would be beneficiaries of the right to self-

---

316. For example in Article 1 of the United Nations Chapter of Human Rights, both the International Covenant on Economic, Social and Cultural Rights and in Article 7 of the Covenant on Civil and Political Rights. The Common provision to the International Human Rights Covenants reads: "All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development". Self-determination is affirmed by substantially the same language in other international instruments. The African Charter on Human Rights and Peoples' Rights Article 20, OAU Doc. CAB/LEG/67/3 Rev. 3 reported in 21 International legal material 1291.

317. Anaya (1993) 137.

318. Ibid.

319. Discussed above under the heading The "Peoples" approach to self-determination.



determination.<sup>320</sup>

#### **6.4.4 On Self-determination and Equality**

The principles of equal rights and self-determination of peoples are referred to only twice in the UN Charter, that is, in Article 1.<sup>321</sup> The development of friendly relations among nations, based on respect for the principle of equal rights and self-determination of peoples, is listed as one of the purposes of the United Nations.<sup>322</sup> The United Nations' 1960 Declaration on Decolonisation<sup>323</sup> is clear as regards self-determination and equality. It provides that all peoples have an equal right to self-determination, regardless of their race, technological status, industrial structure or culture. Article 1 of the United Nations Working Group on Indigenous Peoples provides that indigenous peoples are entitled to universally recognised rights and freedoms, implicitly asserting a right to equality. Closely linked to the question of equality is the question of cultural survival and Articles 4 and 11<sup>324</sup> deal specifically with cultural rights. Article 7 ensures that indigenous collectives receive state support for

---

320. Ibid.

321. Daespi (1993) 2.

322. Ibid.

323. General Assembly Resolution 1514 (XV).

324. Of the United Nations Working Group on Indigenous Peoples Draft Declaration.

maintenance of their identity.

#### **6.4.5 On Self-determination and Cultural Equality**

The notion of respect for cultural determination has long been a feature of bilateral and as well as multilateral treaties.<sup>325</sup> Especially noteworthy today is Article 27 of the United Nations International Covenant on Civil and Political Rights. Article 27 affirms in universalist terms the right of persons belonging to "ethnic, religious or linguistic minorities ... to enjoy their own culture, to profess and practice their own religion, and to use their own language." The cultural integrity norm, especially embodied in Article 27, has been the basis of decisions favourable to indigenous peoples by the UN Human Rights Committee.<sup>326</sup> This body held the norm to cover all aspects of an indigenous group's survival as a distinct culture, understanding culture to include economic or political institutions, land use patterns, as well as language and religious practices.<sup>327</sup> The 1993 Working Group Draft Declaration echoes the requirement of "effective measures" to secure indigenous culture in its many manifestations.<sup>328</sup>

---

325. Lerner (1991) 3.

326. Anaya (1994) 343.

327. Ibid 344.

328. Article 13.

#### **6.4.6 On Self-determination and Secession**

It is clear from the provisions of Article 1 (2) and Article 2 (4) of the Charter of the United Nations that the right of secession, as an element of the right of self-determination of peoples and nations is recognised implicitly.

The recognition of group rights evolving within the United Nations reflects the primacy of self-determination as both a right in itself, and as the means by which all other rights can best be secured.<sup>329</sup>

#### **6.4.7 On Self-determination and Decolonisation**

With time, complete decolonisation became one of the UN's central goals.<sup>330</sup> The General Assembly Resolution was not the first to address decolonisation, but it is generally viewed as one of the most important.<sup>331</sup> Although the title of the resolution refers to its primary object, that is, independence for colonial territories, its reference to self-determination are cast in more universal terms. In a language that would be echoed in subsequent instruments, paragraph 2 of the preamble declares that "all peoples have the right to self-determination".

---

329. Barsh (1988) 69.

330. Hannum (1993) 20.

331. Ibid.

#### **6.4.8 On Self-determination and Territorial Integrity**

Resolution 1514 <sup>332</sup> sets forth another fundamental principle invariably proclaimed in conjunction with the right to self-determination. Paragraph 6 states that: "Any attempt aimed at the disruption of national unity and the territorial integrity of a country is incompatible with the purposes and principles of the Charter of the United Nations".

References to the preservation of territorial integrity are also mentioned in the Declaration Concerning Friendly Relations. Of particular interest in this Declaration is the apparent limitation on the prohibition against interference with territorial integrity or political unity to those "states conducting themselves in compliance with the principle of equal rights and self-determination of peoples..." <sup>333</sup>

#### **6.4.9 On Self-determination, Sovereignty and Statehood**

Resolution 1514 <sup>334</sup> may serve as a point of departure in this regard.

The issue of self-determination, as it relates to sovereignty and

---

332. General Assembly Resolution 1514 (XV).

333. Hannum (1993) 20.

334. General Assembly Resolution 1514 (XV).

statehood, brings about the issue of free association to the fore. Resolution 1541 identifies three means through which a territory may achieve self-government: emergence as a sovereign independent state, free association with an independent state or integration with an independent state.<sup>335</sup> Utilising the criteria set forth in Resolution 1541, the General Assembly subsequently arrogated to itself the authority to determine whether or not a particular territory had in fact achieved self-determination, irrespective of the claims of the administering power.<sup>336</sup>

Principle VII<sup>337</sup> makes provisions for the scope of free association and it provides as follows:

- a. Free association should be the result of a free and voluntary choice by the peoples of the territory concerned expressed through an informal and democratic process. It should be one which respects the individuality and cultural characteristics of the territory and its peoples, and retains for the peoples of the territory which is associated with an independent state the freedom to modify the status of that territory through the expression of their will by

---

335.     Hannum (1993) 20; Principle VI of the Resolution.

336.     Ibid.

337.     of the Resolution.

democratic means and through constitutional process.

- b. The associated territory should have the right to determine its internal constitution without outside interference in accordance with due constitutional processes and the freely expressed wishes of the peoples. This does not preclude consultation as appropriate or necessary under the terms of free association agreed upon.

Resolution 2625 also clarifies that, in addition to the options of free association and others mentioned in Resolution 1541, a people may implement its right to self-determination by choosing "any other political status freely determined".<sup>338</sup> This means that despite the sovereignty of statehood claims by the administering power, indigenous peoples have the right to express their wishes freely. This is the crux of the right of self-determination.

## **6.5 The United Nation's Framework on Self-determination, Land and Natural Resources**

The right to self-determination also appears in the first article of the United Nations' Charter, and in the first articles of both International Covenants on Human Rights, where it is defined to include not only a

---

338. Hannum (1993) 36.

peoples' right to own its cultural, economic, social and political institutions, but also its right to land.<sup>339</sup> The Sub-commission on Prevention of Discrimination and Protection of Minorities has stated that indigenous peoples can be differentiated from ethnic, linguistic and religious minorities by the way they perceive land ownership and self-determination.<sup>340</sup> It was also stressed that, self-determination was an important matter for indigenous populations.<sup>341</sup>

Also relevant to indigenous peoples' linkage with lands and natural resources is the self-determination provision common to the International Human Rights Covenants, which affirm that, "In no case may a people be deprived of its own means of subsistence".<sup>342</sup> Land provides indigenous peoples with their own systems of government, their own way of educating their children, their own way of managing its resources and their own way of showing appreciation for her bountiful riches.<sup>343</sup>

---

339. Barsh (1988) 70.

340. Opekokew (1987) 2.

341. Ibid.

342. Article 1.

343. World Council of Indigenous Peoples, *Indigenous Philosophy and Land*. Presented to the International Conference on Indigenous Peoples and Lands. Paper researched by Debra M Hogan and edited by Marie Smallface Marule.

## **6.6 ILO Framework and the Right to Self-determination for Indigenous Peoples**

### **6.6.1 ILO Convention 107 of 1957**

Indigenous participants at the ILO have repeatedly asserted that their peoples intend to exercise the right to self-determination to effect a free association with other states.<sup>344</sup> In 1957, the International Labour Organisation passed a convention establishing international standards for indigenous peoples on humanitarian principles.<sup>345</sup> The ILO has been a significant exception among International Organisations in addressing the issue of the rights of indigenous peoples within the ILO's mandate of promoting indigenous rights.<sup>346</sup> However, this convention was criticised on the grounds that it accepts as inevitable or desirable the integration of indigenous people and thus accepts the notion of their eventual disappearance as a people.<sup>347</sup> Despite these criticisms the ILO Convention for nearly 30 years, has been the only binding international instrument on the rights of indigenous and tribal peoples.<sup>348</sup> The ILO action reflects growing international awareness of the

---

344. Lam (1992) 608.

345. Opekokew (1987) 7.

346. Hannum (1993) 27.

347. *Ibid.*

348. Barsh (1987) 756.



special character and assertiveness of indigenous organisations, as well as of the increasing recognition of collective human rights in international law.<sup>349</sup>

The approach of the 1957 Convention, as a whole, was regarded as assimilationist, rather than recognition of the distinctive qualities and needs of indigenous peoples. The ILO Convention 107 therefore reflects the prevailing assimilationist goals of its time, and it has long been seen as inadequate and inappropriate by indigenous peoples and their advocates.<sup>350</sup> Nevertheless, it is an important document which recognises, *inter alia*, the principle of non-discrimination, the right of collective and individual land ownership as well as<sup>351</sup> the relevance of indigenous customary law, and the right to be compensated for land taken by the government.<sup>352</sup> The inadequacies of the Convention led to the adoption of the 1989 Convention.

---

349. Barsh (1986) 369.

350. Hannum (1993) 8.

351. Discussed above, Chapter 2.

352. Hannum (1993) 8.

### **6.6.2 ILO Convention 169 of 1989<sup>353</sup>**

By the late 1970s and early 1980s, pressure was growing to abandon the assimilationist policies reflected in ILO Convention 107.<sup>354</sup> Indigenous peoples and non-governmental organisations were actively promoting indigenous rights at the United Nations and other forums.<sup>355</sup> In 1986 the ILO Governing Body approved initiatives of the process to revise Convention 107, and the resulting convention was adopted at the ILO General Conference in 1989. Convention 169 is a substantial improvement over the 1957 Convention although its adoption was not without controversy. The 1969 Convention adopts self-identification as a fundamental criterion for determining the groups to which it applies.<sup>356</sup>

#### **6.6.2.1 On Special Measures**

Article 4 (1) provides that "special measures shall be adopted as appropriate for safeguarding the persons, institutions, property, labour, cultures and environment of the peoples concerned". Article 4 (3) goes further on to say that "such special measures shall not be contrary to the freely expressed

---

353. International Labour Organisation Convention concerning Indigenous Peoples and Tribal Peoples in Independent Countries.

354. Hannum (1993) 45.

355. Ibid.

356. Article 1 (2).

wishes of the peoples concerned”.

#### **6.6.2.2 On Self-determination and Cultural Integrity**

Article 5 (a) provides that “In applying the provisions of this Convention:<sup>357</sup> the cultural values and practices of these peoples <sup>358</sup> shall be taken of the nature of problem which face them as groups and as individuals”.

Article 2 also provides that: “Governments shall have responsibility for developing, with the participation of the peoples concerned, co-ordinated and systematic action to protect the right of indigenous peoples and to guarantee respect for their integrity.”

#### **6.6.2.3 On Self-determination and the Term Peoples**

Note should be taken of the shift in terminology from indigenous populations to indigenous peoples.<sup>359</sup> This corresponds to common usage and indigenous wishes, but many states feared that the use of the term “peoples” would somehow lead to recognition of an indigenous right to self-determination.<sup>360</sup> As a result Article 3 of the ILO Convention of 1969 provides that

---

357. That is Convention 169 of 1989.

358. These peoples refers to indigenous peoples and other tribal peoples.

359. Hannum (1993) 45.

360. Ibid.

"the term 'peoples' in this convention shall not be construed as having any implications as regards to rights which may attach to the term international law" and Article 1 (2) provides that "self-identification as indigenous or tribal shall be regarded as a fundamental criterion for determining the groups to which the provisions apply".

## **6.7 The ILO Framework on Self-determination, Land and Natural Resources**

The issue of land intersects with the idea of property. Property has been affirmed as an international human right.<sup>361</sup> In contemporary international law the notion of cultural integrity is reflected in the affirmation of indigenous land and resources rights, as evident in ILO Convention 169. In its Article 14 (1), Convention 169 affirms:

The rights of ownership and possession of indigenous peoples over land which they traditionally occupy shall be recognised. In addition, measures shall be taken in appropriate cases to safeguard the right of the peoples concerned to use lands not exclusively occupied by them, but to which they have traditionally had access for their subsistence and traditional activities.

Article 15 (1),<sup>362</sup> furthermore, specifies the right to participate in the use, management and conservation of natural resources pertaining to their

---

361. Anaya (1994) 347.

362. Convention 169.

lands and it provides as follows:

1. The rights of peoples concerned to the natural resources, pertaining to their land shall be specially safeguarded.  
Those rights include the right of those peoples to participate in the use, management and conservation of these resources.

The essential aspects of Convention 169's land rights provisions are supported by an expanding nexus of international opinion and practices.<sup>363</sup> It is evident that indigenous land rights norms, rooted in otherwise accepted precepts of property, cultural integrity, and self-determination, have made their way not just into conventional international law, but also into customary law.

Owing to the way in which the principle of the right of self-determination is inextricably embodied and affirmed in a number of international human rights instruments, it is properly understood to benefit human beings as human beings and not as sovereign entities as such.<sup>364</sup> Despite the shortcomings in existing and emerging international human rights instruments in as far as the right to self-determination is concerned, it may be concluded that substantial progress is being made.<sup>365</sup> The work done by international representatives obviously have a positive effect on

---

363. Anaya (1994) 349.

364. Cristecu (1981).

365. Sambo (1993) 45.

legal and political developments in states around the world.<sup>366</sup>

Indigenous peoples are increasing their efforts and involvement in the international area, and they are raising the level of international norms not only for their own benefit but for the overall advancement of human kind.

The international community must now recognise the actuality of self-determination and realistically respond to the aspirations of indigenous groups instead of insisting that they remain hopelessly trapped within the confines of heterogeneous states.<sup>367</sup>

## **6.8 The Inadequacies of the Present International Law in Recognising the Right of Self-determination for Indigenous Peoples**

This section focuses on the inadequacies experienced by indigenous peoples with regard to the accepted law, and the issues raised by them which need to be addressed if these inadequacies are to be overcome.

This will be dealt with within the ambit of the term "peoples" as its restricted interpretation constitutes the ultimate barrier for the recognition of the right of self-determination for indigenous peoples.

### **6.8.1 The Term Peoples as a Barrier for the Recognition of Self-determination for Indigenous Peoples**

The first and most serious inadequacy are found in the term peoples. The definition of peoples is made relevant by two

---

366. Ibid.

367. Joyakwickram (1993) 11.

factors: first, its use in Article 1 of the Covenants and other international instruments proclaiming that all peoples have the right to self-determination and the claims made by the states that indigenous peoples are not peoples and therefore do not have the right to self-determination.<sup>368</sup> Despite the reference in the Covenants, and other repeated references in international law to different rights of peoples, there is no definition of peoples or people in international law. The reason often given is that the term peoples is too vague and difficult to define.

Both general and international law similarly ascribe different meanings to peoples in different legal contexts. In the context of self-determination, the ordinary meaning of people relates to "a specific type of human community sharing a common desire to establish an entity in order to ensure a common future".<sup>369</sup> In ordinary usage, the types of human community that are relevant are thus those that are "united by a common culture, tradition, or sense of kinship, that typically have a common language institutions and beliefs."<sup>370</sup> Under such criteria indigenous peoples are indeed peoples and would therefore appear to be entitled to the international right of self-

---

368. Ioms (1992) 287.

369. Webster's Ninth New College Dictionary.

370. Ibid.

determination.<sup>371</sup> However, international law has not accorded that right to indigenous peoples. Instead it treats them as simple minority populations within states. Furthermore, international law considers that states are peoples for the purposes of self-determination.

Drafters of various international instruments avoid clarifying the term peoples, stemming from the fear that it would "turn the right of peoples to self-determination into a weapon for use against the territorial or political unity of states".<sup>372</sup> Some say that the application of the right to self-determination could entail secession, or violate the sovereignty of a state. This approach can be criticised on the grounds that it obscures the barriers in according a right of self-determination to indigenous peoples, thus making it difficult to address and overcome. A favoured technique has been to proclaim a general right that "all peoples have the right to self-determination," but to restrict it, not by an implicit, restricted definition of "peoples" or by an exception clause, but instead by separate documents that prohibit the disruption of national unity and territorial integrity.

---

371. Ioms (1992) 289.

372. Cristecu (1981).



## CHAPTER 7

### PART I

#### LAND RIGHTS : THE SOUTH AFRICAN LAW CONTEXT AND THE LEGISLATION TOWARDS LAND REFORM

##### 7.1 Historical Background

###### 7.1.1 Introduction

The vital role that property rights, especially with regard to land, play in South African society ensured that property was the subject of heated debate over the last four years.<sup>373</sup> For centuries land has been at the centre of the struggle between South Africa's white rulers and its subjugated Black majority.<sup>374</sup>

It would seem to me that although the historical facts of White settlement in South Africa have been outlined by various historians, the different schools informing such writings all concur on the alienation of lands previously owned by the indigenous populations.

The process of alienation, despite apartheid, does not differ from such processes elsewhere in Africa and the rest of the world.

In South Africa land was seen as a major national asset which had the

---

373. Van der Walt (1994) 4; See also van der Walt (1994) 455.

374. The term Black is used to refer to the then oppressed Africans in South Africa.

capacity to be abused, thus causing social injustice.<sup>375</sup> In actual fact it affects the political and social status of the majority of South Africans as much as their economic position.<sup>376</sup> Whites had monopoly of ownership and access to land — both as individuals and through the state which was enshrined in law.<sup>377</sup> They had empowered themselves politically and socially by laying exclusive physical claim to the land. Blacks in general, were denied both ownership and access to most of the land. Although they have bitterly contested this usurpation, over the centuries it has led to their physical, social and political dispossession.<sup>378</sup>

Although all previous apartheid laws may be repealed, it will take time before the new laws result in a system of land usage which meets the needs and aspirations of South Africans in a democratic South Africa. There is of course a need to construct a new system, which will have to be based on a clear understanding of how the existing property relations have developed, and why these relations do not satisfy peoples' needs.

---

375. Robertson (1990) 217.

376. Marcus (1990) 178.

377. Ibid.

378. Ibid.

### 7.1.2 Racial-Zoning as the Spatial Dimension of Apartheid

Over the better part of the century or longer and through layers of statutory interventions into the common law of property, a legislative map of South Africa had been drawn which divided the entire country into racial zones.<sup>379</sup> These racial zones were referred to as Homelands or Bantustans.<sup>380</sup>

Within these areas people of different races were assigned mutually exclusive and sometimes quite different rights to land.<sup>381</sup> This resulted legal provisions of quite astonishing technical complexities.

The land-holdings of the Blacks were concentrated in the reserves,<sup>382</sup> and in a few remaining areas on the White Platteland. Their position was tenuous and subject to extreme pressure, amongst other things as a result of gross overcrowding through forced population relocation, intense poverty and general absence of life support means, a lack of resources with minimal or no state supports and power abuse by state

---

379. Budlender and Latsky (1990) 155.

380. Figure represents a map of South Africa Bantustans. There were 10 of these Homelands/Bantustans.

381. Budlender and Latsky.

382. A reserve was an area set aside for the residence of Africans (or in some cases other race groups), to which the admission of members of other groups for residential or business purposes was strictly controlled. See Davenport and Hunt (1974) V.

officials.<sup>383</sup>

## **■ Division of the land constituting the area of the Homelands**

The land constituting the area of the Homelands or Bantustans was divided into four types; namely locations, Tribal bought farms; Private bought farms and Trust farms.

**Locations:** These areas were reserved for occupation by Blacks in the late nineteenth century. Their status was legalised in 1913 through the Land Act <sup>384</sup> and became known as reserves. These reserves were legally owned by the government. "Reserves in the Union were created by the Government and can be dealt with in anyway the Government desires".<sup>385</sup>

**Tribal bought land:** Economy is something foreign to most Black if not all indigenous peoples. So before capitalistic economy was introduced in South Africa, there was no land market as such. Land was communally owned by all people.

---

383. Marcus (1990) 179.

384. No. 27 of 1913.

385. Quoted in Schapera (1943) 38.

This was the so-called communal tenure.<sup>386</sup> Among Blacks, it was accepted that land was provided by God for all the people.

Later, under white administration the officials did nothing to encourage, indeed it sought to discourage, purchase of land by Blacks. When land purchase was allowed, some tribes collected money and bought land. However, this land bought by the tribes formed part of the reserves.<sup>387</sup>

**Private Bought land:** The area of the reserves, as indicated in Figure 1, was a small fraction of South Africa and was not sufficient for the Black population, given traditional land use and custom. As a reaction to these extra land shortages, Blacks formed syndicates to purchase land.<sup>388</sup> These syndicates were from different tribes and some of them had never left their original tribal areas. After the purchase of land, the co-buyers distributed it equally among themselves. Each co-buyer got a residential site and land for cultivation. People on privately owned land received no credit from commercial banks or any other source.<sup>389</sup>

---

386. That is, ownership of land is vested in a community not an individual. The chief was regarded as the trustee, with the power to allocate the use of the land to the individual heads of families. See Davenport and Latsky (1974) V.

387. Letsoalo (1987) 64.

388. Davenport and Hund (1974).

389. Letsoalo (1987) 65.

**Trust Land:** This type of land originated from the Land and Trust Act 18 of 1936. In the post 1936 period land was bought by the South African Bantu Trust which was later called the South African Development Trust. The trust held the land in trust for the Blacks but was owned by the Government.<sup>390</sup>

■ **Effects of Homelands and Bantustans**<sup>391</sup>

According to the apartheid propagandists, it was in the ten self governing national states that Africans could enjoy their political and social rights, including the right to own land and to farm it.

This division into Homelands resulted in an acute shortage of land for grazing, residence and cultivation. It also resulted in more people without land, overstocking and "squattling". A Black landless labour force was of paramount importance for capitalist South Africa. The Bantustans were so overcrowded, fragmented and impoverished that they provided little possibility for the development of a modern class of farmers producing commodities for the market. In fact they did not allow most Bantustans residents to farm at even a subsistence level.

Because of the regime's concerted drive to force as many Blacks

---

390. Letsoalo (1987) 65—66.

391. A summary from Harsch (1986) 21—22.

out of "white" South Africa as possible, the total population of the Bantustans increased from 5 million to 11 million between 1960 and 1980 alone, rising to 54 percent of all Africans in the country. None of the Bantustans were viable economic, social or geographic, let alone "independent" states.<sup>392</sup> Later the Government outlined plans to "consolidate" the Bantustans by reshuffling land that is now owned by Whites for some Bantustan territory.

Another consequence of Bantustan "consolidations" was to further deepen language and tribal divisions among Africans. In the Northern Transvaal, for example, the Sotho and Shangaan peoples had close social ties in the past and often lived in the same areas. But the imposition of artificial borders for the former Lebowa and Gazankulu national states sometimes running through the middle of a single village, have fostered divisions and frictions between them. Shangaans who used to rent tractors for ploughing from their Sotho neighbours could no longer do so. When the Land Act 18 of 1936 was adopted, it set a limit of 9,9 acres of land per family, a tiny amount compared to even the smallest white-owned farms.<sup>393</sup> The effects of the division of the country into homelands were

---

392. That is Transkei, Ciskei, Bophuthatswana and Venda, (TBVC Areas).

393. Summary ends.

described by the Johannesburg Rand Daily Mail dated June 17, 1982, as follows:

"What strikes you most forcibly as you drive into Kwandebele,<sup>394</sup> is the way the land changes. As you leave Groblersdal behind, the silver irrigating rich, white farmlands give way to scrubby bushveld and finally to dry arid soil whose main produce appears to be thorn trees. Dust hangs in the air in the wake of every passing vehicle. Looking around, you notice the bareness of the tiny residential plots, devoid of crops which could supplement the family income. But cows graze on the common land. There seem to be goats everywhere".

### **7.1.3 The Native Land Act 27 of 1913**

The core legislation on land dispossession is the original Native Land Act 27 of 1913. It is known among Blacks as the law of dispossession. This Act was the first legislative attempt to divide the Union of South Africa into areas where Africans could own land and areas where they could not.

The Act codified in law the white expropriation of the vast bulk of the African's land.

---

394. One of the Homelands.



More than 90 percent of the country was reserved for white ownership and control, including the richest farming and grazing lands, the forests, and all areas with known or potential mineral deposits. No African could own or purchase new land. In these parts Africans were allowed to own land only in those few areas they still effectively occupied and farmed in the areas formally designated as reserved. At that time these comprised a mere 7,9 percent of the country.<sup>395</sup>

From the above discussion one can deduce that Blacks were prohibited from acquiring land from Whites in parts of the country outside these reserved scheduled areas. A significant feature of this Act was that of the unequal distribution of land between Blacks and Whites. The area for the White minority population was ten times larger than that of the Black minority. The needs of the Whites were classified as superior and those of the Blacks as primitive.<sup>396</sup>

The Native Land Act of 1913 has been seen by many as being an attempt to reduce competition by present producers.<sup>397</sup>

---

395. Harsh (1986) 10.

396. See Letsoalo (1987) 35.

397. Keagan (1983) 108—127.

The loss of land by Blacks through this Act was a severe blow for the Black peasantry. The tribal economy and traditional mode of production could not survive without a land base and access to resources.<sup>398</sup> The Native Land Act therefore played a very significant role in separating and reducing Black territories in South Africa. One will conclude this section by referring to the outcry against the 1913 Land Act, The Land Act song:

"We are the children of Africa  
We cry for our land  
Zulu, Xhosa, Sotho  
Zulu, Xhosa, Sotho unite  
We are mad over the Land Act  
A terrible law that allows sojourners  
To deny us our land  
Crying that we the people  
Should try to get our land back  
We cry for the children of our forefathers  
Who roam around the world without a home  
Even in the land of their forefathers".<sup>399</sup>

#### **7.1.4 The Bantu Trust and Land Act No. 18 of 1936**

An act related to the 1913 Land Act was the Bantu Trust and land Act 18 of 1936. In terms of this Act certain areas were released for occupation by Blacks. The geography of released

---

398. Letsoalo (1987) 36.

399. Culuza R T, quoted in Callinics L; See also Michael de Klerk (1991) 46—47.

areas is shown in Figure 2. The reason for releasing "more" land for Blacks was that every large portion of the Union was occupied by Europeans.<sup>400</sup> The problem of the released and land was that, although, they had been "released" from the restrictions of the Black Land Act of 1913, released areas were nevertheless subject to the typical restriction applying to race zones/Homelands.<sup>401</sup>

In practice much of the release areas were owned by the Trust. However Blacks could acquire ownership freely from any seller in a released area since sec 13 (2) of the Group Areas Act of 1966 made the ownership restrictions in a released area not applicable to Blacks.<sup>402</sup>

#### **7.1.5 Analysis of the existing rights to land, natural resources, environment and development in the rural race zones/homelands<sup>403</sup>**

Land affects the political and social status of the majority of

---

400. Letsoalo (1987) 36.

401. Budlender and Hunt (1990) 157.

402. Budlender and Hunt (1990) 157.

403. A summary from Harsch (1986) 5, 8.

South Africans as much as their economic position.<sup>404</sup> Like the country's vast mineral wealth and the exploitation of its extensive labour power, the bulk of the land was monopolised by a tiny class of white capitalist families. As we have seen from the above discussions, for Africans who comprised some three quarters of the entire population, a mere 13,7 percent of the land was set aside. The poor, overcrowded fragments, that made up the ten rural reserves called Bantustans. Deprived of their land and cattle and uprooted from their homes, millions of Blacks were driven to labour for white employers at extremely low wages and under restrictive conditions. While the capitalist rulers enjoyed the fruits of African land and labour, Blacks were forced to live in most abject of poverty. The Urban Black Townships were plagued by disease, hunger and unemployment. In terms of income, literacy, infant mortality and disease, South Africa's Bantustans ranked with the poorest in Africa.

The vast majority of those confined to the Bantustans either had no land or had plots so small that they could not grow even enough food to subsist. They depended on remittances from wages of the Black migrant workers in their families. The

---

404. Marcus (1991) 25.

extreme inequalities in land ownership lay at the foundation of the apartheid edifice.

The denial of the vast majority of Africans of the opportunity to make their livelihood from cattle raising or tilling the soil was the bedrock of apartheid's repressive system of labour control. It is linked to the regime's denial to Blacks of their most basic rights to citizenship.

As already stated, the history of the sufferings of the Blacks in South Africa dates as way back as 1652 when Jan van Riebeeck arrived in the Cape Colony. Before that indigenous peoples of South Africa had access to as much land as they needed. These Africans practised a mixture of settled agriculture and livestock herding. Although one cannot deny the fact that these African societies were poor and their conditions of production were primitive. But they were also relatively egalitarian. They were not plagued to social inequities.

None of these people considered the land or other natural resources to be anyone's private property. The land was possessed communally, belonging to the people as a whole. Every family in a village or community had a right to as much land as it could cultivate. But through a series of wars launched

by white colonial authorities and settlers, lasting more than 200 years, these indigenous social systems were shattered. The wars deprived Africans of their very economic foundation and means of livelihood — that is, land and cattle.<sup>405</sup>

The importance of land for the rural economy of Africa cannot be over emphasised. There are few economic factors more important than the land, its ownership and tenure. Because land tenure determines the right of access to key factor of production in an agrarian economy, it influences both the macro-economy and the distribution of income among individuals.<sup>406</sup>

The importance of land has been clearly spelled out by Yudelman:<sup>407</sup>

"It is a coincidence that rights to land have played a prominent part in social, political and economic upheavals in countries with large peasant societies. Peasants rarely have anything other than land and labour to sustain themselves".

Without capital, with limited mobility and few alternative opportunities for making a livelihood, they are tied to the land,

---

405. End of summary.

406. Letsoalo (1987) 1.

407. Yudelman (1964) 57.

threats to their positions vis-a-vis the land are threats to their securities. Because of the importance of land as a source of life, social status and political power, land tenure has been and remains an important topic in development planning.

### ■ Land rights and the environment

One other important factor in as far as land rights are concerned are the issues of ecology. This would include the extent to which land reform and agricultural production must take account of what is scientifically possible, and desirable, in exploiting the environment. There are disastrous ecological consequences in the context of the private land tenure of white agriculture.<sup>408</sup>

Marcus views land as a fundamental commodity around which productive relationships play a crucial role in providing material support for social existence.<sup>409</sup>

### **7.1.6 A revolution for Black Land Rights : Towards land Reform**<sup>410</sup>

As part of their broader struggle against white racist rule, South

---

408. Skweyiya (1990).

409. Also see van der Walt (1994) 445.

410. A summary from Harsch (1986) 29, 31, 36, 39.

Africa's Blacks were fighting to break this agrarian system and to return the land to those who worked it. They knew that only the overthrow of the apartheid state could unlock the wealth of South Africa's benefit for all its people.<sup>411</sup>

In 1968 the ANC published a leaflet which stated that "the Whites

have declared war against us, we have to fight back".<sup>412</sup> It is true that when it comes to their land all indigenous people can fight to death.

Though Blacks were military defeated and deprived of most of their land rights, their struggle for land continued. The struggle for land had not lost its force or importance over the decades. It remained a vital issue for all Blacks. The white monopoly over most land was a cornerstone on which the entire apartheid structure rested and without which it could not have been created and maintained. Despite South Africa's extensive industrialisation and the growth in the number of Blacks living in the urban centres, land is still an immediate concern to a significant part of the Black population.

---

411. Harsch (1986) 29.

412. Quoted from Harsh (1986) 31.



The fight of Blacks, even today, to reconquer the land is still a central aspect of South African's unfolding national, democratic revolution. The demand for land is one that elicits an immediate response from millions of Blacks.

### ■ The Freedom Charter

On June 25, 1955 in Kliptown near Johannesburg the Congress of the People convened. They adopted a program for a democratic South Africa called the Freedom Charter. The section of the Charter entitled "The land shall be shared among those work it" declared:

- "— Restrictions of land ownership on a racial basis shall be ended, and all the land redivided amongst those who work it, to banish famine and land hunger;
- the state shall help the peasants with implements, seed, tractors, and dams to save the soil and assist the tillers;
- freedom of movement shall be guaranteed to all who work on the land;
- all shall have the right to occupy land wherever they choose;

- people shall not be robbed of their cattle, and forced labour and farm prisons shall be abolished.<sup>413</sup>

The Freedom Charter's land policy that everyone who actually tills the soil is entitled to land was consistent with its overall non-racial democratic stance, summed up by the slogan that "South Africa belongs to all who live in it, Black and White".

Within the ANC, there were those who rejected this perspective.

They split to form the PAC, Pan Africanist Congress. The leader of the PAC, who was then Potlako Leballo stated in the late 1957 that the Africanisism favoured "The restoration of the land to its rightful owners — the Africans". On the other hand the ANC insisted that it will guarantee the right of white working farmers to keep working their land and provide an equal opportunity to farm to all South Africans who choose to do so, on a non-racial basis.<sup>414</sup>

### **7.1.7 Why the Background?**

The basic question we need to address here is why it is imperative to examine and understand the legal position on land

---

413. For a full text of the Freedom Charter see "The Freedom Charter," New International, Vol. 2, No. 2 (Fall 1985) pp 63–67. This is basically similar to the provisions of the Charter by the Lil-Wat Nations, discussed in Chapter 6.

414. End of summary. Also refer to the extract on page 39 of Harsch (1986).

and property rights before April 27, 1994. The law on land rights that preceded the Constitution is vital to the understanding of the legal and social structural situation inherited from the old order.<sup>415</sup> They do and will continue to exert influence on whatever changes, if any, may be pursued within and in the implementation of the Constitution.<sup>416</sup> Such influence is dictated by:

- (a) The prevailing social reality within the existing laws played an important role in legitimating and reinforcing <sup>417</sup> and
- (b) The express provisions in the Interim Constitution for legal for continuity. <sup>418</sup>

So these are the most basic reasons why we have to look into the historical background of land rights in South Africa.

## **7.2 Redistribution of land the doctrine of Aboriginal title in South Africa**

The concept of aboriginality still has no absolute definition in legal

---

415. Gutto (1995) 57.

416. Ibid.

417. Ibid.

418. Ibid.

years, openly and as if owner, acquires title.<sup>439</sup>

#### **(iv) Beneficiary's Rights**

Despite the political relevance of aboriginal title and despite the tactical advantages it might offer in litigation, it is apparent from what has been said above that successful pursuit of the doctrine may be obstructed by numerous and complex legal arguments.<sup>440</sup>

Aboriginal title was predicated upon historical and demographic circumstances quite different from those in South Africa.<sup>441</sup> In countries where the doctrine was successfully applied, the claimants were a small minority in the overall population, and aboriginal title was linked with the demands for political and cultural self-determination.<sup>442</sup> In Africa, for three obvious reasons aboriginal title has never been an issue.<sup>443</sup>

- The native population has always greatly outnumbered the settlers;

---

439. Bennett (1993) 473.

440. Bennett (1993) 475.

441. Bennett (1993) 475.

442. Nettheim (1987) 295–8.

443. McNeil (1989) 193.

Land that was lost under colonial or apartheid laws could be recovered by purchase. This could not remedy the inequities of near two centuries of sustained discrimination. The problems which aggravates the whole situation is that the forces that draw Blacks off the land at the same time deprived them of the capacity to buy it back. One must also appreciate the fact that the land problem cannot be solved simply by removing discriminatory laws.<sup>423</sup>

The state has now intervened and a programme to redistribute the land is now in process. This began with the provisions of Section 89 of the Abolition of Racially Based Land Measures Act 108 of 1991.<sup>424</sup> In trying to redistribute land aboriginal title has become a vital consideration to meet the demands voiced by South Africans, that is the return of land to the people who were dispossessed by colonisation.

The question which now exists is whether aboriginal title is part of South African law, and whether it can be argued successfully in South Africa.

At first glance, it would seem that whenever a people lays claim to land taken away from them through the working of a received system of colonial law, the doctrine of aboriginal title will be germane to deciding the validity of the claim.<sup>425</sup> In South Africa, for instance, land is being

---

423. Van der Walt (1990) 111.

424. As amended by Act 110 of 1993.

425. Bennett (1993) 444.

reclaimed on the ground that rights granted under colonial and apartheid enactments were illegitimate.<sup>426</sup> But where land had been appropriated through colonisation, that is before a western system of property had become established, aboriginal title is the only basis on which claims for return can be used.<sup>427</sup>

As an original mode of acquiring land, aboriginal title permits legal rights to be generated from the mere fact of occupation. The principles underlying aboriginal title and protection of possession in the common law are clearly related:<sup>428</sup> Hence a people need show only that they were an indigenous group in exclusive occupation of the land at the time of colonisation and that their land had been appropriated by a colonial power. By arguing aboriginal title the potentially inconclusive search to establish the validity of previous title can be avoided.

*A preliminary but critical question is still whether aboriginal title is part of South African law.*

It is said that aboriginal title is and always has been part of South African law.<sup>429</sup> Just that it is latent within our legal system.

---

426. Ibid 445.

427. Ibid.

428. McNeil (1989) Chapter 9.

429. Bennett (1993) 459.

## ■ Application of Aboriginal Title

If the doctrine of aboriginal title is accepted as part of our law, then it follows that the titleholder has rights equivalent to common law ownership.<sup>430</sup>

### (i) Proof of occupancy

Whoever asserts aboriginal title bears the onus of proving occupancy at the time of colonisation.<sup>431</sup>

### (ii) The titleholder

The issue of titleholder poses various problems:

#### (a) The problem of the tribes

Aboriginal title is a group right resting not in individual members of an entity but in the group as a whole.

Because the group has no corporate status, it would seem that all members share the right equally.<sup>432</sup> The title is not the right of the individuals located on particular spots in this case, but must be a perpetual right of possession that inheres in the nation inhabiting the land, as their common property, from generation to generation.

---

430. Bennett (1993) 459.

431. Bennett (1993) 462.

432. McNeil (1989) 212–213.

**(b) The problem of aboriginality**

Only groups that are aboriginal may claim title to land. Although aboriginality is critical to determining the *locus standi* of the right holder, the concept has no clear or fixed meaning in legal sources.<sup>433</sup> In common parlance, the core meaning of the adjective 'aboriginal' or indigenous is habitation of a territory before the arrival of immigrant colonists.<sup>434</sup>

**(c) The problem of *locus standi*:**

Since those who would benefit from an award of aboriginal title would be members of an indigenous group, the simplest method of establishing a claim would be to prove affiliation to one of the already recognised 'tribes' of South Africa.<sup>435</sup>

**(iii) Defences:**

In the case where neither of the above can be proved the following can serve as a defence:

---

433. Bennett (1993) 467.

434. Bennett (1993) 467.

435. Bennett (1993) 469.



years, openly and as if owner, acquires title.<sup>439</sup>

#### **(iv) Beneficiary's Rights**

Despite the political relevance of aboriginal title and despite the tactical advantages it might offer in litigation, it is apparent from what has been said above that successful pursuit of the doctrine may be obstructed by numerous and complex legal arguments.<sup>440</sup>

Aboriginal title was predicated upon historical and demographic circumstances quite different from those in South Africa.<sup>441</sup> In countries where the doctrine was successfully applied, the claimants were a small minority in the overall population, and aboriginal title was linked with the demands for political and cultural self-determination.<sup>442</sup> In Africa, for three obvious reasons aboriginal title has never been an issue.<sup>443</sup>

- The native population has always greatly outnumbered the settlers;

---

439. Bennett (1993) 473.

440. Bennett (1993) 475.

441. Bennett (1993) 475.

442. Nettheim (1987) 295–8.

443. McNeil (1989) 193.

- indigenous law, including land title, has generally been recognised; and
- traditional modes of government have not been suppressed.

By contrast, over three-quarters of the inhabitants of South Africa could be considered aboriginal. From a legal point of view, aboriginal title would seem to work best where there are no competing claims, that is where an indigenous people can assert title to its ancestral land without having to refer to rival claims. In South Africa, however, the settlement of aboriginal titles is almost bound involve the adjudication of competing claims, a problem for which there is no easy solution, given deficiencies in the historical records of pre-colonial landholding and given the large scale population movements of the post colonial period.

#### ■ **Aboriginal title in an international context:**

In 1957, under the auspices of the International Labour Organisation, a convention was negotiated with the aim of protecting aboriginal rights.<sup>444</sup> State parties were obliged to respect aboriginal claims to ancestral lands and to encourage the institutions and customary laws

---

444. ILO 107 of 1957.

of tribal populations within their borders.<sup>445</sup>

## **7.3 Land Reform in South Africa: the post-apartheid era**

### **7.3.1 'Reform era' of the past decade in South Africa**

Land reform is one way of saying "Give people back their land".

This is easy to say, but far more difficult to achieve. Land reform is both politically and practically difficult, and has seldom been achieved in any racial manner without violent revolution.<sup>446</sup>

In other cases, there have been unsuccessful attempts to promote land reform by violent means. In many countries, peasants lost their lives in fighting for land. In South Africa, the issue of land cannot be separated from apartheid's policies of homelands. Land issues remain the core of South African race policies and is a source around which racial competition, animosity, and black anger often crystallised.<sup>447</sup> Historically, land reform meant reform of the tenure system or distribution of land ownership rights.

The remedy of the abovementioned land problems is generally known as Land Reform. Such land reforms are changes of land

---

445. Ibid. Articles 3(1) and 7(1).

446. Dudley, McDéley and Stolton (1992) 38.

447. Skweyiya (1990) 196.

ownership and occupation rights with the aim of changing the distribution income, the social status and political structures. The type of land reform is generally determined by the existing land tenure system, economic objectives or ideological consideration.

Yudelman <sup>448</sup> says "In many societies reorganisation of land ownership and land rights have been a basic element in implementing state policy ... In South Africa the ideology of apartheid is built around territorial segregation ...".

#### ■ Primary motives of land reform

- The primary motive of land reform is generally the sharing of resources, primarily land. Redistribution is the key word in land reform, redistribution of the fruits of the economy which prior to land reforms benefit only a small, prosperous minority; redistribution of land ownership rights "to those who actually work the land".<sup>449</sup> Hence the slogan for land reform in many countries is "land to the tiller".<sup>450</sup>
- The second motive of land reform is to increase production.

---

448. Yudelman (1964) 61.

449. Weitz (1971).

450. Letsoalo (1987) 12.

Land reform reduces the inequality in the distribution of land. Apartheid is fundamentally tied to issues of land reform. It is also argued that in this country land reform has been the tool for exploiting Africans – economically, socially and politically.<sup>451</sup>

From the perspective of the naturally and socially oppressed majority the demand for land reform had three basic components.<sup>452</sup> The demand was for the following:

- political rights;
- Land on which to live;
- Land on which to work.<sup>453</sup>

Reform was a mechanism used by those in power to adjust to changes in the social system and to relieve pressures in order to continue to rule.

#### **■ Criticisms levelled against the "land reform era" of the past decade**

The criticism touched on two fundamental problems with the

---

451. Letsoalo (1987); Outside cover.

452. Marcus (1990) 180.

453. Ibid.

Land reform reduces the inequality in the distribution of land. Apartheid is fundamentally tied to issues of land reform. It is also argued that in this country land reform has been the tool for exploiting Africans – economically, socially and politically.<sup>451</sup>

From the perspective of the naturally and socially oppressed majority the demand for land reform had three basic components.<sup>452</sup> The demand was for the following:

- political rights;
- Land on which to live;
- Land on which to work.<sup>453</sup>

Reform was a mechanism used by those in power to adjust to changes in the social system and to relieve pressures in order to continue to rule.

#### **■ Criticisms levelled against the “land reform era” of the past decade**

The criticism touched on two fundamental problems with the

---

451. Letsoalo (1987); Outside cover.

452. Marcus (1990) 180.

453. Ibid.

state's approach to such land reform.<sup>454</sup>

- First, not only did such reform do little to relieve the situation for peasants but it was likely to further aggravate their already disastrous position as land became concentrated in fewer hands and the dispossession deepens.<sup>455</sup>
- Secondly, the reform restricted the question of land reform to land tenure reform within the reserves.<sup>456</sup>
- Another criticism was that the solutions proposed were largely technicists and economistic. Land reforming sections of monopoly capital give little thought to the general political rightlessness of Africans in South Africa even though this condition emanates from their dispossession of land in the first instance.<sup>457</sup>

The solutions offered were designed to reinforce the position of the ruling parties, without redressing the needs of the majority of

---

454. Ibid 182.

455. Ibid 182.

456. Ibid 182.

457. Ibid 186.

South Africans.<sup>458</sup>

Land reform was understood by the then ruling minority as meaning land tenure on both urban and rural land and the promotion of private, individual smallholder within the reserves.

It did not touch the essential features – legal, political and social – which shape the land question in South Africa. The principal laws and *de facto* relations on land remained entrenched with only slight modification.<sup>459</sup>

Land reform is actually a complex but fundamental issue. The actual content of the affirmative actions programme on land reform will have to be shaped in large measure by rural people themselves.

#### ■ Legal representation and Land Reform

Robertson<sup>460</sup> says that over the years lawyers as a class had rendered inadequate service in defence of the victims of forced removals. He further says that lawyers were unable to grasp the reality and extent of the social predicament lying at the heart of the land issue. He also says that lawyers' concern with fees

---

458. Marcus (1990)186.

459. Ibid 183.

460. (1990) 215.



Post-apartheid land reform can be defined as a systematic policy-directed change with the objective of improving the population's economic and social position. It should be directed toward achieving social justice in the countryside by distributing land for the benefit of all. Land reform will have to provide the landless, rural communities, and small owners with new opportunities to better their lot. The strategic objective is to generate higher incomes, resulting in higher food consumption, better housing and clothing, and a greater chance to educate themselves and thus begin to extricate themselves from the shackles of poverty and ill-health.<sup>463</sup>

Land reform in South Africa is not conceived as a single policy objective to the exclusion of others, but multiple objectives joined to it.<sup>464</sup>

### ■ Financial implications of land reform

Land reform is generally a costly undertaking. The process of redistribution generally comprises extensive development measures that require considerable financial allocations.<sup>465</sup>

Funds were needed to cover the costs of the reform, its

---

463. Skwegiya (1990) 206.

464. Ibid 211.

465. Skwegiya (1990) 211.

preparation and planning, training of cadres, the actual land transfer, including surveying and subdividing of large holdings, investment in infrastructure and public facilities, as well as the supporting of services to be rendered to the beneficiaries during the first few years.<sup>466</sup>

The relatively high costs of implementing a reform programme was frequently used by the antagonists as an excuse against land reform.

It should also be remembered that the process of land reform is a protracted one, the effect of which may not necessarily be felt immediately.

#### ■ RDP — Reconstruction and Development Programme <sup>467</sup>

It is clear from the reconstruction and development programme that reconstruction programs include both restitution of land that was dispossessed in the past and a more positive redistribution program <sup>468</sup> driven by the present land hunger and development needs rather than by historical injustices. It is also likely that conflicting claims with regard to property and land will result not

---

466. Skwegiya (1990) 211.

467. RDP 1994 20 Hem 2.4.5.

468. To be discussed infra.

only from land restitution as such but from other instances where the government's reconstruction and development initiatives affect existing property rights in land.<sup>469</sup>

### ■ The limits of the reforms

The chief characteristic of the "reform" enactments appears to be that they do not focus on a number of major socio-legal issues or property and land rights.<sup>470</sup> Among the problems they do not address or only marginally relate to, include: redistribution to achieve some measure of class, racial and gender equity; restitution of property and land rights lost during forced removals; the unacceptable status of labour tenants languishing in serfdom in large rural landholdings; urban homelessness; and lack of extension of meaningful and secure property and land rights to the dispossessed and marginalised.<sup>471</sup>

Due to this problems the following are public knowledge: spontaneous land settlements in rural and urban area – land invasions in rural areas and "flat invasions" in the cities, urban homelessness, the continuing silent civil war between labour

---

469. Van der Walt (1994) 15.

470. Gutto (1995) 60.

471. Gutto (1995) 60.

tenants and land owners;<sup>472</sup> the glaring exclusion of the Black majority from any meaningful participation in the ownership, control and use of property in the firm of corporate capital, institutionalised in banking, insurance, manufacturing, mining, construction, agriculture and transport industries. These are only but some of the visible expressions and symptoms of the problems of prevailing property relations and economic structure in the country.

#### ■ Identified unresolved problems in the "reforms"

- Among these is illegal squatting by the dispossessed Africans and continued forcible evictions or forced removals using the Prevention of Illegal Squatting Act 52 of 1951 and the Trespass Act 6 of 1959.<sup>473</sup> It is painful that one can become a squatter in one's own land or country.
- A further problem is the hoarding of large tracts of land in the hands of white farmers, some who are absentee landlord and do not make effective and productive use of the land.<sup>474</sup>

---

472. Almost each and every day a farmer is killed, A concerned farmer person in the Zululand Observer once said that he is appealing to the public to pray for the situation since it is now unbearable.

473. Lewis (1989) 233; O Regan (1989) 361; Roos (1989) 395.

474. Skweyiya (1989) 216–219.

- The reforms also never focussed on addressing the demands by Africans for the return (restitution) of at least some of the land they were forcibly removed from or which was expropriated from the 17<sup>th</sup> century onwards.<sup>475</sup>

With all the problems of "reform" being stated, the primary need and challenge to the new South Africa was first and foremost to model a reasonable property clause in the permanent constitution that will permit a speedy, just and equitable resolution of the burning land question. Finally a real distinction was made between land restitution and land redistribution.

## **7.4 Restitution of land under the constitution**

### **7.4.1 Constitution of the Republic of South Africa Act 200 of 1993**

*South Africa ended its apartheid-era after the first ever all-racial democratic elections that were held in April 1994. In many respects the success of the transition, to a more democratic society will be determined by the way in which the new government approaches and resolves property questions.*<sup>476</sup>

The new government found itself in the unenviable position that

---

475. Gutto (1995) 61.

476. Van der Walt (1994) 4.

it was expected to satisfy all – the often conflicting property demands of political and social groupings and of individuals.<sup>477</sup>

The debate about the distribution of property was/is focussed on various resources, the most important of which are the following: land; land-related natural resources; other productive and financial resources and participation in state wealth and resources.<sup>478</sup> Therefore the function of the state will be to manage and control this power struggle by establishing a balance between two state functions with regard to property namely protection of existing property rights on the one hand, and promoting a just and equitable social distribution of at least some property on the other.<sup>479</sup> In the South African context, as already stated, the situation was complicated historically by the legacy of apartheid. In addition to the function which was mentioned above, the government is expected to devise and implement a new social policy which strikes a compromise between those who acquired property in the apartheid era and those who were prevented from doing so.<sup>480</sup> This is done in the

---

477. Ibid.

478. See van der Walt (1992) 436–440.

479. Van der Walt (1994) 5.

480. Ibid.

new constitution <sup>481</sup> by providing a constitutional guarantee for existing property rights, while simultaneously creating mechanisms for removing some of the historical imbalances with regard to the distribution of property.<sup>482</sup> This approach is meant to allay the fears of property holders who are worried about losing their property, while simultaneously satisfying the expectations of those who have been deprived of political and property rights and now demand a redistribution of property.<sup>483</sup>

The question is whether the new government, working within the framework of the new constitution, can satisfy these conflicting sets of expectations, and what impact on property relations will be. The constitution was called the Interim Constitution because at that time it was soon to be replaced by a permanent constitution. In 1996 the Interim Constitution <sup>484</sup> entered into force on 27 April 1994. During the constitution-making process, the property and land question was "central and highly emotive" both to the dispossessed turned owners and the original owners being dispossessed.<sup>485</sup>

---

481. To be discussed *infra*.

482. *Ibid* 5.

483. *Ibid* 5.

484. Constitution of the Republic of South Africa Act 200 of 1993.

485. Chaskalson (1994) 131–132.

One will remember that under the 1913 Natives Land Act<sup>486</sup> and the Native Trust and Land Act,<sup>487</sup> Africans were confined to rural reserves. The unequal distribution of land in South Africa clearly lacked legitimacy. Before constitutional negotiations began all laws designed to restrict access to land on the ground of race were repealed by the 1991 Abolition of Racially Based Land Measures Act.<sup>488</sup> But the provisions of the later Act were unsatisfactory. Accordingly, while the Interim Constitution was being drafted repeated demands were made for inclusion of a right to restitution of land in the Chapter on Fundamental Rights.<sup>489</sup>

The result was section 8 (3) (b) of the constitution.<sup>490</sup> This section provides that every person or community dispossessed of right in land under racially discrimination laws is entitled to claim restitution.<sup>491</sup>

Section 121 (1) of the constitution obliged parliament to pass legislation to facilitate these claims and the remaining

---

486. Act 27.

487. Act 18.

488. 108 of 1991.

489. Coder (1994) 519–20.

490. Provisions at the back of the thesis.

491. For a full text of section 8 refer to the back pages of the thesis.



subsections of s 121 laid down the broad terms of the future Act: individuals or communities may claim restitution from the State,<sup>492</sup> provided that they were dispossessed after 19 June 1913,<sup>493</sup> and provided that the purpose of their dispossession was racial discrimination.<sup>494</sup> In actual fact the relevant sections of the Constitution for land restitution are sections 8 (3), 121, 122 and 123. Section 8 (3) requires that persons or communities dispossessed of rights in land through forced removals under discriminatory apartheid legislation before 27 April 1994 "shall be entitled to claim restitution of such rights subject to and in accordance with section 121, 122, 123", of the Interim Constitution.<sup>495</sup> Section 121 defines the type to be enacted to effect the requirements of section 8 (3). Such a law is to fix the earliest cut-off date at 19 June 1913, thus excluding all forced removals which occurred before that date.

It also excludes those who were properly expropriated according to normal expropriation legislation and "just and equitable

---

492. Section 2 (a).

493. Section 121 (3).

494. This provision was inconsistent with the provisions of s 8 (2) of the Constitution Act 200 of 1993. Also note the provisions of section 4 of the Constitution Act 200 of 1993 which declares the supremacy of the constitution over all other laws, as well as the principle that any law inconsistent with the constitutional provisions, and especially the Bill of Rights, shall "be of no force and effect to the extent of the inconsistency". Section 229 specifically preserves all previous law, unless and until such laws have been amended or repealed.

495. The full text of sections 121, 122, 123 is to be found at the back of the thesis.

compensation was received.” The section further permits the proposed legislation on restitution to impose “conditions, limitations and exclusions” which may only be challenged in court in accordance with the provisions of section 122. Section 122 requires the establishment of a Commission of Restitution of land rights to carry out investigations on the merit of the claims, to mediate and settle disputes arising from such claims and to draw up reports on unsettled claims to be submitted to court for adjudication. The powers of a court to deal with unsettled claims is then spelled out under section 123. It is also significant to note that there is no provision in the Interim Constitution that specifically requires the setting up of a special court for land restitution.<sup>496</sup>

■ **Guarantee of existing rights in property: Section 28**<sup>497</sup>

This section <sup>498</sup> can be regarded as the core of property provisions contained in the constitution. The central focus of this section is a constitutional guarantee for existing private

---

496. Note that the sections, that is, sections 8, 121, 122 and 123 and the Act still to be drafted and promulgated in terms of s 121 (1), (This resulted in the Restitution of Land Rights Act 22 of 1994 which came into force from 2 December 1994) must be read together with the African National Congress's Reconstruction and Development Programme (RDP) of 1994, Agricultural Policy of 1994, other similar and related programmes and legislation enacted in terms of the programmes. As stated above please note again at this stage that the RDP (1994 — 19–22) distinguishes in as far as land reform is concerned, between restitution of land rights on the one hand and redistribution of land on the other. Also see van der Walt (1994) 10–15.

497. Van der Walt (1994) 182—185.

498. Section 28.

rights in property.<sup>499</sup> The entrenchment of the prevailing regime is only directly qualified by the equality or affirmative actions allowance for limited restitution of land to Africans who were removed under apartheid legislation between 1913 and 26 April 1994.<sup>500</sup> For the "free economic activity" provision the direct limitation is where measures are designed to promote the protection or improvement of the quality of life, economic growth, human development, social justice ...<sup>501</sup>

Unless the property clause (section 28) is read together with and balanced against other provisions, especially the equality clause, there is effectively a constitutional blockade on measures for general land distribution.<sup>502</sup> Where the exercise of powers of eminent domain are exercised, the measures must be justified as falling within the ambit of a "public purposes" and the state needs to undertake to pay "just and equitable" compensation as defined under section 8 (3), read together with sections 121–123 and 28 (3).

---

499. For a full text of the section refer to the back pages of the thesis.

500. Section 8 (3), 121–123.

501. Section 26 (2).

502. Gutto (1995) 56.

## ■ Meaning of "rights in property" in terms of section 28

The property guarantee in terms of section 28 comprises two elements:

- firstly, it means that the government cannot make laws which effectively undermine the free-market system, because that would make it impossible for individuals to acquire, hold and dispose of rights in property – a right which is guaranteed by section 28 (1).<sup>503</sup> In this perspective property rights entails a guarantee of a certain kind of economic system.
- secondly, this section provides a guarantee of existing individual rights in property, in that the government cannot make laws or take steps that amount to an infringement of any particular existing rights in property.<sup>504</sup>

## ■ Conflicting claims in land restoration

- claims for restoration concern the establishment of previously dispossessed land rights, while claims for the protection of existing rights would often be based on a

---

503. Gutto (1995) 6.

504. Gutto (1995) 62.

wider category of property rights.<sup>505</sup>

- secondly, even if conflicting claims in a specific instance are concerned with land, they will not necessarily involve rights to the same piece of land.<sup>506</sup>

#### ■ Future property clause: the post 1993-era

The reason for focussing on the future property clause are twofold: to allow room for the policy of redistribution to be put back on the agenda of natural democratisation priorities given the country's historical past, and the recognition that land restitution is important but will not substantially address the property and land right problems adequately.<sup>507</sup>

Another primary challenge is how to model a reasonable property clause in the permanent constitution that will permit a speedy, just and equitable resolution of the burning land question.

### **7.5 Restitution of Land Rights Act 22 of 1994**<sup>508</sup>

---

505. Van der Walt (1994) 16.

506. Ibid.

507. Bennett (1993) 443; De Klerk (1991).

508. It came into force on 2 December 1994.

In November 1994 the Restitution of Land Rights Act was promulgated. The Restitution of Land Rights Act was enacted to give effect to the limited restitution provided under sections 8 (3) and 121–123 of the constitution.<sup>509</sup> The Restitution Act is also regarded as an addition to actions from dispossessed tribes, families and other occupiers of land who were removed to isolated parts in the country.

The Act provides that the persons and communities dispossessed or their direct descendants<sup>510</sup> may apply for return of the land by lodging claims with a commission on Restitution of Land Rights.<sup>511</sup>

Claimants must take action within three years after a date to be fixed by the Minister.<sup>512</sup> Actually the Restitution Act sets out a procedure for restoring land to people who have been prevented from obtaining or attaining title as a consequence of racially discriminatory laws. This Act does not rely on establishing the continuing existence of previously unrecognised rights.<sup>513</sup> It deals with rights which have been acknowledged to have been 'taken away' and are being given back.

---

509. Act 200 of 1993.

510. Descendants is a term that is defined by section 1 (vi) to include the spouse or partners of a customary marriage, whether or not the union was registered. According to Gutto (1994) 65 such a term points towards gender sensitivity and expansive inclusion of categories of those who were dispossessed through forced removals.

511. This commission was established under Ch 2 of the Act. Its function is to investigate claims, settle disputes and draw up reports. It is also established under section 122 of the Constitution of the Republic of South Africa Act 200 of 1993.

512. Section 2 (1) (b).

513. Houdree and McIntyre (1997) 194.

Thus under the South African legislative regime, there is no necessity for any validation process.<sup>514</sup>

Although a customary interest in land qualifies as a 'right in land', and thereby entitles the dispossessed holder to claim restitution,<sup>515</sup> the Act does not guarantee that a claimant will receive the same customary title that was lost. Section 35 (4) gives the land claims court a power to adjust the nature of the right previously held by a claimant and to determine the form of title under which the right may in future be held.

Section 35 (2) (c), which governs situations where a community has claimed land, allows the court to impose whatever conditions it thinks necessary to ensure that all members of a community have access to the land on a fair and non-discriminatory basis.<sup>516</sup>

The Act does not give guidance as to when the government may determine that it is feasible to restore land.<sup>517</sup> There seems to be a strong emphasis on the provision of alternative state-owned land for the purpose of satisfying claims to restoration.

---

514. Ibid.

515. Section 1 (xi).

516. Section 35 (3).

517. Ghoudree and McIntyre (1997) 194. See sec. 15.

## ■ The South African Commission on Restitution of Land Rights

518

Its role is to receive claims of land rights. When the claim is referred to the Land Claims Court from the commission, the commission plays a slightly more active role in the sense that it makes recommendations as to the most appropriate manner in which the claim can be resolved and reports on the failure of any party to accede to mediation.<sup>519</sup>

## ■ The Land Reform (Labour Tenants) Act 1996 (Act 3 of 1996)<sup>520</sup>

This Act supplements the Restitution Act. The Labour Tenants Act state its objective in its long title thus:

"To provide for security of tenure of labour tenants and those persons occupying or using land on account of their association with labour tenants; to provide for the acquisition of land and rights in land by labour tenants; and to provide for matters connected therewith."

This Act recognises the historical inequities associated with the system of labour tenancy, with the attendant breaches of human rights and denial of access to land. Claims under the Labour Tenants Act are to

---

518. Established in terms of Chapter 2 of the Restitution of Land Rights Act 22 of 1994 and the Constitution Act 200 of 1993. See also *Transvaal Union v Minister of Land Affairs and Another* CCT 21/96 where the constitutional validity of the rule regarding the procedure of the Land Claims Commission was sought. It was held by Chaskalson P that the provisions were valid and other members of the court concurred with him.

519. Section 14 (2).

520. It came into operation on 22 March 1996.



be determined by agreement,<sup>521</sup> arbitration<sup>522</sup> or mediation.<sup>523</sup>

## ■ An overview of the provisions of the Restitution of Land Rights Act

As required by the Constitution Act,<sup>524</sup> the Act,<sup>525</sup> reiterates the remedies available to claimants viz:

- ◆ order of restoration, where feasible;
- ◆ determination of compensation for successful claims, where restoration is not feasible;
- ◆ the granting of claimants an appropriate right in available state or public land, where feasible;
- ◆ and many other remedies.<sup>526</sup>

How far the restitution will go either restoring land to its original owners or providing alternative land or in securing meaningful compensation to

---

521. Section 35.

522. Section 19.

523. Section 36.

524. 200 of 1993.

525. Restitution of Land Rights Act.

526. Section 22 of the Act and Section 123 of Act 200 of 1993.

the dispossessed cannot be predicted.<sup>527</sup> Where land is privately owned, the state will still be required to pay some compensation either to successful claimants if they cannot get their land restored or the private owners where restoration is feasible.<sup>528</sup> This means that the restitution process is still circumscribed by the issue of "compensation" which, if set at high rates, may put severe limitations on the ability of the state to secure sufficient resources to be able to carry out extensive restitution and then redistribution.<sup>529</sup> There is therefore, a need to encourage and persuade those who have enjoyed property rights and benefits because of the unjust laws of forced removal to voluntarily relinquish some of the land freely or at nominal rates in the interest of national reconciliation, justice, peace and democracy.

One must also remember the fact that it is still too early to speculate about judicial solutions to the land question. Another fact is also that the importance of the general social context within which property disputes arise should be appreciated.

Conflicts between existing individual property rights and state intervention in the form of distributive reform of property relations are products of a very specific social context, which reflects a quest for

---

527. Gutto (1995).

528. Section 123 of the Interim Constitution Act 200 of 1993.

529. Gutto (1995) 66.

social justice within a legal system dominated by the ideal of individual rights.

### ■ The Route Ahead

Despite the criticisms and deficiencies of the present legislation of land restitution, what is required is a thorough exchange of views about what is best, and worst, as far as other alternative future land policies are concerned. In this regard Robertson <sup>530</sup> says: "Perhaps the most prudent policy would be a mixture of all options where the adoption of one would not exclude the other. There is, it seems, an inevitability that land reform policy will need to be multi dimensional ... Only by accepting an amalgamation of 'solutions' can an honest attempt be made to satisfy the equity and economic objections to which most aspire".

## 7.6 Restitution of Land under the Aboriginal title

One must remember that the state's constitutional obligations to restore land is limited by two considerations:

- ◆ the land must have been lost as a result of a racist law; and

---

530. (1990) 227.

- ◆ dispossession must have occurred after 19 June 1913.<sup>531</sup>

This does not mean that those who do not fall within the ambit of the later provisions are left remediless, they may take action under Aboriginal title. Although this doctrine is judicially untested in South Africa, it may be a second ground for claiming return of land. Bennett<sup>532</sup> says that authority in our law for invoking Aboriginal title has three possible foundations.

- ◆ Firstly, the doctrine could be argued to be part of international customary law. On the basis of natural law, it is argued that native communities had certain rights that were not affected by colonial conquest.<sup>533</sup>
- ◆ Secondly, since the doctrine was accepted by Grotius, it could through his work, be deemed part of Roman-Dutch Common law.<sup>534</sup>
- ◆ Thirdly, a more secure basis are the rules of British Colonial law and the Municipal law of former British colonies.

---

531. The principal beneficiaries will therefore be victims of forced removals under the 1913 and 1936 Land Acts and later apartheid legislation.

532. Bennett (1995) 149.

533. Crawford (1990) 175; Lindley (1990) 12–17.

534. Bennett (1995) 144.

Bennett,<sup>535</sup> also says that from the start of its colonial venture Britain's policy was guided by a self-denying ordinance that indigenous land rights in the colonial territories were to be respected, unless and until they were extinguished by the Crown.<sup>536</sup>

If restoration of land is claimed in South Africa under a doctrine of aboriginal title, only an indigenous people as a collectivity may invoke the right and then only in respect of their traditional lands.<sup>537</sup> Both the concept of aboriginality and of traditional land would be problematic for South African claimants.<sup>538</sup> A successful claim will entitle the group to possession, with the corollary that trespassers may be ejected.<sup>539</sup> Yet, beyond possession, the implications of aboriginal title are still somewhat obscure.<sup>540</sup>

Because it is connected with preserving native cultures, the argument could be made that beneficiaries are bound by the tenure implicit in their culture, which in South Africa would mean giving claimants their land subject to customary law.

---

535. (1995) 149.

536. Refer to the case of *Mabo v Queensland* (1992) 175 Cvr 1. This is the world leading case on Aboriginal title. See also with reference to South Africa, the Diepsloot case. *Diepsloot Residents and Land owners Association v Administrator, Transvaal* (1993) (3) SA 49; van der Walt (1994) THRHR 181–203.

537. Bennett (1995) 150.

538. Bennett (1993) 462.

539. *Tamaki v Baker* [1901] AC 561 (PC) at 574.

540. Bennett (1993) 150; *Choate v Trapp* 224 US 665 (1912); *Gritts v Fisher* 224 US 640 (1912).

## 7.7 Redistribution of land

Section 8 (3) (b) of the South African Constitution <sup>541</sup> permits only the return of land lost during the apartheid era. Other first generation rights, such as those contained in Chapter 3 of the Constitution, offer individuals no general 'right to land' in spite of the fact that many issues pertinent to realizing human rights — housing, food, employment, health, and a clean environment directly involve land.<sup>542</sup> Nonetheless, the South African government is politically committed to changing the existing pattern of landholding, uplifting disadvantaged members of the population, and stimulating economic development in rural areas.<sup>543</sup>

The principle underlying allocation helps to preserve the integrity of family units. Evidence in South Africa, for instance, shows, that customary tenure is functioning to preserve family stability.<sup>544</sup> The customary ban on alienation prevents impoverished families from cashing in their most valuable assets for what may prove to be only short-term financial benefits.

*Above all it is now appreciated that:*

---

541. Act 200 of 1993.

542. Bennett (1995) 151.

543. S.A. Law Commission Report on Human and Group Rights (1989) Working Paper 25 para 141.

544. Van der Walt (1992) 439.

"The land represents the link between the past and the future; ancestors lie buried there, children will be born there, farming is more than just a productive activity, it is an act of culture, the centre of social existence, and the place where personal identity is forced".<sup>545</sup>

An indigenous mode of land tenure is, of course, essential to the protection of a cultural identity and on this ground an argument to protect customary law may be based. Thus international instruments aimed at protecting aboriginal peoples and their culture demand respect for their systems of land tenure too. Tenure can also be linked to a general right to culture. Apart from the above, African modes of tenure have close ties with the constitutional position of traditional rulers.<sup>546</sup> To individualize tenure would be to strip these leaders of one of their most important functions, allotment and control of land, which would be contrary to the constitutional guarantee of their customary law powers.<sup>547</sup>

## **7.8 Land Rights under the Constitution of the Republic of South Africa Act 108 of 1996**

Looking at some of the provisions of the Constitution on Land Rights

---

<sup>545</sup>. Sachs (1992).

<sup>546</sup>. Bennett (1995) 152.

<sup>547</sup>. Section 181 (1) of the Constitution.

will be the best approach to conclude this section. Under the 1996 constitution, the issue of land rights is classified under the banner of property rights.<sup>548</sup> As already stated under the discussion on the Interim Constitution <sup>549</sup> that the section on property rights cannot be discussed alone, since it is inextricably intertwined with other sections. Therefore section 25 of the 1996 Constitution must be read together with sections 14, which deals with right to privacy, section 24, on environment, 30 on language and culture, section 31 on cultural, religious and linguistic communities.<sup>550</sup> The reason is that one cannot be in a position to exercise the right to his culture if there is no land on which one lives or if his tribe is no longer united.

One other important aspect of the constitution is the preamble, where it is stated that "the Constitution is the supreme law of the Republic."<sup>551</sup> This means that anything against the provisions of the constitution will be rendered invalid on the ground of unconstitutionality. Furthermore Section 2 of the constitution makes provision for the supremacy of the constitution, and it states that "This Constitution is the supreme law of the Republic, law or conduct inconsistent with it is invalid and the obligations imposed by it must be fulfilled." This means that land

---

548. Section 25.

549. Act 200 of 1993.

550. The full text of this section is found at the back of the thesis.

551. Page 1 of the Constitution.



dispossession is inconsistent with the provisions of the constitution.<sup>552</sup>

Section 25 of the 1996 constitution replaces section 28 of the 1993 constitution on property rights. One must also note the fact that sections 121, 122 and 123 of 1993 constitution is no longer included in the 1996 constitution, and also the fact that the wording of section 25 of the 1996 constitution and section 28 of the 1993 constitution do not bear any resemblance. Section 25 of the 1996 constitution is now worded in such a way that it at least covers the provisions of all four sections on land rights under the 1993 constitution.<sup>553</sup>

Anyway we now have the Restitution of Land Rights Act <sup>554</sup> and the Labour Tenants Act <sup>555</sup> which specifically deal with the Land Rights issues in South Africa.

## ■ Environment

One other important aspect on Land Rights which needs to be mentioned is the environment. From the discussion on Land Rights at international law, we have seen the negative impact which land dispossession has on the environment. And to show that South Africa

---

552. Against the provisions of section 25.

553. That is sections 28, 121, 122 and 123.

554. 22 of 1994.

555. 2 of 1996.

is moving along within the lines of the international standards, we have a section in the 1996 constitution which specifically make provisions for the environment, that is section 24. Section 24 specifically provides that:

"Everyone has the right —

- ◆ to an environment that is not harmful to their health or well being; and
- ◆ to have the environment protected for the benefit of present and future generations, through reasonable legislative and other measures that —
  - (i) prevent pollution and ecological degradation;
  - (ii) promote conservation; and
  - (iii) secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development."

Looking at the provisions of this section <sup>556</sup> you'll find that some of the provisions are not fully adhered to. If you go to the so-called "squatter" camps in South Africa, you'll find that the areas are not environmentally

---

556. Section 24.

healthy for people to be staying there. Some of the development or industrialising projects are hazardous to the environment. Some of these projects causes pollution.<sup>557</sup>

One can conclude by saying that the government is trying its level best to settle the land disputes in South Africa. To this extent the South African legislation can rightly be held up as amongst the most enlightened legislation of its kind in dealing with the fundamental rights of the historically dispossessed.

## **PART II**

### **SELF-DETERMINATION IN SOUTH AFRICA**

Self-determination entails the right to manage one's affairs. Thus self-determination is the right of a people living in a territory to determine the political and legal status of that territory.<sup>558</sup> People can exercise the right by establishing a state of their own or electing to become part of an existing state. The right of self-determination can be exercised within the existing boundaries of a particular state. Self-determination was never intended to a defined ethnic group. It is destined for a

---

557. For example in Natal we have Mondi, a company for producing paper situated near Richards Bay.

558. Akerhurst (1987) 291.

people without distinction as to race, sex, language or "religion" who are living in a defined territory. The idea is supported by the Organisation of African Unity (OAU). The rationale being that in Africa there are many ethnic groups, and that if self-determination was to be defined ethically, Africa would be fragmented into tiny states.<sup>559</sup> For this reason the OAU and African states start from the "premise that the various ethnic groups can and should reconcile their differences within existing national identities reflecting African values and requirements." After all, the UN regards self-determination as a fundamental human right.<sup>560</sup>

## **7.9 National Self-determination in Africa**<sup>561</sup>

In Africa, the principle of national self-determination was first invoked after World War 1.<sup>562</sup> The Pan-African Congress which convened in 1919 in Paris coined the slogan "Africa for Africans". Independence was demanded in the name of national self-determination.<sup>563</sup> In 1945 when the UN Charter proclaimed the right of all peoples to national self-determination the fifth Pan-African Congress in 1945 in Manchester affirmed "the right of all people to control their own destiny" and

---

559. Nayar (1975) 321.

560. GA Resolution (2625) XXV 24 October; Iglar (1992) 224.

561. Summary from Neuberger (1986) 5–10.

562. Neuberger (1986) 5.

563. Ibid.

demanded "autonomy and independence" for Black Africa.<sup>564</sup> In all Africa in the late 1940s and the 1950, the call for national self-determination and liberation from colonial rule was heard.

Initially, the application of the principle of national self-determination in Africa after World War 2 posed no particular problem – as long as nationalism was essentially defined as anti-colonialism. The general acceptance of the right to self-determination vis-a-vis the colonial power was not yet burdened by the knowledge of the dilemmas contained in implementing that right. The following quotation is representative for the era of colonisation.

"The right of self-determination is God given and no man or nation is chosen by God to determine the destiny of others".<sup>565</sup>

#### ■ Internal and External national self-determination

In as far as national self-determination is concerned we can differentiate between external and internal self-determination. An external self-determination entitles the self-determination unit to exercise the right in a given territory.<sup>566</sup> On the other, internal self-determination means amongst other things the right to language, democracy and culture.

---

564. Cervenka (1964) 27.

565. Mboya (1963) 93.

566. Manganye (1994) 50.

Internal self-determination is therefore not necessarily linked to land.<sup>567</sup>

The distinction between states and nations with regard to national self-determination is a crucial one.

Sometimes you'll find that the principles of external and internal self-determination are completely interwoven and cannot be separated.

#### ■ Other types of national self-determination

- ◆ **Individual self-determination:** Individual self-determination involves the protection of the individual's basic freedoms and the right of political participation.
- ◆ **Collective self-determination:** This type of self-determination relates the right of groups and peoples.<sup>568</sup>
- ◆ **Economic self-determination:** In its internal aspect, economic self-determination denotes the emancipation of the working-class from exploitation by the capitalist owners of the means of production. In its external aspect, economic self-determination can be explained by referring to the clause in the International Covenant on Economic, Social and Cultural Rights which says that "The right of people to self-determination shall also include

---

567. Ibid.

568. Faust (1980) 13.

permanent sovereignty over their natural wealth and resources".<sup>569</sup>

◆ **Political self-determination:** It aims only to establish external sovereignty or an internal constitutional framework without insisting on socio-economic changes.

◆ **Cultural self-determination:** This is the right to teach and study in one's own language,<sup>570</sup> to develop an autonomous culture, and to resist assimilation by the dominant power.<sup>571</sup>

Cultural self-determination can also be expressed in both its internal and external sense. External cultural self-determination is essentially cultural decolonisation. The aim of external cultural self-determination is a return to roots and authenticity in order to break the degrading dominance of European cultures, languages, and behaviour patterns. Cultural decolonisation is the natural by-product of nationalism, which always works. The notion to be distinct, unique, and equal in value to other nations.

Cultural self-determination in the internal sense relates to aspirations of African ethnic groups for schooling in their language, for the recognition of their language in government

---

569. Chu Chen (1976) 216.

570. The denial of this right led to the 1976 uprising in South Africa.

571. Faust (1980) 6.

and administration, or for religious liberty.

- ◆ **Colonial self-determination:** Colonial self-determination is the liberation of African peoples in a colony from European colonial rule. It has been the most common form of self-determination in post World War 2 Africa. It has meant that the populations of a colony, a "staatsnation" which usually has had no ethnocultural unity but has been arbitrarily delimited by the colonial partition, gained independence.
- ◆ **Secessionist self-determination:** Secessionist self-determination represents a people's aspiration to break out of the post-colonial state and achieve liberation for one Afro-Asian people from rule by another Afro-Asian people.

All these distinctions may be summed up by establishing a dichotomy between "grand self-determination" whose object is the internationally recognised sovereignty, and "small self-determination", which deals with the internal structure of the state. Grand self-determination is more external, collective political and anti-colonial, or secessionist, while small self-determination is more internal, individual, economic and cultural.<sup>572</sup>

---

572. End of summary from Neuberger (1986) 5–10.



### 7.9.1 What is a national self?

National self-determination assumes the presence of a "national self" but the question which exist is "what is a national self". The UN Charter declares that "all peoples have the right to national self-determination", but who is to decide what "a people" is and who are "all the peoples".<sup>573</sup> One may say a nation, or a people, has to be a "distinct self", but who is going to determine what is distinct?<sup>574</sup> Almost all Africans affirm the importance and decisiveness of colonial history and at least some colonial self in African nation building.<sup>575</sup> Certainly there are also efforts in Africa to resist to ethnocultural, precolonial - historical, and geographic selves, for the sake of self-determination, but it should be kept in mind that the colonial self is dominant in post-colonial Africa.

#### (i) The Ethnocultural nation

A different kind of self for whom the demand for national self-determination is sometimes voiced is the ethno cultural group – the "tribe" in colonial terminology.<sup>576</sup> The ethno

---

573. Neuberger (1986) 19.

574. Ibid.

575. Ibid.

576. Ibid.

cultural group is difficult to define. For many people ethnicity evokes strong emotions and dominates their collective identity and solidarity.<sup>577</sup> South Africa's former policy of developing homelands into independent ethno cultural nation states cannot be regarded as a case of ethno cultural self-determination. The case of the Transkei, Ciskei and Bophuthatswana, Venda and KwaZulu is different, because the basic demand for secession and independence does not come from "below" — from the Xhosa, Tswana or Zulu — but from "above" from the South African government.<sup>578</sup> Essentially, the government employed a divide and rule strategy by declaring that South Africa's blacks consist of many nations and by not applying the same logic to South Africa's whites.

## **(ii) Historic and Geographic selves**

Another self for which self-determination independence, and reunification is sometimes demanded is a "historical natural self", whether real or mythical.<sup>579</sup> South Africa is regarded by its Black community as a traditional historical

---

577. Ibid.

578. Ibid 39.

579. Ibid 42.

community. This is certainly true for traditional people who conceive of the nation as a historical personality linking past, present and future generations and as a group whose members share a "common cemetery".<sup>580</sup> For this people a nation is characterised by institutions and customs which represented the accumulated historical wisdom and experience of past generations.<sup>581</sup> This people have in common memories, sacrifices, glories and afflictions.

### **(iii) Mixed and conflicting identities**

The demand for a "pure" ethno cultural self-determination is relatively rare. More common in Africa is the quest for 'mixed' ethnic-territorial self-determination. In post colonial Africa, most separations are of the mixed type.<sup>582</sup>

### **(iv) "Natives", "settlers" and the "critical date"**

Another problem area with regard to who is the self concerns the differentiation between "natives" and foreign "settlers".<sup>583</sup>

---

580. Hayes (1948) 192.

581. Treitschke (1968).

582. Neuberger (1986) 52.

583. Ibid 56.

## ■ Conflicting principles of national self-determination

There are problems inherent in the concept of national self-determination. In most of the cases there are conflicting principles. For example in Africa, more than anywhere else, we face the dilemma to choose between territorial integrity of a state and the self-determination of a people. The conflict between these two principles explains most of the wars, conflicts, and tensions between and within African States in post-colonial Africa.

### 7.10 The South Africa case on self-determination

While the South African case is sensitive, it too can be analysed in terms of the quest for self-determination.<sup>584</sup> In spite of the then flagrant racial segregation and oppression, South Africa was inhabited by 25 million or so human beings. There are four or five part racial divisions in South Africa: Europeans (or Afrikaners and English speaking whites separately), blacks, coloured and Asians. The English-speaking whites and the Afrikaner whites, though racially identical, have not always considered themselves as an "us", neither have all black so perceived themselves.<sup>585</sup> Nor has there been in South Africa a constant struggle of the blacks for self-determination. Since the first day the whites set

---

584. Ronen (1979) 89.

585. Ibid 90.

foot on the continent, in spite of the fact that objectively the blacks have always been subordinated to the whites.<sup>586</sup>

Today the situation is different. The blacks are now in quest of their self-determination through the activation of a non-European/racial identity vis-a-vis the whites, who are viewed as colonisers. The South African blacks too now bridge over their own ethnic differences. They are all now relatively successfully united as blacks against whites.

One other aspect which affects the South African position on self-determination are the provisions of the 1970 Declaration, which makes provisions for ways in which self-determination can be attained, that is, by merger, free association and independence.<sup>587</sup> However these options are only available to the self or people that have a territory separate from that of the state from which the group wishes to secede.

This is not the position in South Africa as the different groups are already merged. Any attempt to form an exclusive state for one race cannot be achieved without massive relocations.<sup>588</sup>

#### ■ The claim for a Volkstaat in South Africa

The process of self-determination in South Africa is inhibited by a

---

586. Ibid 90.

587. Manganye (1994) 58.

588. Ibid.

similar claim by the Afrikaner to an exclusively white state.<sup>589</sup> The demand for a Volkstaat is complicated by the uniqueness of the situation compared to other situations in the world. The people making a claim to a Volkstaat are not territorially defined in that they do not constitute a local majority in any given region or province in the country.<sup>590</sup> Despite this shortcomings there is a will to achieve this goal, and there are threats of the use of force if it cannot be achieved peacefully.

A minority is accorded a right to preserve its culture, but this should not be seen as a licence to impair national unity and national state security.<sup>591</sup> Therefore in return for having been allowed to maintain their own culture minorities are expected to be loyal to the state of which they are nationals. Thus the Afrikaners will be permitted to preserve their culture within greater South Africa. Section 235 of the 1996 Constitution Act makes provision for the exercise of the right of self-determination by a community in a territorial entity or in any other way determined by national legislation. However, it will appear that such a right can be exercised with the existing border of the Republic. Therefore the exercise of the right will not amount to secession.

---

589. Ibid 59.

590. Ibid.

591. Thornberry (1991) 150.

## ■ The application of *uti possidetis* and South Africa's national borders

*Uti possidetis* is an international law rule which restricts the exercise of self-determination within existing borders to boundaries drawn by colonial powers at least in the case of decolonisation. A challenge to this rule is posed by the Afrikaner claim for a Volkstaat. So the Afrikaners are prevented by the *uti possidetis* rule from exercising an external right of self-determination entitling them to have their own state. They can participate in the democratic process in the present government in South Africa without having a state of their own.

Various factors counts against them:

- ◆ They are not territorially defined, and
- ◆ they have never been subjected to gross violations of Human Rights.<sup>592</sup>

---

<sup>592</sup> Manganye (1994) 60.

## CHAPTER 8

### 8. CONCLUSION

#### 8.1 Findings on Land Rights and the Impact of Land Dispossession on Indigenous Peoples and the Environment

In as far as Land Rights are concerned, Reynolds<sup>588</sup> states that the future of indigenous peoples lie in the 21<sup>st</sup> century and not in the 18<sup>th</sup> century.

Rather than dwell on the atrocities committed against indigenous peoples, we are being asked to look to the future. I find it very hard to believe that there are still people around who continue to take the issue of land rights for indigenous peoples lightly. It is high time that the injustices of the past be rectified.

From the foregoing discussion on land rights, it is found that, for indigenous peoples, the European settlement resulted in an overwhelming sense of loss. The dispossession of land, the removal of children from their families, loss of self-esteem and identity transformed most indigenous peoples from being a rich, self-sufficient race to a community suffering from widespread poverty and illness. Dispossession has rendered many indigenous peoples squatters and refugees in their own lands.

The most amazing quality of the indigenous peoples is their persistence,

---

588. Reynolds (1989) 19–21.



despite more than a century of disregard and suppression. As years go by, more and more indigenous peoples are identified.

It is also found that dispossession of land did not only result in the sufferings of indigenous peoples, but that the technologies used in development projects have also destroyed the environment, thereby leaving it barren for all. In some cases the environment was deforested and in other instances it was polluted. The protection of the environment is necessary for the survival of all humankind, whether indigenous or non-indigenous.

As far as legal instruments for the protection of indigenous rights and the environment are concerned, their first weakness is manifested in the fact that (as in the case of Declarations) they are not legally binding. Although a non-binding declaration has normative force, it is of no use in negotiating for Declarations, since they will not carry any binding obligations. The inclusion of exceptions in the instruments may be far-reaching, as they may allow for policies leading to the annulment of indigenous rights provided by these instruments.

Indigenous organisations have been comparatively slow in recognising both their particular needs and aspirations. The existing land rights standards are not fully applicable to indigenous peoples. Instruments do not reflect the views of indigenous peoples. In as far as the protection

of the rights of indigenous peoples is concerned, international law is weak, taking into consideration that some instruments have been in place since 1919 but up to this day nothing tangible has been done to put them into effect. The provisions envisaged in the creation of the instruments were easier said than done. Consideration should also be given to the question of sanctions in the case of illegal encroachment on indigenous lands.

### **8.1.2 Recommendations**

In spite of the observance of the fundamental freedoms of individuals, it must be recognised that indigenous peoples have legitimate interests that must be appreciated and accommodated. Without special attention accorded to indigenous peoples, they will not survive. Indigenous cultures deserve special treatment, notwithstanding the commercial and other values of the rest of society. The retention of tribal cultures and traditional wisdom must be permitted for so long as the peoples affected wish to retain their tribal indigenous status.

Indigenous peoples should be allowed to exercise influence in the processes that concern their own lands and environmental protection, as they are the people directly affected.

As far as environmental protection is concerned, the Europeans

can benefit from indigenous peoples. Methods of fire control, conservation of nature and environmental land management may constitute of the aspects where knowledge may be gained from indigenous peoples. In many parts of the world such methods have begun to be used to protect ecosystems.<sup>589</sup>

It will also be morally justified to secure for indigenous peoples guaranteed and permanent possession of the lands which their ancestors have occupied since time immemorial. In order to secure a better future for all, it is necessary for all levels of government on international as well as non-governmental basis, to take action.

## **8.2 Findings on Self-determination and Indigenous Peoples**

The foregoing portrays a norm of self-determination based on premises of humanity, that should benefit all sectors of the world community, whether they be indigenous or not.

All peoples are entitled to participate equally in the constitution and development of the governing international order under which they live and, furthermore, to live continuously within a government in which the universal freedoms abound.<sup>590</sup> Self-determination includes the right of

---

589. Beacroft (1987) 3.

590. Anaya (1993) 161.

cultural groupings to the political institutions necessary to allow them to exist and develop freely according to their distinctive characteristics.<sup>591</sup>

It is in this manner that we may understand self-determination to be a right of "all peoples" without formalistic attempts to narrowly define the term "people".<sup>592</sup> Rather, the term "peoples" is appropriately understood as simply denoting the collective character of the human impulse toward self-determination and as affirming the value of the community bonds notwithstanding traditional categories of human organisation associated with sovereignty and statehood.<sup>593</sup>

At present, there appears to be little possibility that indigenous, minority self-determination will be accepted as an international legal norm in the near future. Cultural self-determination may already be accepted, but the grave threat which political self-determination of native minorities presents to the integrity of states and to the international legal system will deter states from acquiescing indigenous claims without more ado.<sup>594</sup>

We have seen from the discussion that although states oppose indigenous claims to self-determination on ultimately economic and political grounds, they justly and perhaps even conceive of this opposition in terms of international legal concepts whose meanings have been not

---

591. Ibid.

592. Ibid.

593. Ibid.

594. Paxman (1989) 202.

so much declared as historically "filled in".<sup>595</sup> The key concepts at issue here were sovereignty, statehood, peoples and self-determination.<sup>596</sup>

International law, as the guardian of human rights, lacks the specific provisions to address many of the indigenous peoples' concerns. Due to this reason, indigenous peoples argue that existing principles in international human rights law are inadequate to deal with their aspirations and that legal instruments do not reflect their views as interested parties. Indigenous rights as components of human rights instruments are therefore seen to be inadequate.

Although most provisions of the declarations are clear and appear to protect the right to self-determination for indigenous peoples, the problem is that a declaration has its own inherent weakness. The weakness is that a declaration is not legally binding.<sup>597</sup>

While the right of self-determination continues to be the political focus of the international indigenous movement, the recent jurisprudence of the Human Rights Committee has done little to resolve the conflicts between indigenous peoples and states.<sup>598</sup> Although provided an opportunity to focus on domestic aspects of some of the human rights problems that

---

595. Lam (1992) 611.

596. Ibid.

597. Eide (1987) 31.

598. Turpel (1992) 601.

indigenous peoples face, this opportunity was neither facilitated nor supported by international institutions or forums.<sup>599</sup> It is clear that present international law does not recognise a general right of indigenous peoples situated within states to full self-determination. However, the United Nations Working Group on Indigenous Peoples appears to be considering the inclusion of such a right. Such recognition could entail a fundamental change in international law.

### 8.2.1 Recommendations

It is clear from the later discussion that in the case of protecting group rights, such as the right to self-determination, the existence of an efficient and sensitive legal system is immensely important. The only appropriate legal framework in which to consider the right of self-determination for indigenous peoples, is one based on the legal framework rules developed in international human rights law.<sup>600</sup> Indigenous peoples can be given the right to act before international organisations and bodies in representations of their members, a right which they do not presently enjoy as a rule. The right to self-determination for indigenous peoples will merely imply the group's right to resolve its own political institutions and to order its communal life

---

599. Ibid.

600. McCorquodale (1994) 858.

according to its own values. It must also involve the right to decide whether industrial or other development should be permitted on indigenous lands. The recognition of self-determination, land and resources rights, and other fundamental rights of indigenous peoples, as well as their corresponding obligations, must become the solid foundation upon which the relations between states and indigenous peoples are established if positive and long-lasting relationships are to flourish between indigenous peoples and states.<sup>601</sup>

Indigenous peoples should also be entitled to full enjoyment of all human rights under existing human rights instruments, including the preservation of cultural identities, the use of lands and waters on which the indigenous cultures depend, and autonomy within their traditional territories.<sup>602</sup> One of the major shortcomings of international law is that it tends to focus, in the human rights area, on individuals. International law must accord rights on a collective basis. What is needed in relation to indigenous peoples is more in the nature of recognition of group rights.

The rights of a group to be given protection if there is to be

---

601. Sambo (1993) 46.

602. Suagee (1992) 689.

adequate enjoyment of human rights, cannot be disregarded.

The UN must formally acknowledge the right to self-determination of indigenous peoples so that they become recognised subjects of international law, competent to represent their interests in the international arena.<sup>603</sup> This right must be extended to indigenous peoples regardless of whether a particular people propose to exercise the right to remain attached to its present state, to separate from it, or to form a compact of free association with it or another state. The importance of self-determination in economic, social and cultural matters as a right must be stressed, thereby assuring indigenous peoples as much control as possible over their own economic, social and cultural development. Indigenous peoples must be encouraged to participate in matters affecting them so that their interests are represented by their own freely-elected people. Indigenous peoples must freely choose their alliances and, in turn, their representatives. States do not represent indigenous interests and cannot replace indigenous participation.<sup>604</sup> Only full and direct participation by indigenous peoples will lead to creative political arrangements able to reduce violent confrontations between indigenous peoples and to protect the

---

603. Lam (1992) 621.

604. Turpel (1992) 598.



human rights of indigenous peoples.<sup>605</sup>

Human rights are very simple, in that they are basically concerned with respect for the religious concepts, political beliefs and culture of others. Insofar as the indigenous peoples have been denied self-determination, remedial measures are to be developed in accordance with the aspirations of indigenous peoples themselves.

Finally, although the strategies pursued by many indigenous groups as well as the approaches of their advocates in the international forum are often flawed, they can be replaced by better approaches.<sup>606</sup> They should use other phrases than self-determination, and instead of seeking support for cultural integrity, they should secure their rights through existing human rights treaties and declarations. They should also agree to a broad, objective definition of "indigenous".<sup>607</sup>

The search for appropriate legislation regarding indigenous populations, reflecting real social needs and legitimate aspirations, is generally relevant to the evolving attitude regarding group rights in today's international life. It would be

---

605. Ibid.

606. Cornstassel and Hopkins (1995) 343.

607. Ibid.

a great achievement if international law could succeed in elaborating upon an agreed-upon right of self-determination for indigenous peoples.

This may satisfy the claims advanced by indigenous peoples. These are all measures likely to lead to a constructive response to many of the needs and desires of indigenous peoples. In addition, solutions must be found for other expectations of indigenous groups related to such issues as the collective property of land and natural resources.

There must be an effective application of the principle of self-determination to the indigenous people of dependent and independent peoples alike. It can finally be concluded that under international law, all peoples have the right to self-determination and not the least among these peoples are the indigenous peoples themselves. Self-determination promotes a stable and peaceful world. Recognition of indigenous self-determination will require domestic public support as well as international debate, and ideally, international supervision. International law must help make self-determination work for indigenous peoples. What is needed is a breakthrough in the capacity of the UN system to deal with the frustrated claims to self-determination.

### **8.3 Land Rights and Self-determination In South Africa : A Comparison**

The process of alienation in South Africa, despite apartheid, does not differ from such processes elsewhere in the world. In South Africa, just like in other countries in the world, white settlement brought about changes in the system of land tenure. The arrival of white settlers meant a great reduction in the availability of land for Black rural life, and the reduction of land meant a change in the farming system. Blacks were reduced from being landowners to a status of tenants in their own land.

Labour tenancy became a source of labour and a means of survival for the Black indigenous peoples of South Africa. One also found that the precarious means of survival for the Blacks became threatened as the value of land went up and white agriculture became highly mechanised.

The other threat came from the growth of the capitalist economy, that is mining and industries which needed the labour of the Black people.

We've also seen that various forms of legislation were passed to eliminate labour tenancy and squatting, but nonetheless, the provisions thereof were not implemented in any real sense. Homelands were established to house the Blacks, who could be drawn into the white economy when needed.

The homelands were too tiny to support the Black population since they were only allocated 13 percent of the land. The 1913 and 1936 Land Acts sealed the separation of lands for whites and land for Blacks. The

separation of races, Blacks against whites and Blacks against Blacks, involved forced removals of various groups of Blacks into the tribal homelands. The confinement of Blacks to reserves and the accompanying resettlement resulted in overcrowding, landlessness and overstocking, which led to the deterioration of the land. The landless families outnumbered the families with less than economic units by far.

When the survival strategies of the rural population were examined, it revealed that migratory labour was the major provider. Migratory labour also reveals that:

- ◆ The restriction of Blacks to the limited areas within homelands was a coercive measure to make the Blacks serve as a pool of labour.
- ◆ Despite the declining homelands economy, more and more Blacks were resettled into these areas, where the "unproductive" Blacks are permitted domicile.
- ◆ Finally, homelands were given "independence" as a way of making Blacks foreigners who may only come into South Africa as migrants.

It is clear from these findings that the Black indigenous peoples of South Africa have suffered the same fate, in as far as land rights are concerned, as other indigenous peoples around the world. Although

each country suffered its own form of dispossession, the most common factor that led to the sufferings of indigenous peoples is colonisation. International instruments on land rights have been in existence since time immemorial,<sup>608</sup> but till today there has not yet been a satisfactory answer to the land rights problem for indigenous people. All indigenous people regard the land as the only link to their ancestors. Without their lands they are nothing. The only precious gift that they can give to their future generations is the land, which they refer to as their "Mother". In South Africa various legislations have recently been passed in an attempt to resolve the land problem amongst the Black communities. This shows that efforts which move in tandem with the provisions of International instruments are being made. The Land Restitution Act and the subsequent reforms were steps towards land reform in South Africa. From the lesson of the international instruments, the South African community must learn to accept the fact that the problem of 'land reform' will not be solved overnight. It will take many years before a satisfactory answer can be found with regard to land reform problems. Legislation to protect the environment for the benefit of all humankind in South Africa has also been enacted.

In as far as self-determination is concerned, indigenous people are of the opinion that it is impossible for them to exercise their right of self-determination if they do not have land on which to exercise such rights.

---

608. As early as 1919.

For them the exercise of the right of self-determination cannot be separated from land rights. International instruments also provide that every community or tribe must be free to practice their own culture and to speak a language of their own choice. The new Constitution <sup>609</sup> also makes provision for self-determination. What is needed in the different Black ethnic groups of South Africa is to reconcile their differences and be one united nation. Considering the history of the South African Apartheid era, they must appreciate the fact that the land rights issue is still going to take a long time before it is finally resolved. A period of five years is too little.

In concluding this thesis, it must be stressed that the dispossession of our people of the land that is theirs remains one of the most painful national grievances for indigenous people. Land is their life, and they can be expected to defend it to the last drop of their blood.

"The struggle for property, land and justice continues." <sup>610</sup>

---

609. Section 236 of Act 108 of 1996.

610. Gutto (1995) 66.

## **ANNEXURE I**

### **THE CONSTITUTION OF THE REPUBLIC OF SOUTH AFRICA ACT 200 OF 1993**

#### **Supremacy of the Constitution**

- Section 4 (1)** This Constitution shall be the supreme law of the Republic and any law or act inconsistent with its provisions shall, unless otherwise provided expressly or by necessary implication in this Constitution be of no force and effect to the extent of the inconsistency.
- (2)** This Constitution shall bind all legislative, executive and judicial organs of state at all levels of government.

#### **Equality**

- Section 8 (1)** Every person shall have the right to equality before the law and to equal protection of the law.
- (2)** No person shall be unfairly discriminated against, directly or indirectly, and without derogating from the generality of this provision, on one or more of the following grounds in particular race, gender, sex, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture or language.
- (3) (a)** This section shall not preclude measures designed to achieve the adequate protection and advancement of persons or groups or categories of persons disadvantaged by unfair discrimination, in order to enable their full and equal enjoyment of all rights and freedoms.
- (b)** Every person or community dispossessed of rights in land before the commencement of this Constitution under any law which would have been inconsistent with subsection (2) had

**THE CONSTITUTION OF THE REPUBLIC OF SOUTH AFRICA ACT 200 OF 1993**

that subsection been in operation at the time of the dispossession, shall be entitled to claim restitution of such rights subject to and in accordance with sections 121, 122 and 123.

- (4) Prima facie proof of discrimination on any of the grounds specified in subsection (2) shall be presumed to be sufficient proof of unfair discrimination as contemplated in that subsection, until the contrary is established.

### Privacy

Section 13 Every person shall have the right to his or her personal privacy which shall include the right not to be subject to searches of his or her person, home or property, the seizure of private possessions or the violation of private communications.

### Religion, belief and opinion

Section 14 (1) Every person shall have the right to freedom of conscience, religion, thought, belief and opinion, which shall include academic freedom in institutions of higher learning.

- (2) Without derogating from the generality of subsection (1), religious observances may be conducted at state or state-aided institutions under rules established by an appropriate authority for that purpose provided that such religious observances are conducted on an equitable basis and attendance at them is free and voluntary.

- (3) Nothing in this Chapter shall preclude legislation recognising –

THE CONSTITUTION OF THE REPUBLIC OF SOUTH AFRICA ACT 200 OF 1993

- (a) a system of personal and family law adhered to by persons professing a particular religion; and



- (b) the validity of marriages concluded under a system of religious law subject to specified procedures.

#### Economic activity

Section 26 (1) Every person shall have the right freely to engage in economic activity and to pursue a livelihood anywhere in the national territory.

- (2) Subsection (1) shall not preclude measures designed to promote the protection or the improvement of the quality of life, economic growth, human development, social justice, basic conditions of employment, *fair labour practices or equal opportunity for all*, provided such measures are justifiable in an open and democratic society based on freedom and equality.

#### Property

Section 28 (1) Every person shall have the right to acquire and hold rights in property and, to the extent that the nature of the rights permits, to dispose of such right.

- (2) No deprivation of any rights in property shall be permitted otherwise than in accordance with a law.
- (3) Where any rights in property are expropriated pursuant to a law referred to in subsection (2), such expropriation shall be permissible for public purposes only and shall be subject to the payment of agreed compensation or, failing

#### THE CONSTITUTION OF THE REPUBLIC OF SOUTH AFRICA ACT 200 OF 1993

agreement to the payment of such compensation and within such period as may be determined by a court of law as just and equitable, taking into account all relevant factors, including, in the case of the determination of compensation, the use to which the property is being put, the history of its acquisition, its market value,

the value of the investments in it by those affected and the interests of those affected.

### Environment

Section 29 Every person shall have the right to an environment which is not detrimental to his or her health or well-being.

### Language and culture

Section 31 Every person shall have the right to use the language and to participate in the cultural life of his or her choice.

## RESTITUTION OF LAND RIGHTS

### Claims

Section 121 (1) An Act of Parliament shall provide for matters relating to the restitution of land rights, as envisaged in this section and in sections 122 and 123.

(2) A person or a community shall be entitled to claim restitution of a right in land from the state if –

(a) such person or community was dispossessed of such right at any time after a date to be fixed by the Act referred to in subsection (1); and

## THE CONSTITUTION OF THE REPUBLIC OF SOUTH AFRICA ACT 200 OF 1993

(b) such dispossession was effected under or for the purpose of furthering the object of a law which would have been inconsistent with the prohibition of racial discrimination contained in section 8(2), had that section been in operation at the time of such dispossession.

- (3) The date fixed by virtue of subsection (2) (a) shall not be a date earlier than 19 June 1913.
- (4) (a) The provisions of this Section shall not apply to any rights in land expropriated under the Expropriation Act, 1975 (Act No. 63 of 1975), or any other law incorporating by reference that Act, or the provisions of that Act with regard to compensation, if just and equitable compensation as contemplated in section 123(4) was paid in respect of such expropriation.  
  
(b) In this section "Expropriation Act, 1975" shall include any expropriation law repealed by that Act.
- (5) No claim under this section shall be lodged before the passing of the Act contemplated in subsection (1).
- (6) Any claims under subsection (2) shall be subject to such conditions, limitations and exclusions as may be prescribed by such Act, and shall not be justiciable by a court of law unless the claim has been dealt with in terms of section 122 by the Commission established by that section.

#### Commission

### THE CONSTITUTION OF THE REPUBLIC OF SOUTH AFRICA ACT 200 OF 1993

- Section 122
- (1) The Act contemplated in section 121(1) shall establish a Commission on Restitution of Land Rights, which shall be competent to –
    - (a) investigate the merits of any claims;
    - (b) mediate and settle disputes arising from such claims;

- (c) draw up reports on unsettled claims for submission as evidence to a court of law and to present any other relevant evidence to the court; and
  - (d) exercise and perform any such other powers and functions as may be provided for in the said Act.
- (2) The procedures to be followed for dealing with claims in terms of this section shall be as prescribed by or under the said Act.

#### Court orders

- Section 123 (1) Where a claim contemplated in section 121(2) is lodged with a court of law and the land in question is –
- (a) in the possession of the state and the state certifies that the restoration of the right in question is feasible, the court may, subject to subsection (4), order the state to restore the relevant right to the claimant; or
  - (b) in the possession of a private owner and the state certifies that the acquisition of such land by the state

#### THE CONSTITUTION OF THE REPUBLIC OF SOUTH AFRICA ACT 200 OF 1993

- is feasible, the court may, subject to subsection (4), order the state to purchase or expropriate such land and restore the relevant right to the claimant.
- (2) The court shall not issue an order under subsection 1(b) unless it is just and equitable to do so, taking into account all relevant factors, including the history of the dispossession, the hardship caused, the use to which the property is being put, the history of its acquisition by the owner, the interests of the owner and others affected by any expropriation, and the interests of the

dispossessed: Provided that any expropriation under subsection (1)(b) shall be subject to the payment of compensation calculated in the manner provided for in section 28(3).

(3) If the state certifies that any restoration in terms of subsection (1)(a) or any acquisition in terms of subsection (1)(b) is not feasible, or if the claimant instead of the restoration of the right prefers alternative relief, the court may, subject to subsection (4), order the state, in lieu of the restoration of the said right –

(a) to grant the claimant an appropriate right in available alternative state-owned land designated by the state to the satisfaction of the court, provided that the state certifies that it is feasible to designate alternative state-owned land;

(b) to pay the claimant compensation; or

(c) to grant the claimant alternative relief.

#### THE CONSTITUTION OF THE REPUBLIC OF SOUTH AFRICA ACT 200 OF 1993

(4) (a) The compensation referred to in subsection (3) shall be determined by the court as just and equitable, taking into account the circumstances which prevailed at the time of the dispossession and all such other factors as may be prescribed by the Act referred to in section 121(1), including compensation that was paid upon such dispossession.

(b) If the court grants the claimant the relief contemplated in subsection (1) or (3), it shall take into account, and, where appropriate, make an order with regard to, any compensation that was paid to the claimant upon the dispossession of the right in question.

## **ANNEXURE 2**

### **RESTITUTION OF LAND RIGHTS ACT**

**22 OF 1994**

**as amended by**

Restitution of Land Rights Amendment Act, 84 of 1995

Land Restitution and Reform Laws Amendment Act, 78 of 1996

---

### **ACT**

**To provide for the restitution of rights in land in respect of which persons or communities were dispossessed under or for the purpose of furthering the objects of any racially based discriminatory law; to establish a Commission on Restitution of Land Rights and a Land Claims Court; and to provide for matters connected therewith.**

WHEREAS the Constitution of the Republic of South Africa, 1993 (Act No. 200 of 1993), provides for the restitution of a right in land to a person or community dispossessed under or for the purpose of furthering the objects of any racially based discriminatory law;

AND WHEREAS legislation for this purpose is to be designed to promote the protection and advancement of persons, groups or categories of persons disadvantaged by unfair discrimination, in order to promote their full and equal enjoyment of rights in land:

**Section 2. Enforcement of claim for restitution.**—(1) A person shall be entitled to enforce restitution of a right in land if—

- (a) he or she is a person or community contemplated in section 121(2) of the Constitution or a direct descendant of such a person;

# RESTITUTION OF LAND RIGHTS ACT

22 OF 1994

- (b) the claim is not precluded by section 121(4) of the Constitution; and
- (c) the claim for such restitution is lodged within three years after a date fixed by the Minister by notice in the *Gazette*.

[Sub-s. (1) substituted by s. 2(1)(a) of Act No.78 of 1996.]

(1A) No person shall be entitled to enforce restitution of a right in land if just and equitable compensation as contemplated in section 123 (4) of the Constitution, calculated at the time of any dispossession of such right, was paid in respect of such dispossession.

[Sub-s.(1A) inserted by s. 2(1) (b) of Act No.78 of 1996.]

(2) The date contemplated in subsection (1), shall be a date not earlier than the earliest of the dates contemplated in section 43.

(3) The date contemplated in section 121(2) (a) of the Constitution is 19 June 1913.

## COMMISSION ON RESTITUTION OF LAND RIGHTS

### **Section 4. Establishment of Commission on Restitution of Land Rights.—(1)**

There is hereby established a commission to be known as the Commission on Restitution of Land Rights.

(2) The Commission shall have a head office and such other offices, with such areas of jurisdiction, as the Minister may determine.

(3) The Commission shall consist of a Chief Land Claims Commissioner appointed by the Minister, after inviting nominations from the general public, a Deputy Land Claims Commissioner similarly appointed and as many regional land claims commissioners as may be appointed by the

# RESTITUTION OF LAND RIGHTS ACT

22 OF 1994

Minister.

(4) The Chief Land Claims Commissioner, the Deputy Land Claims

Commissioner and a regional land claims commissioner, shall—

- (a) be fit and proper persons to hold such offices;
- (b) be South African citizens; and
- (c) have skills and knowledge relevant to the work of the Commission or such legal knowledge or qualifications as the Minister may deem necessary.

(5) The Minister may terminate any appointment made under subsection

(3)—

- (a) if he or she is satisfied that such appointed person no longer complies with the requirements of subsection (4); or
- (b) if the appointed person requests the Minister in writing to terminate the appointment.

**Section 13. Mediation.**—(1) If at any stage during the course of the Commission's investigation it becomes evident that—

- (a) there are two or more competing claims to a particular right in land;
- (b) in the case of a community claim, there are competing groups within the claimant community making resolution of the claim difficult;



## RESTITUTION OF LAND RIGHTS ACT

22 OF 1994

- (c) where the land which is subject to the claim is not state-owned land, the owner or holder of rights in such land is opposed to the claim; or
- (d) there is any other issue which might usefully be resolved through mediation and negotiation

the Chief Land Claims Commissioner may direct the parties concerned to attempt to settle their dispute through a process of mediation and negotiation.

(2) (a) A direction contemplated in subsection (1) shall be made in a written notice specifying the time when and the place where such process is to start.

(b) The Chief Land Claims Commissioner shall appoint a mediator to chair the first meeting between the parties: Provided that the parties may at any time during the course of mediation or negotiation by agreement appoint another person to mediate the dispute.

(3) A person appointed by the Chief Land Claims Commissioner in terms of subsection (2) (b) shall either be an officer contemplated in section 8 who is a fit and proper person to conduct such a process of mediation and negotiation or an independent mediator contemplated in section 9 (1) (b).

(4) All discussions taking place and all disclosures and submissions made during the mediation process shall be privileged, unless the parties agree to the contrary.

**Section 14. Referral of claims to Court.**—(1) If upon completion of an investigation by the Commission—

## RESTITUTION OF LAND RIGHTS ACT

22 OF 1994

- (a) the parties to any dispute arising from the claim agree in writing that it is not possible to settle the claim by mediation and negotiation;
- (b) the regional land claims commissioner certifies that it is not feasible to resolve any dispute arising from such claim by mediation and negotiation;
- (c) the parties to any dispute arising from such claim reach agreement as to how the claim should be finalised and the regional land claims commissioner is satisfied that such agreement is appropriate; or
- (d) the regional land claims commissioner is of the opinion that the claim is ready for hearing by the Court,

the Chief Land Claims Commissioner shall certify accordingly and refer the matter to the Court.

(2) Any claim referred to the Court as a result of a situation contemplated in subsection (1) (a), (b) or (a) shall be accompanied by a document—

- (a) setting out the results of the Commission's investigation into the merits of the claim;
- (b) reporting on the failure of any party to accede to mediation;
- (c) containing a list of the parties who have an interest in the claim;

[Para. (c) substituted by s.7 (a) of Act No.78 of 1996.]

- (d) setting out the Commission's recommendation as to the most

## RESTITUTION OF LAND RIGHTS ACT

22 OF 1994

appropriate manner in which the claim can be resolved.

(3) A referral made as a result of an agreement contemplated in subsection (1) (c) shall be accompanied by a document setting out the results of the Commission's investigation into the merits of the claim and a copy of the relevant deed of settlement together with a request signed by the parties concerned and endorsed by the Chief Land Claims Commissioner requesting that such agreement be made an order of Court.

(4) If the Chief Land Claims Commissioner is not satisfied that a settlement referred to in subsection (1) (c) is appropriate, he or she shall refer the matter to the Court for a hearing in accordance with subsection (1) (d).

(5) Any interested party shall be entitled, upon payment of the prescribed fee, to copies of the documents contemplated in this section, including the submissions of other interested parties in relation to any matter contemplated in this section.

(5A) No claim shall be referred to the Court in terms of this section until—

- (a) in the case of land contemplated in section 123 (1) (a) or (b) of the Constitution, the Minister has issued or refused to issue a certificate in terms of subsections (1) and (3) of section 15;
- (b) in the case of an order contemplated in section 123 (3) (a) of the Constitution, the Minister has issued or refused to issue a certificate in terms of section 15(2).

[Sub-s. (5A) inserted by 5.7 (b) of Act No.78 of 1996.]

## RESTITUTION OF LAND RIGHTS ACT

22 OF 1994

(6) The Court shall not make any order in terms of section 35 unless the Commission has, in respect of the claim in question, acted in accordance with the provisions of this section.

(7) .....

[Sub-s. (7) deleted by s.7 (c) of Act No.78 of 1996.]

**Section 15. Certificate of feasibility.**—(1) Prior to referral of a claim contemplated in section 121(2) of the Constitution to the Court in terms of section 14, the Chief Land Claims Commissioner shall request the Minister to certify whether—

- (a) in the case of land contemplated in section 123 (1) (a) of the Constitution, restitution of the right in question is feasible;
- (b) in the case of land contemplated in section 123 (1) (b) of the Constitution, acquisition of the right in question is feasible.

[Sub-s. (1) substituted by s.8 (a) of Act No.78 of 1996.]

(2) Prior to referral of a claim for an order contemplated in section 123 (3) (a) of the Constitution to the Court in terms of section 14, the Chief Land Claims Commissioner shall request the Minister to certify whether it is feasible to designate alternative state-owned land.

[Sub-s. (1) substituted by s.8 (b) of Act No.78 of 1996.]

(3) If the Minister certifies under subsection (1) that restoration or acquisition is not feasible, the Chief Land Claims Commissioner shall forthwith request the Minister to certify whether it is feasible to designate alternative state-owned land.

(4) When submitting a request contemplated in subsections (1), (2) or

## RESTITUTION OF LAND RIGHTS ACT

22 OF 1994

(3), the Chief Land Claims Commissioner shall advise the Minister as to whether or not restoration, acquisition or designation is feasible in the case in question.

(5) All interested parties shall be given the opportunity to make submissions to the Minister on the question of feasibility.

(6) In considering whether restoration or acquisition by the State is feasible in terms of subsection (1), the Minister shall, in addition to any other factor, take into account—

- (a) whether the zoning of the land in question has since the dispossession been altered and whether the land has been transformed to such an extent that it is not practicable to restore the right in question;
- (b) any relevant urban development plan;
- (c) any other matter which makes the restoration or acquisition of the right in question unfeasible; and
- (d) any physical or inherent defect in the land which may cause it to be hazardous for human habitation.

(7) In considering whether designation of alternative state-owned land is feasible in terms of subsections (2) and (3), the Minister shall, in addition to any other factor, take into account—

- (a) what land is owned by the State, in particular land which is situated in the area in which the dispossession took place; and

# **RESTITUTION OF LAND RIGHTS ACT**

**22 OF 1994**

(b) the suitability of such land to meet the needs of the claimant.

(8) Nothing in this section shall be construed to mean that the Minister shall be required or entitled to consider whether restoration, acquisition or designation is just or desirable.

(9) The Minister shall issue the relevant certificate of feasibility, or refuse to do so, within 30 days of receipt of a request, and the Chief Land Claims Commissioner or the regional land claims commissioner concerned shall communicate the Minister's decision to every person affected by it.

(10) Any decision of the Minister in terms of this section shall be subject to review by the Court, the hearing of which review may, at the discretion of the Court, be conducted at the same time as the hearing of the claim in question.

[Sub-s. (10) substituted by s.8 (c) of Act No.78 of 1996.]

(11) The decision of the Minister in respect of the issue of a certificate of feasibility, and the reasons for such decision, shall be public documents.

(12) If the Minister certifies in terms of subsection (2) or (3) that it is feasible to designate alternative state-owned land he or she may make such designation at the same time or at any time thereafter.

# RESTITUTION OF LAND RIGHTS ACT

22 OF 1994

## THE LAND CLAIMS COURT

**Section 22. Land Claims Court.**—(1) There shall be a court of law to be known as the Land Claims Court which, in addition to the powers contemplated in section 123 of the Constitution, shall have the power—

- (a) to determine restitution of any right in land in accordance with this Act;
- (b) to determine compensation in terms of this Act;
- (c) in respect of a claim in terms of section 3, to determine the person entitled to ownership;
- (cA) at the instance of any interested person and in its discretion, to grant a declaratory order on a question of law relating to section 121, 122 or 123 of the Constitution or to this Act or to any other law or matter in respect of which the Court has jurisdiction, notwithstanding that such person might not be able to claim any relief consequential upon the granting of such order;

[Para. (cA) inserted by s. 10 (a) of Act No.78 of 1996.]

- (d) to determine all other matters which require to be determined in terms of sections 121, 122 and 123 of the Constitution.

(2) Subject to Chapter 7 of the Constitution, the Court shall have jurisdiction throughout the Republic and shall have—

- (a) all such powers in relation to matters falling within its jurisdiction as are possessed by a provincial division of the Supreme Court having jurisdiction in civil proceedings at the

## RESTITUTION OF LAND RIGHTS ACT

22 OF 1994

place where the land in question is situated, including the powers of such a division in relation to any contempt of the Court;

- (b) *all the ancillary powers necessary or reasonably incidental to the performance of its functions, including the power to grant interlocutory orders and interdicts.*

[Sub-s. (2) substituted by s.10(b) of Act No. 78 of 1996.]

(3) There shall be a President of the Court, who shall be appointed by the President of the Republic, acting on the advice of the Judicial Service Commission.

(4) The President of the Republic may, after consultation with the President of the Court and the Judicial Service Commission, appoint additional judges of the Court.

(5) The President of the Court and the additional judges of the Court may be appointed for a fixed term.

(6) A judge of a provincial or local division of the Supreme Court may be seconded to serve as a judge of the Court.

(7) The President of the Republic shall designate a judge of the Court to act as President of the Court during the absence of the President of the Court.

[Sub-s. (7) added by s. 1 of Act No.84 of 1995.]

(8) If there is sufficient reason the President of the Republic may, after consultation with the President of the Court, appoint an acting judge of the Court for such term as the President of the Republic shall determine: Provided that the Minister of Justice, after consultation with the President of the Court, may make such an appointment in respect of a term not



# RESTITUTION OF LAND RIGHTS ACT

22 OF 1994

exceeding one month.

[Sub-s. (8) added by s.1 of Act No.84 of 1995 and substituted by s.10(c) of Act No.78 of 1996.]

(9) (a) Proceedings in which a judge of the Court has participated and which have not been disposed of at the termination of his or her term of service or, having been disposed of before or after such termination, are reopened, shall be disposed of by that judge.

(b) For the purposes of paragraph (a) any appointment made under this section shall be deemed also to have been made for the time in which the proceedings referred to in paragraph (a) are being disposed of.

[Sub-s. (9) added by s. 1 of Act No.84 of 1995.]

**35. Court orders.**—(1) A person in whose favour an order contemplated in section 123 (3) (c) of the Constitution has been made may, instead of accepting such alternative relief, within 30 days after the date on which the order was made, apply in writing to the Minister to be registered as a preferential claimant to benefit from any State support programme for housing and the allocation and development of rural land.

(2) The Court may in addition to the orders contemplated in section 123 of the Constitution—

- (a) determine conditions which must be fulfilled before a right in land can be restored or granted to a claimant;
- (b) if a claimant is required to make any payment before the right in question is restored or granted, determine the amount to be paid and the manner of payment, including the time for payment;

# RESTITUTION OF LAND RIGHTS ACT

22 OF 1994

- (c) if the claimant is a community, determine the manner in which the rights are to be held or the compensation is to be paid or held;
- (d) *recommend to the Minister that a claimant be given priority access to State resources in the allocation and development of housing and land in the appropriate development programme;*
- (e) give any other directive as to how its orders are to be carried out, including the setting of time limits for the implementation of its orders;
- (f) make an order in respect of compensatory land granted at the time of the dispossession of the land in question;
- (g) *make such orders for costs as it deems just, including an order for costs against the State or the Commission;*

[Para. (g) substituted by s. 20 (a) of Act No.78 of 1996.]

(3) An order contemplated in subsection (2) (c) shall be subject to such conditions as the Court considers necessary to ensure that all the dispossessed members of the community concerned shall have access to the land or the compensation in question, on a basis which is fair and non-discriminatory towards any person, including a woman and a tenant, and which ensures the accountability of the person who holds the land or compensation on behalf of the community to the members of such community.

(4) The Court's power to order the restitution of a right in land or to grant a right in alternative state-owned land shall include the power to adjust the nature of the right previously held by the claimant, and to determine the form of title under which the right may be held in future.

# RESTITUTION OF LAND RIGHTS ACT

22 OF 1994

(5) If the Court orders the State to expropriate land or a right in land in order to restore it to a claimant, the Minister shall expropriate such land or right in accordance, *mutatis mutandis*, with the provisions of the Expropriation Act, 1975 (Act No.63 of 1975): Provided that the owner of such land or right shall be entitled to the payment of just and equitable compensation, determined either by agreement or by the Court according to the principles laid down in section 28(3) of the Constitution: Provided further that the procedure to be followed by the Court in the determination of such compensation shall be as provided in sections 24 and 32 of this Act.

(6) In making any award of land, the Court may direct that the rights of individuals to that land shall be determined in accordance with the procedures set out in the Distribution and Transfer of Certain State Land Act, 1993 (Act No.119 of 1993).

(7) An order of the Court shall have the same force as an order of the Supreme Court for the purposes of the Deeds Registries Act, 1937 (Act No.47 of 1937).

(8) .....

[Sub-s. (8) deleted by s. 20(b) of Act No.78 of 1996.]

(9) Any state-owned land which is held under a lease or similar arrangement shall be deemed to be in the possession of the State for the purposes of section 123 (1) (a) of the Constitution: Provided that, if the Court orders the restitution of a right in such land, the lawful occupier thereof shall be entitled to just and equitable compensation determined either by agreement or by the Court according to the principles laid down in section 28 (3) of the

# RESTITUTION OF LAND RIGHTS ACT

22 OF 1994

Constitution.

(10) An interested party which is of the opinion that an order of the Court has not been fully or timeously complied with may make application to the Court for further directives or orders in that regard.

(11) The Court may, upon application by any person affected thereby and subject to the rules made under section 32, rescind or vary any order or judgment granted by it—

- (a) in the absence of the person against whom that order or judgment was granted;
- (b) which was void from its inception or was obtained by fraud or mistake common to the parties;
- (c) in respect of which no appeal lies; or
- (d) in the circumstances contemplated in section 11(5):

Provided that where an appeal is pending in respect of such order, or where such order was made on appeal, the application shall be made to the Constitutional Court or the Appellate Division of the Supreme Court, as the case may be.

[Sub-s. (11) added by s. 20(c) of Act No.78 of 1996.]

(12) The Court may, upon application by any person affected thereby, or of its own accord—

- (a) if a person is, in the circumstances contemplated in subsection (1), registered as a preferential claimant, rescind or vary the order contemplated in that subsection;
- (b) correct patent errors in any order or judgment.

[Sub-s. (12) added by s.20 (c) of Act No.78 of 1996.]

## ANNEXURE 3

### RESTITUTION OF LAND RIGHTS AMENDMENT ACT

84 OF 1995

#### ACT

To amend the Restitution of Land Rights Act, 1994, so as to provide for the designation of an acting President of the Land Claims Court; to provide for the appointment of additional and acting judges of the Land Claims Court; and to further regulate the remuneration and conditions of employment of judges of the Land Claims Court; and to provide for matters connected therewith.

1. *Amends section 22 of the Restitution of Land Rights Act, No.22 of 1994, by adding subsections (7), (8) and (9).*

2. *Substitutes section 26 of the Restitution of Land Rights Act, No.22 of 1994.*

3. **Short title.**—This Act shall be called the Restitution of Land Rights Amendment Act, 1995.

---

**ANNEXURE 4**  
**LAND REFORM (LABOUR TENANTS) ACT**  
**3 OF 1996**

**as amended by**  
Land Restitution and Reform Laws Amendment Act, No.78 of 1996

---

**ACT**

**To provide for security of tenure of labour tenants and those persons occupying or using land as a result of their association with labour tenants; to provide for the acquisition of land and rights in land by labour tenants; and to provide for matters connected therewith.**

WHEREAS the present institution of labour tenancy in South Africa is the result of racially discriminatory laws and practices which have led to the systematic breach of human rights and denial of access to land;

WHEREAS it is desirable to ensure the adequate protection of labour tenants, who are persons who were disadvantaged by unfair discrimination, in order to promote their full and equal enjoyment of human rights and freedoms;

WHEREAS it is desirable to institute measures to assist labour tenants to obtain security of tenure and ownership of land;

AND WHEREAS it is desirable to ensure that labour tenants are not further prejudiced;

**19. Initiation of arbitration proceedings.—**(1) On referral of an application by the Director-General, the President of the Court or a judge of the Court nominated by him or her shall—

- (a) appoint an arbitrator to hear the application;

## LAND REFORM (LABOUR TENANTS) ACT

3 OF 1996

- (b) set a date and venue for the hearing of the application;
- (c) give such directions as he or she considers appropriate as to the procedure to be followed or steps to be taken before the hearing takes place; and
- (d) take steps to ensure that the parties are notified accordingly, and may order any party—
  - (i) to make discovery under oath of documents in his or her possession; or
  - (ii) to furnish such particulars to his or her application or reply as any other party may reasonably require; or
  - (iii) to furnish summaries of any expert testimony which he or she wishes to present at the hearing,

in such manner as may be provided in the rules.

(2) The President of the Court or the judge nominated by him or her may appoint as arbitrator—

- (a) a person nominated by the parties in terms of section 18 (8); or

[Para. (a) substituted by s. 29 of Act No.78 of 1996.]

- (b) a person on the panel of arbitrators referred to in section 31, but shall not be obliged to appoint a person nominated by the parties.

# LAND REFORM (LABOUR TENANTS) ACT

3 OF 1996

## MISCELLANEOUS PROVISIONS

**Section 36. Mediation.**—(1) The Director-General may appoint one or more persons with expertise in relation to dispute resolution to facilitate meetings of interested parties, and to attempt to mediate and settle a dispute: Provided that the parties may at any time during the course of mediation or negotiation, by agreement, appoint another person to mediate the dispute.

(2) A person appointed in terms of subsection (1) who is not in the full-time service of the State may, from moneys appropriated by Parliament for that purpose, be paid such remuneration and allowances as may be determined by the Minister in consultation with the Minister of Finance for the services performed by him or her.

(3) All discussions, disclosures and submissions which take place or are made during the mediation process shall be privileged, unless the parties agree to the contrary.



## **ANNEXURE 5**

### **LAND RESTITUTION AND REFORM LAWS**

#### **AMENDMENT ACT**

**78 OF 1996**

---

#### **ACT**

To amend the Restitution of Land Rights Act, 1994, so as to insert certain definitions; to effect certain textual improvements; to provide that no person shall be entitled to enforce restitution of a right in land dispossessed if just and equitable compensation was paid; to provide for the appointment of certain organisations to advise the Commission on Restitution of Land Rights, to facilitate meetings of interested parties and to mediate and settle disputes; to require the leave of the Land Claims Court for the lodging of a claim in respect of land in certain circumstances; to alter the powers and duties of a regional land claims commissioner; to prohibit a person from selling, exchanging, donating, leasing, subdividing or rezoning land in respect of which a notice in terms of section 11(1) has been published without having given the regional land claims commissioner notice of his or her intention to do so; to provide that certain claims referred to the Court shall be accompanied by a document containing a list of the parties who have an interest in the claim; to prohibit the referral of claims to the Court in terms of section 14 until the Minister has issued certificates in terms of section 15 or has refused to do so; to extend the powers of the Court; to amend the provisions relating to assessors; to provide that gratuities and certain allowances of the President and judges of the Court shall not be taxable; to empower the Minister of Justice with

Land Restitution and Reform Laws Amendment Act,

78 of 1996

the concurrence of the Minister of Finance to determine allowances for travelling and subsistence expenses incurred by the President and judges of the Court; to clarify the provisions relating to the manner of arriving at decisions of the Court; to provide for the seals of the Court; to provide that the proceedings of the Court shall be conducted in open court; to empower the Court to refer particular matters for investigation by a referee; to prohibit the issue of process against a judge of the Court without the consent of the Court; to provide for judgment by default; to provide for the manner of securing attendance of witnesses or the production of any document or thing in proceedings before the Court; to make special provision for the manner in which witnesses may be dealt with on refusal to give evidence or produce any document or thing; to provide for the examination by interrogatories of persons whose evidence is required in proceedings before the Court; to empower the Minister of Justice to appoint officers of the Court; to make special provision for finances and accountability in respect of the administration and functioning of the Court; to provide for the scope and execution of process of the Court; to provide for offences relating to execution; to provide for witness fees; to provide for the powers of the Court on the hearing of appeals; to provide for the application of Chapter m in respect of the performance by the Court of its functions in terms of other legislation; to express more clearly the provisions relating to the intervention of parties and legal representation; to provide that certified copies of records of the Court shall be admissible as evidence; to express more clearly the provisions relating to the power of the President of the Court to make rules in respect of the procedure of the Court; to empower the

Land Restitution and Reform Laws Amendment Act,

78 of 1996

Court to make an order for costs against the State or the Commission; to empower the Court to rescind, vary or correct orders and judgments granted by

the Court; to clarify the Court's power to review any act or decision of the Minister; to provide for the procedure pertaining to appeals from the Court; to require registrars of deeds to remove certain notes from their records; and to provide that references to judges of the Supreme Court in laws shall be construed so as to include judges of the Court; to amend the Land Reform (Labour Tenants) Act, 1996, so as to include references to inserted sections and to effect certain textual improvements; and to provide for matters connected therewith.

## ANNEXURE 6

### The Constitution of the Republic of South Africa Act 108 of 1996

#### PREAMBLE

We therefore, through our freely elected representatives, adopt this Constitution as the supreme law of the Republic ...

**Section 1. Republic of South Africa.**—The Republic of South Africa is one, sovereign, democratic state founded on the following values:

- (a) ...
- (b) ...
- (c) Supremacy of the constitution and the rule of law.
- (d) ...

**Section 2. Supremacy of Constitution.**—This Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled.

**Section 9. Equality.**—(1) Everyone is equal before the law and has the right to equal protection and benefit of the law.

(2) Equality includes the full and legal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.

(3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and

## **The Constitution of the Republic of South Africa Act 108 of 1996**

**\* (4)** No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.

**(5)** Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.

**Section 14. Privacy.**—Everyone has the right to privacy, which includes the right not to have—

- (a)** their person or home searched;
- (b)** their property searched;
- (c)** their possessions seized; or
- (d)** the privacy of their communications infringed.

**Section 24. Environment**—Everyone has the right—

**(a)** to an environment that is not harmful to their health or well-being;  
and

**(b)** to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that—

- (i)** prevent pollution and ecological degradation;
- (ii)** promote conservation; and
- (iii)** secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development.

**Section 25. Property.**—(1) No one may be deprived of property except in terms of law of general application, and no law may permit arbitrary deprivation of property.

(2) Property may be expropriated only in terms of law of general application—

- (a) for a public purpose or in the public interest; and
- (b) subject to compensation, the amount of which and the time and manner of payment of which have either been agreed to by those affected or decided or approved by a court.

(3) The amount of the compensation and the time and manner of payment must be just and equitable, reflecting an equitable balance between the public interest and the interests of those affected, having regard to all relevant circumstances, including—

- (a) the current use of the property;
- (b) the history of the acquisition and use of the property;
- (c) the market value of the property;
- (d) the extent of direct state investment and subsidy in the acquisition and beneficial capital improvement of the property; and
- (e) the purpose of the expropriation.

(4) For the purposes of this section—

## **The Constitution of the Republic of South Africa Act 108 of 1996**

(a) the public interest includes the nation's commitment to land reform, and to reforms to bring about equitable access to all South Africa's natural resources; and

(b) property is not limited to land.

(5) The state must take reasonable legislative and other measures, within its available resources, to foster conditions which enable citizens to gain access to land on an equitable basis.

(6) A person or community whose tenure of land is legally insecure as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to tenure which is legally secure or to comparable redress.

(7) A person or community dispossessed of property after 19 June 1913 as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to restitution of that property or to equitable redress.

(8) No provision of this section may impede the state from taking legislative and other measures to achieve land, water and related reform, in order to redress the results of past racial discrimination, provided that any departure from the provisions of this section is in accordance with the provisions of section 36 (1).

(9) Parliament must enact the legislation referred to in subsection (6).

**Section 30. Language and culture.**—Everyone has the right to use the language and to participate in the cultural life of their choice, but no one exercising these rights may do so in a manner inconsistent with any provision of the Bill of Rights.

**Section 31. Cultural, religious and linguistic communities.**—(1) Persons belonging to a cultural, religious or linguistic Community may not be denied the right, with other members of that community—

(a) to enjoy their culture, practise their religion and use their language;  
and

(b) to form, join and maintain cultural, religious and linguistic associations and other organs of civil society.

(2) The rights in subsection (1) may not be exercised in a manner inconsistent with any provision of the Bill of Rights.

**235. Self-determination.**—The right of the South African people as a whole to self-determination, as manifested in this Constitution, does not preclude, within the framework of this right, recognition of the notion of the right of self-determination of any community sharing a common cultural and language heritage, within a territorial entity in the Republic or in any other way, determined by national legislation.



# **BIBLIOGRAPHY**

## **BOOKS**

1. Akerhurst, A : A Modern Introduction to International Law (1987).
2. Alexander, Y and F Friedlander: Self-determination — National and Global Dimensions (1980).
3. Bailey, P : Bringing Human Rights to Life (1993)
4. Bailey, P : Human Rights, Australia in an International Context (1990).
5. Bennett, G : Aboriginal Rights in International Law (1978).
6. Bennett, T W : Human Rights and African Customary Law (1995).
7. Brendt, R M : Aboriginal Sites, Resources and Development.
8. Brollman, C *et al* : Peoples and Minorities in International Law (1992).
9. Brown, L : Saving the Planet: How to Shape an Environmentally Sustainable Global Economy (1991).
10. Brownlie, I : Principles of International Law (1990).
11. Buchett, L C : Secession The Legitimacy of Self-determination (1978).
12. Burger, J : Report From the Frontier: The State World's Indigenous Peoples (1987).

13. Callinicos, L : Working Life (1987)
14. Cervenka, Z : The Unfinished Quest for Unity — Africa and the OAU (1981).
15. Crawford, J : The Rights of Peoples.
16. Crawford, Y : The Creation of States in International law (1990).
17. Crawford, Y : Politics in the Congo : Decolonisation and Independence (1988).
18. Davies, P : Human Rights (1988).
19. Davis, S : Victims of the Miracle (1977).
20. Davenport, T R H and Hunt, K S : The Right to the Land : Documents on Southern African History (1974).
21. Deisman, M and Weston, B H : Towards World Order and Human Dignity (1976).
22. De Klerk, M : A Harvest of Discontent : The Land Question in South Africa (1991).
23. Dinstein, Y and Mala, T : The Protection of Minorities and Human Rights (1991).
24. Dudley, Macleley and Stolton : Land is Life, Land Reform and Sustainable Agriculture (1992).
25. Dawn, R E and Reyna S P : Land and Society in Contemporary Africa (1986).
26. Emerson, R : Self-determination Devised in the Era of Decolonisation (1964).

27. Ernest, H : Apartheid's Great Land Theft. The Struggle for the Right to Farm in South Africa (1986).
28. Gerrard, J : Libois, Katanga Secession (Rebecca Young Translation) (1966).
29. Gutto, S B O : Property and Land Reform
30. Halperin, M *et al* : Self-determination in the New World Order (1992)
31. Hannum, H : Documents on Autonomy and Minority Rights : General Standards Related to Self-determination and Indigenous Peoples (1993).
32. Hannum, H : Autonomy, Sovereignty and Self-determination : The Accommodation of Conflicting Rights (1990).
33. Hayes, C J H : Historical Education of Modern Nationalism (1948).
34. Hocking, B : International Law and Aboriginal Human Rights (1988).
35. Kegan, O : The Share-cropping Economy, African Class Formation and the 1913 Native Land Act in the Highveld Maize Belt, In Brozzol Bed (1983).
36. Lauri, H : Peremptory Norms (*ius cogens*) in International law : Historical Development Criteria, Present Status (1988).
37. Lemer, N : Group Rights and Discrimination in

International Law (1991).

38. Letsoalo, E M : Land Reform in South Africa A Black Perspective (1987).
39. Lowe, V and Warbick C : The United Nations and the Principles of International Law (1994).
40. Mary-bury Lewis D : Millenium: The Tribal Wisdom and the Modern World (1992).
41. McNeil, K : Common law Aboriginal Title (1989).
42. Mboya, T : Freedom Charter (1963).
43. McRea, H M C *et al* : Aboriginal Legal Issues: Commentary and Materials (1991).
44. Meadows, D *et al* : The Limits to Growth, A Report for the Club of Rome (1972).
45. Nettheim, G : Aborigine Human Rights and the Law (1974).
46. Neuberger, B : National Self-determination in Post-Colonial (1979).
47. Rautenbach I M : General Provisions of the South African Bill of Rights (1995).
48. Reynolds, H : Dispossession (1989).
49. Ronen, D : The Quest for Self-determination (1979).
50. Rycroft, A J *et al* : Race and the Law in South Africa (1987).
51. Sachs, A : Protecting Human Rights in a New South Africa (1990).

52. Schapera, I : Native Land Tenure in Bechuanaland Protectorate (1943).
53. Shaw, M N : International Law (1980).
54. Stanner, W E H : *Whiteman Got No Dreaming* (1979).
55. Thompson, R : The Rights of Indigenous People in International Law : Selected Essays on Self-determination (1987).
56. Thornberry, P : International Land Rights of Minorities (1991)
57. Treitschke, R : *Politics* (1968).
58. Trotsky, L : On Black Nationalism and Self-determination (1978).
59. Van Wyk, D *et al* : Rights and Constitutionalism — The New South African Legal Order (1994).
60. Weitz, R : *From a Peasant to a Farmer : A Revolutionary Strategy for Development* (1971).
61. Weston, B H : Human Rights in the World Community (1992).
62. Williams, R : The American Indian in Western Legal Thought: the Discourses of Conquest (1990).
63. Yudelman, M : Africans on Land (1964)

## ARTICLES

1. Alfredson, G : "The Right to Self-determination and its Many Manifestations" in Ruth Thompson *The Rights of Indigenous Peoples in International Law: Selected Essays on Self-determination* (1987), 53.
2. Anaya, J : "The Native Hawaiian Peoples and International Human Rights: Toward a Remedy for Past and Continuing Wrongs" (1994) 28 *Georgia Law Review*, 309.
3. Anaya, J : "A Contemporary Definition of the International Norm of Self-determination" (1993) 3 *Transnational Law and Contemporary Problems* 131.
4. Barsh, R L : "Indigenous Peoples : An Emerging Object of International law" (1986) 80 *American Journal of International law*, 369.
5. Barsh, R L : "The Challenge of Indigenous Self-determination" (1993) 26 *University of Michigan Journal of Law Reform*, 272.
6. Barsh, R L : "Revision of the ILO Convention No. 107" (1987) 81 *The American Journal of International law*, 756.
7. Barsh, R L : "Indigenous Peoples and the Right to Self-determination" in Barbara Hocking *International Law and Aboriginal Human Rights* (1988), 68.

8. Barunga, A : "Why Land Rights? How Much? What sort and for Whom? in Garth Nettheim, *Aboriginal Human Right and the Law* (1975), 85.
9. Beacroft, L : "Conservation : Accommodating Aboriginal Interests or New Competitor?" (1987) 3 in *Aboriginal law Bulletin*.
10. Bennett, T W : "Redistribution of Land and the Doctrine of Aboriginal Title in South Africa" (1993) 9 *South African Journal on Human Rights*, 443.
11. Brenna, S J F : "Aboriginal Aspirations to Land: Unfinished History an Ongoing National Responsibility" in Barbara Hocking *International law and Aboriginal Human Rights* (1988), 148.
12. Brollman, C : "Indigenous Peoples" in Catherine Brollman *et al. People and Minorities in International Law* (1992), 187.
13. Brownlie, I : "The Rights of Peoples in International law" in J Crawford *The Rights of Peoples* (1991), 1.
14. Bruton, M N : "Conservation and Development in Maputaland" in *Studies on Ecology of Maputaland*.
15. Bryant, M J : "Aboriginal Self-determination : The Status of Canadian Aboriginal Peoples in International Law" (1992) 56 *Saskatchewan Law Review*, 267.
16. Buchanan, A : "The Role of Collective Rights in the Theory of Indigenous Peoples Rights" (1993) 3, 266.

17. Budlender, G and Latsky, J : "Unravelling Rights to Land and to Agricultural Activity in Rural Race Zones" (1990) 6 *South African Journal on Human Rights*, 155.
18. Burger, J : "Indigenous Peoples : New Rights for Old Wrongs" in Peter Davies, *Human Rights* (1988), 99.
19. Chaskalson, M : "The Property Clause: Section 28 of the Constitution" (1994) 10 *South African Journal on Human Rights*, 131.
20. Choudree, R and McIntyre, G : "Restitution of Land in Two Jurisdictions: Australia and South Africa" (1997) 114 *South African Law Journal*, 187.
21. Chuchen, L : "Self-determination is a Human Right" in M Deismann and B H Weston; *Towards World Order and Human Dignity* (1976), 216.
22. Claasens, A : "For Whites Only: Land Ownership in South Africa" in Michael de Klerk, *A Harvest of Discontent: The Land Question in South Africa* (1991), 43.
23. Cornstassel, J J and Premeau, T H : "Indigenous 'Sovereignty' and International law. Revised Strategies for Pursuing Self-determination" (1995) 17, *Human Rights Quarterly* 343.
24. Crawford, J : "The Aboriginal Legal Heritage : Aboriginal  
267.



Public Law and the Treaty Proposal" (1989)  
63, *Australian Law Journal*, 392.

25. Crawford, J : "The Aborigine in Comparative Law : General Report" (1987) 2, *Law and Anthropology*, 5.
26. Cycon, D E : "When Worlds Collided, Law Development and Indigenous People" (1991) 25 *New England law Review*, 761.
27. Daespi, E I : "Some Consideration on the Right of Indigenous Peoples to self-determination" (1993) 3 *Transnational law and Contemporary Problems*, 1.
28. Devenish, G E : "The Development of Administrative and Political Control of Rural Blacks" in Rycroft, A *et al. Race and the Law in South Africa* (1981), 51.
29. Dinstein, Y : "Collective Human Rights of Peoples and Minorities" (1976) 25 *International and Comparative Law Quarterly*, 102.
30. Dudley, N : "Stabilisation of Agricultural Resources, World Hunger, Land Reform and Organic Agriculture" in Dudley *et al. Land is Life: Land Reform and Sustainable Agriculture* (1992), 1.
31. Du Plessis, W "Riglyne vir Herstel van Grondregte" 1997 *Tydskrif vir Hedendaagse Romeins Hollandse Reg* 709.
32. Eide, A : "United Nations Action on the Rights of  
268.

Indigenous Populations" in Ruth Thompson, *The Rights of Indigenous Peoples in International Law : Selected Essays on self-determination* (1987), 31.

33. Epps, V : "The New Dynamics of Self-determination" (1997) 2 *ILSA Journal of International and Comparative Law*, 433.
34. Faust, J : "Self-determination : A Definitional Focus" in Y Alexander and A Friedlander, *Self-determination – National and Global dimensions* (1980), 13.
35. Glavovic, P D : "Environmental 'Group' Rights for Indigenous South Africans" (1991) 108 *The South African Law Journal*, 67.
36. Glavovic, P D : "'State Policy' Agriculture and Environmental Values" (1981), 51.
37. Green, L : "Aboriginal Peoples in International Law and the Canadian Charter of Rights and Freedoms" (1983) 61 *Canadian Bar Review*, 339.
38. Herb, F and Smith, A : "The Kurds and Self-determination : The UN Must Act Now For a New Process: Paper Delivered.
39. Iglar, A : "The Constitutional Crisis in Yugoslavia and the International Law of Self-determination. Slovenia's and Croatia's Right to Secede" (1992) 15 *Boston College of International and*

40. Ioms, C J : "indigenous Peoples and Self-determination : Challenging State Sovereignty" (1992) 24 *Case Western Reserve Journal of International Law*, 199.
41. Jayawickrama, N : "The Right of Self-determination — A Time for Reinvention and Renewal" (1993) 57 *Saskatchewan Law Review* 1.
42. Juviles, P : "Contested Ground Rights to Self-determination and Experience of the Former Soviet Union" (1993) 3 *Transnational Law and Contemporary Problems*, 71.
43. Koskenniemi, M : "National Self-determination Today : The Problems of Legal Theory and Practice" (1994) 43 *International and Comparative Quarterly*, 274.
44. Lam, M : "Making Room for Peoples at the United Nations : Thoughts Provoked by Indigenous Claims to Self-determination" (1992) 25 *Cornell International law Journal*, 603.
45. Lanhupuy, W : "Aboriginal Prospective of the Lands and its Resources" in R M Brendt, *Aboriginal Sites, Resources and Resource Development* (1982), 53.
46. Lemer, N : "The 1989 ILO Convention on Indigeneous Populations New Standards" in Yoram Distein and Malabo Tabori *The Protection of*  
270.

*Minorities and Human Rights* (1991), 213.

47. Lewis, C : "The Prevention of Illegal Squatting Act. The Promotion of Homelessness" (1989) 115 *South African Journal on Human Rights*, 223.
48. Lindley, W B : "The Acquisition and Government of Backward Territory in International Law (1990) in *Law and Anthropology*.
49. Manganye, D : "The Application of *Uti Possidetis* and South Africa's Internal Border" (1994) 2 *Codicillus*, 49.
50. Marcus, T : "National, Class and Gender in Land Reform" in De Klerk, Michael, *A Harvest of Discontent : The Land Question in South Africa* (1991), 25.
51. Marcus, T : "Land Reform : Considering National, Class and Gender Issues" (1990) 6 *South African Journal on Human Rights*, 178.
52. McCorquodale, R : "Self-determination : A Human Rights Approach" (1994) 43 *International and Comparative Law Quarterly*, 887.
53. McCorquodale, R : "South Africa and the Right of Self-determination" (1994) 10 *South African Journal of Human Rights*.
54. Nanda, V P : "Self-determination Under International Law : Validity of Claims to Secede"(1981) 13 *Case Western Reserve Journal of International Law*, 257.

55. Nanda, V P : "Revisiting Self-determination As An International Law Concept : A Major Challenge in the Post - Cold War Era" (1997) 2 *ILSA Journal of International and Comparative Law*, 443.
56. Nayar, K : "Self-determination Beyond the Colonial Context : Biafra in Retrospect" (1975) *Texas International Law Journal*, 321.
57. Nettheim, G : "Indigenous Rights, Human Rights in Australia" (1987) 611 *Australian Law Journal*, 29.
58. Nettheim, G : "'Peoples' and 'Populations' : Indigenous Peoples and the Rights of Peoples" in J Crawford, *The Right of Peoples* (1982) 107.
59. Opekokew, D : "International Law, International Institutions, and Indigenous Issues" in Ruth Thompson *The Rights of Indigenous Peoples in International Law : Selected Essays on Self-determination* (1987) 1.
60. O'Regan, C : "No More Forced Removals? A Historical Analysis of the Prevention of Illegal Squatting Act"(1989) 5 *South African Journal on Human Rights* 361.
61. Pallermaerts, M : "Developments, conservation and Indigenous Rights in Brazil" (1986) 8 *Human Rights Quarterly*, 374.
62. Paxman, J T : Minority Indigenous Populations and Their

claims for self-determination:(1989) 21 *Case Western Reserve Journal of International law*, 185.

63. Prtzetanznik, P : "The Basic collective Human Right to Self-determination of Peoples and Nations as a Prerequisite to Peace" *Viii Journal of Human Rights*, 99.
64. Quigley, J : "Russian Minorities in the Newly Independent States" (1997) 2 *ILSA Journal of International and Comparative Law*, 433.
65. Robertson, M : "Land and Human Rights in South : A Reply to Marais and Skweyiya" (1990) 6 *South African Journal on Human Rights*, 215.
66. Roos, J : "On Illegal Squatters and Spoliation Orders" (1989) 5 *South African Journal on Human Rights*, 395.
67. Sambo, D : "Indigenous Peoples and International Standard Setting Process : Are State Governments Listening?" (1993) 3 *Transnational Law and Contemporary Problems*, 13.
68. Seattle, Chief : Chief Seattle's Reply to U.s. President Frank in Pierce, Reprinted Sub Nom 'We May Be Brothers After All' (1986) 2 *Environmental Policy and Law*, 48.
69. Shaw, M : "The Definition of Minorities" (1990) 20 *Israel Yearbook of Human Rights*, 13.

70. Shutkin, W : "International Human Rights and Earth, The Protection of Indigenous Peoples and the Environment" (1991) 31 *Virginia Journal of International Law*, 479.
71. Simpson, G : "Current Issues Relating to Self-determination" in (1991) *International Law, Weekend Australian National University Canberra* 10–12 May 1991.
72. Skweyiya, Z : "Towards a Solution to the Land question in Post Apartheid South Africa : Problems and Models" (1981) 21 *Columbia Human Rights Law Review*, 211.
73. Strelein, L : "Indigenous Peoples and Protected Landscape in Western Australia" (1993) *Environmental and Planning Journal*, 380.
74. Suagee, D : "Self-determination for Indigenous Peoples of the Dawn of the Solar Age" (1995) 25 *University of Michigan Journal of Law Reform*, 680.
75. Sweptstone, L and Plant, R : "International Standards and the Protection of Land Rights of Indigenous and Tribal Populations" (1985) 24 *International Labour Review*, 91.
76. Thornberry, P : "The Principle of Self-determination" in Lowe and Warbrick *The United Nations and the Principles of International Law* (1994), 175.
77. Turpel, M E : "Indigenous Peoples' Right of Political

Participation and Self-determination. Recent International legal developments and the Continuing Struggle for Recognition" (1992) 25 *Cornell International Law Journal*, 579.

78. Van Der Walt, A J : "Notes on the Interpretation of the Property Clause in the New Constitution" 1994 *Tydskrif vir Hedendaagse Romeins Hollandse Reg*, 181.
79. Van der Walt, A J : "Property Rights, Land Rights and Environmental Rights" in van Wyk *et al. Rights and Constitutionalism — The new South African Legal Order* (1994), 445.
80. Van der Walt, A J : "Towards the Redevelopment of Post-apartheid Land Law: An Explanatory Survey" (1990) 23 *De Jure*, 35.
81. Van der Walt, A J : "The Fragmentation of Land Rights" (1992) 8 *South African Journal on Human Rights*, 431.
82. Van der Walt, A J : "The Future of Private Ownership of Land" (1994) 2 *Codicillus*, 4.
83. Williams, R A : "Encounter on the Frontiers of International Human Rights Law : Redefining the Terms of Indigenous Peoples' Survival in the world" (1990) *Dule Law Journal*, 660.



## **ACTS**

84. Native Land Act 27 of 1913.
85. Bantu Trust and Land Act 18 of 1936.
86. Constitution of the Republic of South Africa Act 200 of 1993.
87. Native Title Act of 1993 (Australia).
88. Restitution of Land Rights Act 22 of 1994.
89. Restitution of Land Rights Amendment Act 84 of 1995.
90. Restitution of Land Rights Amendment Act 78 of 1996.
91. Land Reform (Labour Tenants) Act 3 of 1996.
92. The Constitution of the Republic of South Africa Act 108 of 1996.

## **CASES**

1. Choate v Trapp 224 US 665 (1912).
2. Diepsloot Residents and Land Owners Association v Administrator Transvaal 1993 (3) SA, 49.
3. Grittis v Fisher 224 US 640 (1912).
4. Mabo v The State of Queensland (1995) 175 CLR 1.
5. Reservations to the Convention of Genocide case ICJ Reports (1970), 15.
6. Tamaki v Baker (1901) AC 561 (AC).
7. Transvaal Agricultural Union v Minister of Land Affairs and Another 1996 (21) CCT.
8. Western Sahara case ICJ Rep (1975), 114.

## **DICTIONARIES**

9. Black's Law Dictionary 1386 (1979).
10. Webster's Ninth New College Dictionary.

## **JOURNALS**

1. Aboriginal Law Bulletin
2. American Journal of International Law
3. Australian Law Journal
4. Boston College of International and Comparative Law Review
5. Canadian Bar Review
6. Case Western Reserve Journal of International Law
7. Codicillus
8. Columbia Human Rights Law Review
9. Cornell International Law Journal
10. De Jure
11. Dule Law Journal
12. Environmental and Planning Journal
13. Environmental Policy and Law
14. Georgia Law Review
15. Human Rights Quarterly
16. ILSA Journal of International and Comparative Law
17. International and Comparative Law Quarterly
18. International Labour Review
19. International Legal Materials
20. Israel Yearbook of Human Rights

21. Journal of Human Rights
22. Law and Anthropology
23. New England Law Review
24. Texas International Law Journal
25. Transnational Law and Contemporary Problems
26. Tydskrif vir Hedendaagse Romeins Hollandse Reg
27. Saskatchewan Law Review
28. South African Journal on Human Rights
29. South African Law Journal
30. Studies on Ecology of Maputaland
31. Virginia Journal of International Law

## UNITED NATIONS DOCUMENTS

1. National Maori Congress — The Founding Constitutional Document of Aoteora New Zeland the Treaty of Waitangi, signed by the British Crown with the Indigenous Maori Tribes in 1840.
2. Convention on the Prevention and Punishment of the Crime of Genocide 1948.
3. General Assembly of the United Nations Resolution 1502, 1541 (XV).
4. Declaration on the Granting of Independence to Colonial Countries and Peoples, GA Res. 1514 (XV); 15 UN GAOR Supp. (No. 16) at 66, UN Doc A/4684 (1960).
5. Declaration on the Granting of Independence to Colonial Countries and Peoples, GA Res. 1514, UN GAOR, 15<sup>th</sup> session, Supp. NO 16 at 66 UN Doc A/4684 (1961).
6. International Covenant on Economic, Social and Cultural Rights Art 1, GA Res 2200, UN GAOR, 21<sup>st</sup> sess, supp No. 16, 49 UN Doc A/6316 (1966).
7. International Covenant on Economic, Social and Cultural Rights art 1 GA Resolution 2200, UN GAOR, 21<sup>st</sup> sess, supp No. 16, at 53, UN Doc A/6316.
8. International Covenant on Economic, Social and Cultural Rights UN Doc, A/conf. 92/40 (1978).
9. Hector Gros Espiell, The Right to self-determination: Implementation of United Nations Resolutions Relating to the Right of Peoples under Cononial and Alien Domination to self-determination Paragraph 74, UN Dox/E/CN.41 sub. 2/405/Revol. UN Sales No. E.79.XIV. (1980)  
  
\* Espiell is former special Rapporteur of the UN sub-commission on the Prevention of Discrimination and Protection of Minorities.
10. Aurelin, Cristesau: The Right of self-determination: Historical and contemporary development on the basis of the United Nations at 31, UN Doc E/CN.4/sub.

2/404/Rev.1, UN Sale No. E.80.XIV.3 (1981).

11. World Council of Indigenous Peoples', Land Rights of the Indigenous Peoples, International Agreements and Treaties, Land Reform and Systems of Tenure presented to NGO Conference on People and the Land (1981).
12. *World Council of Indigenous Peoples: Indigenous Philosophy and Land.* Presented to International NGO Conference on Indigenous Peoples and the Land 1981.
13. United Nations submission on Prevention of Discrimination and Protection of Minorities, study of the problem of discrimination against populations. U.N. Doc. E/CN.4./sub.2 1986/7 (1986).
14. Jose R Martinez Cobo, United Nations, Economic and Social Council, Commission on Human Rights, sub-commission on Prevention of Discrimination and the Protection of Minorities study of the Problem of Discrimination against populations 29, U.N. Doc. E/CN.4/sub.2 1986/7/Add 4, UN. Sale No. E86, XIV.3 (1987).
15. United Nations, Economic and Social Council, Commission on Human Rights, Sub-commission on Prevention of Discrimination and the Protection of Minorities, study on the Problem of Discrimination Against Indigenous Populations 29, UN. Doc. E/CN.4/sub.2 1986/7/Add.4 U.N. Sales No. E.89 XIV.3 (1987).
16. Global Consultation on the Realisation of the Right to Development as a Human Right, UN. Doc. E/CN.4/1990/9, par 45 (1990).
17. Foreign Affairs and Trade Position Paper on self-determination (1991).
18. United Nations, Discrimination Against Indigenous Peoples: Report of the Working Group on Indigenous Populations on its Ninth session at 2, UN. Doc. E/CN.4/sub. 2/1991/40.
19. United Nations Working Group on Indigenous Populations 11<sup>th</sup> session 1992 — Genera, Venezuelan National Indian Council.

20. United Nations, Economic and Social Council, Commission on Human Rights, Sub-commission on the Prevention of Discrimination and Protection of Minorities, Report on the Discrimination Against Indigenous Peoples 29, E/CN.4/sub.2/1993/29/Annex 1.
21. Alternatives to Development: Environmental values of Indigenous Peoples — Environment Workshop — Northwest Regional Conference on the Emerging International Economic order, Seattle, Washington USA.
22. Lil'wat Nation—Introduction and application for membership into the International League of the United Nations. Document submitted to the United Nations, Geneva, Switzerland by the Stl'alt'imx Nations of Chiefs.
23. Report of the Working Group on Indigenous Populations on its twelfth session.
24. The African Charter on Human Rights and Peoples' Rights art 20, OAU Doc CAB/LEG/67/3 Rev. S Reprinted in 21 International Legal materials, 1292.
25. World Council of Indigenous Peoples, Indigenous Philosophy and Land. Presented to the International NAO Conference on Indigenous Peoples and the Land. Paper researched and prepared by Debra M Hogan and edited by Marie Smallface Marule.

## **INTERNATIONAL LABOUR ORGANISATIONS (ILO) CONVENTIONS**

1. International Labour Organisation Convention concerning the Protection and Integration of Indigenous and other Tribal and semi-tribal populations in Independent Countries 107 of 1957 (ILO Convention 107 of 1957).
2. International Labour Organisation Recommendations concerning the Protection and integration of Indigenous and other Tribal and semi-tribal Populations in independent countries 104.
3. International Labour Organisation Convention concerning Indigenous Tribal and semi-Tribal Peoples in Independent Countries 169 of 1989 (ILO Convention 169 of 1989).