



# **The Theoretical and Legal Foundations of Community-Based Property Rights in East Africa**

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## List of Acronyms

ACODE	Advocates Coalition for Development and Environment
CBPRs	Community-Based Property Rights
CBNRM	Community-Based Natural Resources Management
CPR	Common Pool Resources
CFM	Collaborative Forest Management
CAMPFIRE	Community Areas Management Programme for Indigenous Resources
WWF	World Wildlife Fund
IUCN	International Union for the Conservation of Nature
ICDPs	Integrated Conservation and Development Projects
NGOs	Non-Governmental Organizations
SAPs	Structural Adjustment Programmes
ACTS	African Centre for Technology Studies
CESCR	International Covenant on Economic, Social and Cultural Rights
CCPR	International Covenant on Civil and Political Rights
CCPR-OP	International Covenant on Civil and Political Rights-Optional Protocol
CERD	Covenant on the Elimination of all Forms of Racial Discrimination
CEDAW	Covenant on the Elimination of All Forms of Discrimination Against Women.
CEDAW-OP	Covenant on the Elimination of All Forms of Discrimination Against Women-Optional Protocol
CRC	Convention on the Rights of the Child
UN	United Nations
WCED	World Commission on Environment and Development
UNCED	United Nations Conference on Environment and Development
EAC	East African Community
USAID	United States Agency for International Development
DfID	Department for International Development
REPA	Rights and Equity in Protected Areas Programme of CARE International in Uganda
WRI	World Resources Institute

## **Acknowledgements**

This concept is part of an ongoing research at ACODE focusing on environment, human rights and democratization. Over the last three years, there has been a concerted research effort to promote accountability in the making of decisions on the environment that affect poor communities and indigenous populations. These research activities focusing on decision making in the forestry, land and wildlife sectors have clearly demonstrated the relationship between nature, wealth and power. The findings of the studies have also tended to emphasize the need to strengthen legal and legislative representation as a means of counter-balancing decision making power with accountability and responsibility.

The studies on Community-Based Property Rights (CBPR) of which this concept paper is one are intended to bridge the missing link between conservation, human rights and poverty. This paper provides the conceptual basis for further detailed case studies and policy review on CBPR in Uganda. The broad objective of the studies is to explore how the rights of indigenous and marginalized communities can be recognized and promoted in a new conservation and development paradigm characterized by expropriation of ancestral lands and resources.

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Finally, the views expressed in this concept paper are entirely those of the author and do not represent the views of ACODE or any of our partners who provided funding for the activities under this programme.

## 1. Introduction

Indigenous, mobile, and local communities all over the world have for millennia played a critical role in conserving the earth's patrimony. They have protected forests, wetlands, rangelands, watersheds, hunting grounds, rivers and streams and other water catchment systems that are to day the basis of prosperity for all nations. "Community" husbandry of these resources has been done for a wide range of reasons ranging from economic, cultural, spiritual, aesthetic to many others. Scholars and practitioners are now almost agreed that the history of conservation and sustainable use of these resources is much older and perhaps more effective than the contemporary government practice of "exclusion", "participation" and all other forms of "jargon" that is being used in the conservation literature of the modern society.

In spite of this recognition of the contribution of indigenous communities to the science and practice of conservation, the growth of governmental institutions as the dominant authority in the area of conservation is seriously challenging these long-held conservation notions. In this context, the concept of Community-Based Property Rights (CBPR) has been attracting considerable scholarship and advocacy as a means of securing the livelihoods of many of these communities. In spite of this attention, we see emerging national policies and laws either paying "lip service" to CPBR or in fact undermining these rights.

The purpose of this concept paper is to develop a theoretical understanding grounded in the traditional principles of modern property rights theory and conservation practice to guide a more empirical research on the application of the concept (CBPR) in East Africa. It is argued that at the moment, there is generally no clarity on the meaning of the concept of CBPR among policy makers and practitioners. As a result, there is growing policy distortion with respect to the context within which CBPR is used and applied which inevitably is undermining the policy recognition, protection and promotion of these rights. The resulting marginalization and disenfranchisement, it is argued, is to keep the affected indigenous communities in perpetual poverty.

## 2. The Concept of Property

The debate as to the nature and meaning of property and the rights that accrue to those entitled to property has been with us from the day of creation. In property rights theory, it is important to ask ourselves and perhaps answer at least four inter-related questions which have a strong bearing on CBPR. These questions are: (i) what are the sources of property rights? (ii) what happens in cases of competing property rights? (iii) what is the historic origin of property law? and (iv) does distributive justice apply to property? However,

for purposes of this paper, we shall restrict our discussion to the sources of property rights and an examination as to whether community-based property rights fits within the theoretical scheme of work regarding the legitimate existence of property rights.

Generally, the concept of property may be traced from the biblical times. From the Old Testament, the authors of the book of Genesis tell us that God gave the earth to man for the support and comfort of his well being. According to Genesis, therefore, the resources of the world are an original grant from God to man and one can as well argue that in theological and moral terms, this grant forms the basis for all property relations that we are confronted with today. However, it is not until one examines the writings of renowned philosophers such as Aristotle, Hugh Grotius and John Locke that one begins to see a more rigorous and intellectually dynamic debate on the issue of property in general and property rights in particular.

Grotius based his analysis of the concept of property on the 'social contract'. For him, entry into a social contract has the effect of intensifying the freedom and rights of citizens; one of these rights affects the ownership of property. He suggests that originally all things were in a class of *res nullius* and, with the coming into force of the social contract there is introduced a general agreement for the division of material goods among individuals. The processes by which property is defined appear, and are refined, at a relatively later stage in man's social development. They include: division by individual participation in the agreement by which a specific acquisition is made; by discovery or acquisition; or by lawful acquisition from persons who have exercised their natural rights of disposition.<sup>1</sup>

John Locke developed the classic theory of property rights. He justified property by arguing that individuals who took actions to mix their labor with natural resources thereby became entitled to be protected in controlling the fruits of their labor. Writing in *The Second Treatise of Government*, Locke argued that this entitlement was based both on the moral imperative of rights and on the utilitarian ground that legal protection for property justly produced or possessed through labor promoted useful work and increased social welfare. This assertion by Locke seems to have found support in an 1805 case of *Pierson v. post*.<sup>2</sup> In this case, Post was chasing a fox when all of a sudden Pierson popped out of no where and killed the fox and took it away. Post sued Pierson, claiming that he should rightly own the fox because he was the one chasing it. The trial court ruled in favor of Post and Pierson appealed. On

<sup>1</sup> Grotius, Hugh, 1625. *On the Law of War and Peace*. Batoche Books, Kitchener. Translated by Campbell, A.C. 2001.

<sup>2</sup> 3 Cal. R. 175, 2 Am.Dec.264 (Supreme Court of New York, 1805) also available at [www.lawschool.mikesheket.com/property/piersonvpost.htm](http://www.lawschool.mikesheket.com/property/piersonvpost.htm) (accessed on September 9, 2005). Although court ruled in favour of Pierson, Livingston, J. delivered a dissenting judgement stating *inter alia* that "[W]e are at liberty to adopt one of the provisions just cited ...that property in animals *ferae naturae* may be acquired without bodily touch or manupaptation, provided the pursuer be within reach, or have a *reasonable* prospect of taking, what he has thus discovered an intention of converting to his own use."



appeal, the question was whether ownership is established by active pursuit, physical capture, or mortal wounding. In the case, all the parties agree that possession or labor, in some form, establishes ownership rights.

But Locke and other utilitarian philosophers who advanced this classical view approach did also recognize the essence of collective rights. While advocating for appropriation of one's labor through guarantees of property rights, they nevertheless argued that labor creates rights "at least where there is enough and as good left in common for others."<sup>3</sup> In fact, they tended to subject private property interests to the interests of the common good. So, beyond the principles of labour and possession, Locke and others who subscribe to the classical theory of property believed in the desire to protect the "common good" where questions of individual property rights were at issue.

Related to the concept of the 'common good' is the concept of 'primary social goods' advanced by John Rawls in his *A Theory of Justice* published in 1971.<sup>4</sup> Rawls argued that since the participants in the social contract intend to evolve their charter on the basis of rationality, the communal structure which will be evolved as a result of the 'reflective equilibrium' of the group, will be concerned with *the rational distribution of 'primary social goods'*. Rawls considers *primary social goods* to be those which a rational person is presumed to want more of; they have a use whatever a person's rational life-plan may be; their distribution is always a matter of concern. According to Rawls, *primary social goods* include rights and liberties, opportunities and powers, income and wealth. At a later stage, Rawls added *self-respect* covering a person's sense of his own value, his secure conviction that his good, his plan or life is worth carrying out.

The theoretical discourse on property rights hence suggests that property rights can be derived from both formal and informal sources. Appropriation through labor, possession, or government grants seems to be the most common of the formal sources of property rights. On the other hand, informal sources may include "adverse possession"<sup>5</sup> and acquisition of property rights through social arrangements such as family relationships. Whatever the form of acquisition, it is important to recognize that property has two fundamental attributes. The first attribute is possession which can be defined as control over a resource based on the practical inability of another to contradict the ends of the possessor of that property. The second is title, which is the expectation that others will recognize rights to control a resource, even when it is not in possession.

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<sup>3</sup> John Locke, 1690. *The Second Treatise of Government*. Indianapolis: Bobbs-Merrill, 1962 at pg 17.

<sup>4</sup> John Rawls, 1971. *A Theory of Justice*. The Belknap Press of Harvard University Press. (Like Hobbes, Locke, Rousseau and Kant, Rawls belongs to the social contract tradition).

<sup>5</sup> The principle of adverse possession holds that if an owner visibly occupies property for a long enough period of time, that person becomes the owner, taking away the title from the "true owner."



Hence, once established, full ownership of property entitles the property holder to four basic entitlements or a bundle of rights: First, the property holder has a right to use or benefit from the property. The discourse on the right to use or benefit from property is perhaps most advanced among those who advocate for private or individual property rights. Indeed, early scholars such as Adam Smith argued that the expectation of profit from “improving one’s stock of capital” rests on private property rights, and the belief that property rights encourage the property holders to develop the property, generate wealth, and efficiently allocate resources based on the operation of the market. Second, property rights entitle the property holder to exclude others from the enjoyment of that property. Thirdly, property rights include immunity from loss without one’s consent. The fourth element is the power of the property holder to transfer the property in issue to others.<sup>6</sup>

Indeed, the literature is replete with writings that tend to emphasize private property rights as opposed to other forms of property ownership. It is apparent therefore that the current notions of property put too much emphasis on protecting those who have individual property. This classical approach addresses the conditions under which citizens may get property but does not include the premise that conditions must be structured so that everyone has the right to get property. Indeed, as William Singer has argued, the classical view of property focuses on individual owners and the actions they have to take to acquire property rights that will then be defended by the state.<sup>7</sup>

Finally, property theory also suggests that one can lose property in different ways. Since, as John Locke and other scholars argued, the state is vested with power to regulate property relations, then that power includes the power to take away property from an individual in one way or the other. Conventionally, this may be in the form of confiscation, exercise of the power of eminent domain, fines, regulatory fees or costs and zoning restrictions. However, the history of property is full of examples where individuals have successfully fought state attempts to deprive them of their property unless full, fair, adequate and timely compensation has been paid and the acquisition by the state is intended for a public purpose.

On the contrary, compulsory takings of lands that historically belonged to indigenous and minority communities including through forceful evictions and “enclosures” especially in Africa has been a common feature of the post-colonial African state. Over the last forty years, indigenous and minority communities such as the Bennet of Mt. Elegon, the Batwa and the Basongora

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<sup>6</sup> These principles have gained general affirmation from judicial practice. See for example *Sporrong and Lönnroth v. Sweden*, European Court of Human Rights. Application Nos. 7151/75, Judgment of 23 September 1982. In the case, the Court reaffirmed the three basic rules regarding the right to private property: peaceful enjoyment of the property; protection from deprivation; and the right of the state under the European Convention on Human Rights to control the use of property in accordance with the general interest. The court also found that interference that affects property rights and which cannot be defined as deprivation, nor as limitation, can still be unjustifiable interference with property rights.

<sup>7</sup> Singer, William, J. 1997 “*Property*” in Kairys, David (Ed). *The Politics of Law: A Progressive Critique*. Basic Books, Third Edition

in Uganda, and the Mungiki in Kenya have lost their ancestral lands through state takings in the bid to create protected forest and wildlife areas. In this regard, a re-thinking of the theory and practice of the concept of Community-Based Property Rights provides us a useful vehicle to initiate a fresh dialogue in policy and practice to address the injustice and human rights violations that have been inflicted on these communities.

### 3. The Putative Concepts Linked to CBPR

In policy and practice, the concept of Community-Based Property Rights (CBPR) has remained an elusive concept. This is mainly because the concept is often either confused or used interchangeably with other related concepts such as Common Property or Common Pool Resources (CPR), Community-Based Natural Resources Management (CBNRM), Collaborative Forest Management (CFM) in forestry or Community Conservation in wildlife, etc. In conceptual terms though, these different concepts have been at the centre of the discourse on the merits and demerits of state or private property regimes in the management of the environment and natural resources.

Indeed, *Tenkir Bongor*, one of the leading scholars on Zimbabwe's CAMPFIRE Programme has observed that the dichotomy between state property regimes and private property regimes has been colored and mystified by broader ideological and geo-political controversies. He asserts that proponents of privatizing natural resources management suggest that market dynamics, coupled with long-term security of tenure provide the best incentive for their sustainable use and efficient management. On the other hand, proponents of state management regimes counter by emphasizing equity considerations or collective societal interests in common pool resources. What *Bongor* and others in his school of thought have not bothered to explain is how each of these two regimes relates to the long-held African traditional concepts of property which were largely premised on collective self assertion and protection of the common good for all- which is the fundamental foundation of CBPR.

The concept of Common Property Resources (CPR) has itself dominated public policy discourse since 1968 after the publication of *Hardin's* famous article entitled "the Tragedy of the Commons." The notion of the tragedy of the commons itself has been used to explain overexploitation of key resources including deforestation, over fishing, overgrazing, and abuse of public lands and generally misallocation of resources.<sup>8</sup> The "tragedy of the commons" asserts that when property rights to natural resources are absent or un-enforced or what *Hardin* called "open access", no individual bears the full costs of resource degradation. *Hardin* and others were of the view that a

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<sup>8</sup> See for example Stevenson, G.G., 1991. "Common Property Economics: A General Theory and Land Use Application". Cambridge University Press. Cambridge.

resources held under a common property resource (CPR) regime is inherently inefficient since individuals do not get proper incentives to act in a socially efficient and perhaps responsible way.

Other concepts related to CBPR are generally recent having emerged during the 1980s and the 1990s. Sometime during the mid to the late 1980s, major conservation organizations such as the International Union for the Conservation of Nature (IUCN), World Wildlife Foundation (WWF), Conservation International (CI) and many others started designing programmes with the overall objective of working with communities living around protected areas. The initiatives of these organizations were “baptized” with various names such as “community-based natural resources management,” “sustainable utilization projects,” “community-based conservation,” and “decentralization of natural resources management,” etc. In the later part of the 1990s, this “cocktail” of conservation initiatives came to be collectively referred to as the Integrated Conservation and Development Projects (ICDPs).

The theoretical foundation of all ICDPs was that to achieve sustainable development, conservation projects had to integrate communities adjacent to protected areas in the overall conservation agenda. By whatever name so called, Integrated Conservation and Development Projects were strikingly similar in both design and execution. Indeed, what is most striking, although not surprising, is that all of these terms or concepts were crafted by conservation NGOs and none of them by indigenous peoples. Worse still, all of the conservation programmes that fitted within the ICDP concept were designed and executed by conservation NGOs and none by the communities.

The implication of these conservation concepts were far reaching in a number of ways. First, the initiatives became the most “strategic” way of communicating with the outside world the intentions of these conservation agencies to work with the local communities. For almost two decades, it became fashionable to coin conservation projects as “community conservation” in wildlife, or “collaborative management” in forestry or “co-management” in fisheries. In many ways, ICDP initiatives kept donor funds flowing to these conservation organizations especially since the declared objectives of these initiatives fitted in well with the philanthropic work of many donors.<sup>9</sup>

Secondly, the buy-in by the Governments was almost automatic for at least two major reasons. First, the advocates of ICDPs brought with them much needed funds into the conservation programmes of Government agencies which were hitherto suffering from cutbacks in public spending being pursued

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<sup>9</sup> See for example Chapin Mac, 2004. A Challenge to Conservationists. Worldwatch Institute. December 2004.

under the World Bank sponsored Structural Adjustment Programmes (SAPs). Secondly, by perpetuating the status of deprivation of community-based property rights initiated during the colonial era, ICDP initiatives facilitated the retention of control over natural resources by Government conservation agencies. Indeed, CBNRM which became the dominant conservation programme of the 1990s as illustrated by the example of the CAMPFIRE Programme in Zimbabwe<sup>10</sup> epitomizes this alliance between Governments and the proponents of ICDP initiatives.

Finally, the full meaning and utility of conservation initiatives dubbed ICDP was never clear from the beginning and perhaps has never been clear to date. Conceptually, it has never been clear whether “community-based conservation” is the same as “community conservation” or whether “collaborative forest management (CFM)” was the same as “community forestry.” To the extent that there was conceptual disagreement or lack of agreement as to the exact meaning and implications of these concepts and terms, conservation remained a beehive of activity as scholars sought to out-do each other in the name of elaborating on these concepts. In practice therefore, scholars and practitioners -both with vested interests, and not the communities that were the victims of deprivation and disenfranchisement arrogated to themselves the responsibility of defining the legal and political content of all conservation initiatives into these programmes. It is therefore not surprising that concepts such as restitution and compensation were only alluded to in passing in all these initiatives.

It is therefore important to recognize that these concepts are not and should not be equated to CBPR in any way. As shown in the following section, CBPR is both a legal and conservation concept that connotes rights of ownership over land and all the attendant rights to property. As a legal concept, it establishes the legal foundation upon which the property and human rights of indigenous and minority communities must be premised, recognized and protected. As a conservation concept, it establishes the scientific foundations for tapping on an important knowledge base of these communities that is essential for the conservation and sustainable use of biological and other environmental resources. On the contrary, the putative concepts referred to above are mere conservation concepts and do not confer any legal rights to the intended target beneficiaries of these conservation programmes. In practice, these putative conservation concepts continue to be incorporated in national policy and legislation without full recognition of the property or human rights of the victims of the global conservation agenda. It can therefore be argued that the conservation legislation agenda of the last four decades

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<sup>10</sup> For a detailed discussion on the CAMPFIRE Programme, see Bongor, Tenkir, 1999 “*The CAMPFIRE Programme in Zimbabwe: Institutional innovation and implications for environmental governance*” in Okoth-Ogendo, H.W.O and Tumushabe, Godber (Eds). *Governing the Environment: Political Change and Natural Resources Management in Eastern and Southern Africa*. ACTS Press. Nairobi. 1999.



represents one of the most enduring conspiracies of our time executed against indigenous and minority communities by the state and conservation practitioners.

#### 4. Community-Based Property Rights as a Distinct Property Regime

The origin of the concept of community-based property rights is not particularly clear. However, the earliest of what could be considered CBPR may be traced to the time of the Greek philosophers and in particular Aristotle and Theophrastus. As early as 200BC, Theophrastus inherited The Lyceum, a school established by Aristotle and specializing in cooperative research. Before his death, Theophrastus acquired property for The Lyceum in Athens where the school library and work place were housed. He later bequeathed this real estate to his scholarly colleagues in his will where he stated: "I give the garden, the *peripatos*, and all the houses along the garden to those of my friends, named herein, who wish continually to practice education and philosophy together in them.....; my condition is that no one alienate the property or devote it to private use but that all should hold it in common as if it were a sanctuary."<sup>11</sup>

Since the bequest of the Lyceum, the concept of "common interest" in property has remained a key feature of property relations even in the face of the growing dominance of the classical property theories that emphasize private ownership. Especially in traditional African societies, common interests and joint ownership of property was deeply embedded in the cultures and traditions of many communities including fishing, agricultural and pastoralist communities. In these communities, common interests in property were embedded in the notion that human beings are mere parts of a large "organism" often referred to as "humanity". Indeed, in the intellectual discourse of our time, people make reference to humanity – as when they talk about sacrificing oneself or one's self interests or materialistic goals for humanity. In terms of CBPR, this collectivism is expressed by making reference to community or ethnic groups that are bound together by common traditions of property relations.

But the practice of CBPR clearly shows that it can be distinguishable from other forms of collective rights. CBPR are a kind of property rights usually vested in a community or group of individuals. To qualify as CBPR, the rights must have three basic characteristics: common or collective ownership of a given natural resource –often a common pool resource; sharing rights to access and use of the resource in accordance with established traditions or

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<sup>11</sup> Cited in Lindberg, David, C., 1992. *The Beginnings of Western Science: The European Scientific Tradition in Philosophical, Religious, and Institutional Context, 600 B.C to A.D 1450*. The University of Chicago Press. Chicago and London. Pp75-76.

regulations; and a right to regulate access to the resource by outsiders or non-members of the community. In CBPR, land upon which the property rights are premised is collectively owned, the improvements are individually owned but those improvements may not be transferred outside of the community. CBPRs are essentially derived from historical relations of long use and dependence on natural resources for the survival and well-being of the community concerned.

## 5. The Legal Basis of Community-Based Property Rights

### 5.1. Community-Based Property Rights in International Law

Over the last half a century, a large body of international law has emerged which sets out rights of all human beings and obligations of the international community and individual States to recognize, protect and promote these rights. Through a series of legally binding agreements, soft law instruments and declaratory principles,<sup>12</sup> common principles of international law have emerged and have gained general acceptance as establishing minimum standards of State conduct with regard to human rights. In fact, international human rights law has expanded significantly over the last four decades to the extent that widespread or state inspired abuse of human rights is now a basis for state intervention or legitimate use of force under the Charter of the United Nations.<sup>13</sup> This section therefore explores the main sources of international law relevant to the international acceptability and recognition of Community-Based Property Rights.

In general international human rights law, there are at least 12 major international instruments that relate to the international recognition and protection of human rights. These instruments cover such areas as economic, social and cultural rights,<sup>14</sup> civil and political rights,<sup>15</sup> elimination of all forms of racial discrimination,<sup>16</sup> discrimination against women,<sup>17</sup> prohibition of torture and other cruel and inhuman or degrading treatment or punishment<sup>18</sup>

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<sup>12</sup> For sources of international law, see Article 38 of the Statute of the International Court of Justice. Also see the Headquarters Agreement Opinion (ICJ, 1988) on the relationship between international law and municipal law. In this case, the International Court of Justice established the supremacy of international law over municipal law by holding *inter alia* that the United States could not rely on its Constitution or municipal legislation to derogate from its obligations under the Charter of the United Nations.

<sup>13</sup> See also Report of the International Commission on Intervention and State Sovereignty, 2001. International Development Research Centre, Ottawa. There is growing consensus in international jurisprudence that state inspired gross violations of human of human rights including a likelihood of genocide is a legitimate ground for intervention in the affairs of a state the may have failed to take action to stop the violations.

<sup>14</sup> The International Covenant on Economic, Social and Cultural Rights (CESCR);

<sup>15</sup> The International Covenant on Civil and Political Rights (CCPR). Also see the Optional Protocol to the International Covenant on Civil and Political Rights (CCPR-OP1) and the Second Optional Protocol to the Covenant on Civil and Political Rights (CCPR-OP2-DP)

<sup>16</sup> See the International Covenant on the Elimination of All Forms of Racial Discrimination (CERD).

<sup>17</sup> See the Covenant on the Elimination of All Forms of Discrimination Against Women (CEDAW). Also see the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW-OP).

<sup>18</sup> See the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

and protection of children.<sup>19</sup> Although not specifically mentioning the rights of indigenous communities in general and CBPR in particular, these instruments suggest widespread international acceptance of the need to protect human rights and the rights of special groups in international law.

For example, in articles 1, the International Covenant on Economic, Social and Cultural Rights (CESCRs) enjoins States to desist from depriving any people of its means of subsistence. In article 2, States undertake to “guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.” The International Covenant on Civil and Political Rights (ICCPR) which was adopted by the United Nations General Assembly at the same time as the CESCR also contains more elaborate provisions that directly or indirectly relate to CBPR. In addition to restating the general provisions on self-determination and prohibition from discrimination as spelt out in the CESCR, the ICCPR further provides that “in those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of the group, to enjoy their own culture, to profess and practice their own religion, or to use their own language.”<sup>20</sup>

The concept of Community-Based Property Rights whether in its historical perspective or in international law is closely associated with the term “indigenous communities” or “indigenous peoples” as it is often referred to within the United Nations System. Indeed, those who elect to despise CBPR as an old fashioned property rights regime often argue that indigenous communities or indigenous peoples are not a legally defined term or corporate entity in whom property can vest. The most rigorous debate on the definition of “indigenous peoples” has largely taken place within the International Labor Organization in the process of revising its Indigenous and Tribal Convention (Convention 107) as early as 1959.

From 1972 to 1986, the UN Special Rapporteur to the Sub-Commission on Prevention of Discrimination and Protection of Minorities undertook a comprehensive study on the Problem of Discrimination against Indigenous Populations.<sup>21</sup> The work of the Special Rapporteur has since then provided the overall intellectual framework within which the term indigenous peoples has been used or applied. Among his many ideas, Martinez’s report recognized the right of indigenous peoples themselves to define what and who is

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<sup>19</sup> See Convention on the Rights of the Child (CRC) and the additional protocols to the Convention covering involvement of children in armed conflict and sale of children, child prostitution and child pornography.

<sup>20</sup> Article 27.

<sup>21</sup> See UN Doc. E/CN.4/Sub.2/1986/7; also available as United Nations sales publication U.N. Sales No. E.86.XIV.3. Martinez Cobo acted as the Special Rapporteur to the Sub-Commission.



indigenous. In general terms, he described indigenous peoples in the following terms:

*“Indigenous communities, peoples and nations are those which, having historical continuity with pre-invasion and pre-colonial societies that developed on their territories, consider themselves distinct from other sectors of the societies now prevailing on those territories, or parts of them. They form at present non-dominant sectors of society and are determined to reserve, develop and transmit to future generations their ancestral territories, and their ethnic identity, as the basis of their continued existence as peoples, in accordance with their own cultural patterns, social institutions and legal systems”<sup>22</sup>*

According to Martinez, the essential elements of this continuity include factors such as the following: occupation of ancestral lands, or at least of part of them; common ancestry with the original occupants of these lands; culture; language, etc. Nevertheless, it is important to note that international processes and practice has tended to emphasize the need for indigenous peoples to identify and define themselves than adopting a structured and exclusive definition. Indeed, at a global meeting of representatives of indigenous peoples on July 27, 1996, the assembled representatives adopted a resolution “endorsing the Martinez Cobo Report” and “categorically reject any attempts that Governments define indigenous peoples.”<sup>23</sup> At its 15<sup>th</sup> Session in 1997, the Working Group on Indigenous Populations concluded that a definition of indigenous peoples at the international level was not possible at the time, and certainly not necessary for the eventual adoption of the Draft Declaration on the Rights of Indigenous Peoples.<sup>24</sup>

It is therefore not surprising that the International Labor Organization Convention (No. 169) concerning Indigenous and Tribal Peoples in Independent Countries does not attempt to provide any definition of these terms.<sup>25</sup> Instead, article 1 of the Convention contains a statement of coverage largely defining the scope of its application. In this regard, Convention No. 169 applies to:

*“a) tribal peoples in independent countries whose social, cultural and economic conditions distinguish them from other sections of the national community and whose status is regulated wholly or partially by their own customs or traditions or by special laws or regulations;*

<sup>22</sup> *Supra*, note 15, paragraphs 379-380.

<sup>23</sup> See Report of the Working Group on Indigenous Populations, 1996 (UN Doc. E/CN.4/Sub.2/1996/21).

<sup>24</sup> See UN Doc. E/CN.4/Sub.2/1997/14, para 129. Consequently, article 8 of the Draft Declaration states that “Indigenous Peoples have a collective and individual right to maintain and develop their distinct identities and characteristics, including the right to identify themselves as indigenous and to be recognized as such.” See UN Doc. E/CN.4/Sub.2/1994/2/Add.1.

<sup>25</sup> Convention No. 169 was adopted on 27 June 1989 by the General Conference of the International Labour Organization at its seventy-sixth session. The Convention entered into force on September 5, 1991.

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

The Convention further provides that “Self-identification as indigenous or tribal shall be regarded as a fundamental criterion for determining the groups to which the provisions of this Convention apply.”<sup>26</sup>

Community-Based Property Rights of indigenous communities also find widespread support in the African Charter on Human and Peoples Rights.<sup>27</sup> The Charter in articles 2, 3, and 5 binds the Member States of the Organization of African Unity (the predecessor to the African Union) to protect and promote human rights of African peoples. The Charter proclaims, *inter alia*, that the right to equality and human dignity belong to all individuals, including the individual members of indigenous communities. Specifically, the Charter recognizes what it refers to as collective rights of “peoples”, a concept that may be interpreted as having direct reference to the rights of indigenous peoples.<sup>28</sup>

Outside the work of the International Labor Organization and the United Nations Commission for Human Rights, the debate over the rights of indigenous communities has featured prominently in the ongoing global discourse on environment and development. As early as 1987, the World Commission on Environment and Development (WCED) or the Brudtland Commission sought to put the issue of rights of indigenous communities on the global environment and development agenda. In its report commonly referred to as “Our Common Future”, the Brudtland Commission observed that “the standard for a just and humane policy for such groups is the recognition and protection of their traditional rights to land and the other resources that sustain their way of life – rights that they may define in terms that do not fit into standard legal systems.”<sup>29</sup>

The recommendations of the Brudtland Commission have been continuously reflected in the global environment and development discourse that was triggered by the Commission’s report. Several of the outcomes of the United Nations Conference on Environment and Development (UNCED) and in particular Agenda 21 – the programmatic outcome of the Conference, the

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<sup>26</sup> ILO Convention No. 169, Article 1(2).

<sup>27</sup> Also referred to as the Banjul Charter was adopted in 1981 and entered into force on 21<sup>st</sup> October 1986. See also Decision 15 (XVI) of the Sixteenth Ordinary Session of the Assembly of the OAU Heads of State and Government, Monrovia, Liberia. 17-20 July 1979.

<sup>28</sup> *Ibid*, articles 19-24.

<sup>29</sup> *Our Common Future: Report of the World Commission on Environment and Development*, 1987. Oxford University Press. Oxford and New York. pg115.

Rio Declaration –the political statement of the Conference, and the Convention on Biological<sup>30</sup> Diversity either alluded to or contained specific recognition of indigenous peoples as being critical in the conservation and sustainable use of the global environmental resources.

By signing and or ratifying international human rights instruments, States incur obligations to respect and promote human rights and these obligations extend to marginalized populations such as indigenous communities and minority groups.<sup>31</sup> Indeed, there is currently consistent state practice evidenced by widespread signature, ratification or accession to these instruments that clearly suggests that these covenants occupy a significant place in international human rights law. In East Africa for example, Kenya and Uganda have signed virtually all the covenants and the additional protocols where applicable. Tanzania has also ratified all the covenants with the exception of the two additional protocols to the CCPR. In addition to participating in the UNCED process and endorsing both Agenda 21 and the Rio Declaration, the three EAC countries have also signed and ratified the Convention on Biological Diversity.

<b>Dates of accession, signature or ratification of selected international instruments by the East African states</b>				
<b>No.</b>	<b>INTERNATIONAL INSTRUMENTS</b>	<b>UGANDA</b>	<b>KENYA</b>	<b>UNITED REP OF TANZANIA</b>
1.	International Covenant on Economic, Social and Cultural Rights (CESCR)	21 April 1987 <sup>a</sup>	03 Jan 1976 <sup>a</sup>	11 Sept 1976 <sup>a</sup>
2.	International Covenant on Civil and Political Rights (CCPR)	21 Sept 1995 <sup>a</sup>	23 Mar 1976 <sup>a</sup>	11 Sept 1976 <sup>a</sup>
3.	Optional Protocol to the International Covenant on Civil and Political Rights. (CCPR-OP1)	14 Feb 1996	INA	INA
4.	Second Optional Protocol to the International Covenant on Civil and Political Rights. (CCPR-OP2)	INA	INA	INA
5.	International Convention on Elimination of All Forms of Racial Discrimination (CERD)	21 Dec 1980 <sup>a</sup>	13 Oct 2001 <sup>a</sup>	26 Nov 1972 <sup>a</sup>
6.	Convention on the Elimination of All Forms of Discrimination against Women. (CEDAW)	21 Aug 1985	08 April 1984 <sup>a</sup>	19 Sept 1985
7.	Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW-OP)	INA	INA	INA
8.	Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT)	26 June 1987 <sup>a</sup>	23 Mar 1997 <sup>a</sup>	
9.	Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT-OP)	INA	INA	INA
10.	Convention on the Rights of the Child. (CRC)	16 Sept 1990	02 Sept 1990	10 July 1991
11.	Optional Protocol to the Convention on the Rights of the Child (CRC-OP-AC) on the involvement in armed conflict.	06 June 2002	12 Feb 2002	

<sup>30</sup> Nairobi, 1992. Although the Final Act of the Convention was adopted in Nairobi, it was opened for signature at the United Nations Conference on Environment and Development in Rio de Janeiro, Brazil.

<sup>31</sup> On the relationship between international law and municipal law, see The Headquarters Agreement Opinion, supra note 10.

12.	Optional Protocol to the Convention on the Rights of the Child (CRC-OP-SC) on the sale of children, child prostitution and child pornography	18 Jan 2002 <sup>a</sup>	08 Sep 2000 <sup>s</sup>	24 May 2003 <sup>a</sup>
13.	International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (CMW)	01 July 2003 <sup>a</sup>	INA	INA
14.	Convention on Biological Diversity. (CBD)	08 <sup>th</sup> Sept 1993	26 <sup>th</sup> July 1994	08 <sup>th</sup> Sept 1996
15.	Cartagena Protocol on Biosafety (CPB)	30 <sup>th</sup> Nov 2001	24 <sup>th</sup> Jan 2002	24 <sup>th</sup> April 2003
16.	Rio de Janeiro Declaration on Environment and Development.	1992	1992	1992
17.	Universal Declaration of Human Rights.	INA	INA	INA
18.	The African Charter on Human and Peoples Rights (Banjul Charter)	INA	INA	INA

Note : INA Information Not Available

In jurisprudential terms, it is not particularly clear whether the signature and ratification of these instruments by the East African countries is significant for the recognition and promotion of CBPR within the Community. This is because of at least three reasons: first, nowhere in the instruments establishing the East African Community including the Treaty Establishing the East African Community is the issue of CBPR or general human rights of indigenous communities mentioned. Both the Treaty and other related policy instruments such as the Memorandum of Understanding on the Environment do not devote particular attention to this subject. Secondly, although the three EAC countries have ratified or acceded to the international human rights instruments and incorporated some of its provisions in national constitutions, indigenous communities in each of these countries are living on the margins of life. Those that still occupy their ancestral lands such as the Mungiki of Kenya are still fighting legal battles for the recognition of their land rights<sup>32</sup> or are simply living in destitution and generally face extinction.<sup>33</sup>

All in all, it is tenable to argue that the concept of Community-Based Property Rights has gained increasing acceptability in international law and international practice. The variety of international legal instruments that have either directly or indirectly alluded to the existence and importance of these rights represent sufficient *opinio juris*- an essential precondition for the existence of an acceptable norm of international law. The growing recognition of CBPR by international judicial tribunals also provides compelling evidence that the existence of these rights is no longer a subject of much legal contestation.

<sup>32</sup> The current draft Constitution of Kenya, 2005 contains elaborate provisions on property rights including recognition of CBPR. See Republic of Kenya, 2005. The Proposed New Constitution of Kenya. Kenya Gazette Supplement No. 63. Nairobi. (Article 81).

<sup>33</sup> For example, at a public policy dialogue organized by ACODE in August 2005 to share the preliminary findings of the CBPR studies, Minister Baguma Isoke, Ugandan Minister of State for Lands appealed to ACODE to undertake a detailed study on the status and plight of the Basongola, another minority pastoral community that has been dispossessed and displaced from their lands as a result of the establishment of Semliki National Park.

## 5.2. The Constitutional Legal Basis for CBPR in East Africa

In the preceding section, it has been argued that Community-Based Property Rights have found widespread support and expression in international treaty law and state practice. It is therefore important to recognize that like all fundamental human rights, CBPR are not granted by the State but it is essential that the state recognizes, protects and promotes these rights so as to facilitate their enjoyment by the entitled populations. This section examines the constitutional foundations of CBPR in the three East African countries. It is asserted that save for the 2005 draft constitution of Kenya<sup>34</sup>, the current constitutional instruments do not provide adequate provisions for CBPR and the constitutional validity of these rights is only established on the basic general principles embedded in the Bill of Rights and to a large extent, land law.

The contemporary practice among many countries is to include certain declaratory statements as national objectives and guiding principles of state policy.<sup>35</sup> In this regard, the Uganda Constitution contains such general provisions that may be considered to guarantee the protection and promotion of CBPR. Principle XI which provides the guiding principles to govern the role of the State in the development process states, *inter alia*, that “The State shall give the highest priority to the enactment of legislation establishing measures that protect and enhance the right of the people to equal opportunities in development.” A series of other principles also enjoin the state to ensure balanced development of the country and the protection of and promotion of social and cultural wellbeing of the people of Uganda.<sup>36</sup>

Similar provisions are found in the Constitution of the United Republic of Tanzania, 1997. In particular, article 9 provides, *inter alia*, that “the object of the Constitution is to facilitate the building of a United Republic as a nation of equality and free individuals enjoying freedom, justice, fraternity and concord, through the pursuit of the policy of Socialism .....” As such, the State is enjoined to pursue programmes that ensure respect for human rights, preserves human dignity and promotes the common good. The essential elements of the *primary social goods* as first propounded by John Rawls in 1971<sup>37</sup> are clearly evident in the spirit and letter of the Tanzanian Constitution.

However, it is important to recognize two critical issues with respect to constitutional provisions characterized as principles of state policy. First, this part of the Constitution is a new phenomenon having emerged around 1988

<sup>34</sup> The said draft Constitution was however rejected in a national plebiscite held on November 21, 2005 (Discussions with Didus Twinomugisha, Uganda High Commission, Nairobi Dec. 22, 2005)

<sup>35</sup> These are referred to by various titles in different constitutions. In the Constitution of Uganda, 1995, they are referred to as the ‘National Objectives and Directive Principles of State Policy’; in the Constitution of the United Republic of Tanzania, 1997 (as amended), they are referred to as the ‘Fundamental Objectives and Directive Principles of State Policy’; while the Proposed New Constitution of Kenya, 2005 refers to these principles as ‘National Values, Principles and Goals.’

<sup>36</sup> See Principle XIV, National Objectives and Directive Principles of State Policy. Constitution of Uganda, 1995

<sup>37</sup> *Supra*, note 4



as the new wave of constitutionalism and democratization swept through Eastern Europe and most of Africa. Constitutional principles of state policy are therefore largely common with national constitutions that were either “substantially” revised or promulgated subsequent to 1988. Such provisions are conspicuously missing in the Constitution of the Republic of Kenya which passed with minor amendments in 1992 that only focused on the introduction of multi-partism. Indeed, this can be sharply contrasted with the current draft of the Kenyan Constitution which has a specific chapter devoted to such principles.<sup>38</sup>

The second important point to note with respect to these principles of state policy is that they are found in the part of the constitution that is often considered non-justiciable or are generally not considered enforceable. The justiciability of these provisions is a continuous question of constitutional jurisprudence and has not been settled in constitutional law and practice. Indeed, the Constitution of the United Republic of Tanzania specifically provides that “the provisions of this Part of this Chapter are not enforceable by any court. No court shall be competent to determine the question whether or not any action or omission by any person or any court, or any law or judgment complies with the provisions of this Part of this Chapter.”<sup>39</sup> Yet, in other cases, courts have had the liberty to hold this part of the constitution justiciable and hence creating rights and obligations on the part of the state and the citizens.<sup>40</sup> However, to the extent that this debate continues, the extent of the utility of these constitutional provisions with regard to CBPR remains a matter of juridical inquiry.

In spite of the legal uncertainty with respect to the constitutional principles of state policy, there are also a number of other provisions in the substantive sections of the constitutions of the three EAC countries that render tenable the argument that CBPR is part and parcel of the human rights recognized and guaranteed by the constitution. For example, the current constitutions contain provisions guaranteeing the rights to property and proscribing deprivation of property without the due process,<sup>41</sup> or the need to take affirmative action in favor of marginalized communities.

In terms of national constitutions in East Africa, it is important to recognize that it is only The Proposed New Constitution of Kenya that contains the most elaborate proposals for the recognition, protection and promotion of CBPR. Article 81(1) provides that “Community land shall vest in and be held by communities identified on the basis of ethnicity, culture or community of

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<sup>38</sup> See The Proposed New Constitution of Kenya, 2005. Kenya Gazette Supplement, No. 63, 2005. Chapter three.

<sup>39</sup> Constitution of the United Republic of Tanzania, 1997. Article 7

<sup>40</sup> Juana Antonio Oposa versus The Honorable Fulgencio, Factoran, No. 101083, July 30, 1993 reported in Compendium of Judicial Decisions on Matters Related to Environment (National- Decisions Volume 1) United Nations Environment Programme, 1998.

<sup>41</sup> See article 26, Constitution of Uganda; article 75, Constitution of Kenya (Revised Edition 1998) and article 24 of the Constitution of the United Republic of Tanzania.

interests.” Paragraph (2) of the same article clearly spells out the nature of land that falls under the rubric “community land” and includes, in relevant parts the following: land lawfully held, managed or used by specific communities as community forests, grazing areas or shrines; and ancestral lands traditionally occupied by hunter-gatherer communities. Indeed, these provisions epitomize the constitutional recognition of CBPR in contemporary constitutional processes.<sup>42</sup>

However, beyond constitutional articulation of CBPR, the critical issue is how these rights are recognized and implemented in practice. None of the constitutions has so far addressed the issue of restitution or compensation. Policy and programmatic actions that are based on affirmative action have only targeted groups that have strong voices in the policy arena such as women, people with disabilities and the youth. None of the three countries have developed a specific and coherent programme for the protection and promotion of CBPR and the effective integration of indigenous communities in national policy and planning. It is also important to emphasize the fact that the protracted debates at the international level attempting to define both the meaning of indigenous peoples and the scope of the rights that accrue to such communities as well as the interchangeable use of the concept of CBPR with recent conservation notions comprised in the rubric -ICDP, clearly highlight the lack of conceptual clarity - a major cause of policy distortion at the national level.

Indeed, the conspicuous absence of articulation and recognition of these rights in key regional and national legal instruments within the East African Community only serves to highlight one important point - that their articulation in international law was not an accident but a result of struggle and advocacy by indigenous peoples and their representatives around the world. This is why it is important that a similar campaign be waged at the sub-regional and national level. The ongoing processes to elaborate various provisions of the EAC Treaty provides a rare but realistic opportunity to bring issues of indigenous and marginalized communities at the centre of community policy and community legislation.

### **5.3. Judicial Recognition of CBPR**

There is generally no well established judicial practice on the enforcement of CBR either by national courts or international tribunals. Most of the cases that have been brought before such judicial or quasai judicial bodies are often purely cases of individual property rights violations. Nevertheless, three

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<sup>42</sup> Article 81(5) enjoins Parliament to enact legislation to give effect to this article. The major challenge is whether, in case these provisions were finally adopted, Parliament would proceed to put in place such legislation or make such an action a priority. In many cases, issues of indigenous communities and minority groups fall outside the main priorities of both Government and the legislature.



judicial decisions may be highlighted here which suggest that community-Based Property Rights are recognized in the context of the general provisions on property contained in international and regional human rights instruments.

In 1982, the European court of Human Rights in the case of *Sporrong and Lönnroth v. Sweden* found that interference that affects property rights and which cannot be defined as deprivation, nor as limitation, can still be an unjustifiable interference with property rights. In that case, the Swedish Government granted the City Council expropriation permits pending expropriation taking effect. During this period, construction or alterations of the property were prohibited, essentially affecting the possibility to sell the estates, this diminishing the value of the applicants' properties. The court observed that a gradual interference with property rights contravened the provisions of the European Convention guaranteeing the right to property.

Although the facts of this case cover property rights of a purely individual nature, the principle enunciated by the Court is directly relevant to Community-Based Property Rights. In most cases, CBPR are expropriated through gazetting of indigenous peoples' lands as wildlife or forest protected areas. In other cases, CBPRs are expropriated through changes in the status of a given protected area such as the elevation of a game reserve to a national park or a local forest reserve to a central forest reserve. As already alluded to, communities sometimes gain access to selected resources in the name of collaborative management, community conservation or co-management depending on the resource in question. In such cases however, it seems apparent that indigenous communities can still establish a case of gradual interference with their traditional and legal rights to property.

In a 1984 case of *Ominayak (Lubicon Lake Band) v. Canada*, Chief Bernard Ominayak of the Lubicon Lake Band in Canada brought a complaint before the Human Rights Committee of the United Nations.<sup>43</sup> He alleged that Canada had denied members of the Lubicon Lake Band their rights to self-determination and to dispose freely of their natural wealth and resources. Chief Ominayak claimed that the actions by Canada contravened the Indian Act of 1970 and Treaty 8 of 1899 which recognized the Band's right to continue its traditional ways of life. The complaint alleged that by expropriating approximately 10,000 square kilometers of the Band's land, Canada had denied the Lubicon Lake Band its means of subsistence and enjoyment of the right to self-determination, causing irreparable damage to its members. In its views of 26 March 1990, the Human Rights Committee observed as follows:

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<sup>43</sup> Human Rights Committee, Communication No. 167/1984 (Views of 26 March 1990) cited in Magdalena Sepúlveda, et al, 2004. Universal and Regional Human Rights Protection: Cases and Commentaries. University for Peace. Ciudad Colon, Costa Rica.

*“.....While all peoples have the right of self-determination and the right freely to determine their political status, pursue their economic, social and cultural development and dispose of their natural wealth and resources, as stipulated in article 1 of the Covenant, the question whether the Lubicon Lake Band constitutes a “people” is not an issue for the Committee to address under the Optional Protocol to the Covenant. The Optional Protocol provides a procedure under which individuals can claim that their individual rights have been violated. These rights are set out in part III of the Covenant, articles 6-27 inclusive. There is, however, no objection to a group of individuals, who claim to be similarly affected, collectively to submit a communication about alleged breaches of their rights.”<sup>44</sup>*

In a recent case of *Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, a petition was filed with the Inter-American Commission on Human Rights on behalf of the Mayagna Awas Tingni Community, which lives in the Atlantic coast region of Nicaragua and is made up of approximately 142 families. The applicants denounced Nicaragua for failing to demarcate the Awas Tingni Community’s communal land and to take the necessary measures to protect the Community’s property rights over its ancestral lands and natural resources. The applicants therefore sought precautionary measures to prevent the proposed concession of 62,000ha of tropical forest to be awarded to a private company in communal lands. On June 4, 1998, the Inter-American Commission submitted the case to the Inter-American Court of Human Rights. In its judgment of August 31, 2001, the Court declared that the state had violated the right to judicial protection enshrined in article 25 of the American Convention on Human Rights and the right to property enshrined in article 21 of the Convention, to the detriment of the members of the Mayagna (Sumo) Awas Tingni Community.<sup>45</sup>

In the case of *Uganda Land Alliance Ltd v. Uganda Wildlife Authority and the Attorney General*,<sup>46</sup> the applicants representing the Benet community living in the forests on the Uganda side of Mount Elgon challenged the decision of the respondents to evict the Community from its current domicile. In a consent judgment, the court recognized the historical rights of the Benet to leave in this area. The Court observed:

*“that the Benet Community residing in Benet Sub-County including those residing in Yatui Parish and Kabsekek village of Kween County and in Kwoti Parish of Tingey County are historical and indigenous inhabitants of the said areas which were declared a Wildlife Protected Area or National Park.”*

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<sup>44</sup> Ibid, pg 421-42.

<sup>45</sup> Inter-American Court of Human Rights, Application No. 11.577. Judgment of August 31, 2001.

<sup>46</sup> Miscellaneous Cause No. 0001 of 2004 (The High Court of Uganda at Mbale).

And that;

*“the said Community is entitled to stay in the said areas and carry out economic and agricultural activities including developing the same undisturbed.”*

The court approvingly referred to the need by Government to take “affirmative action in favour of the said Community to redress the imbalance which presently exists in the said area in terms of education, infrastructure, health and social services in the spirit of Article 32(1) of the Constitution (Uganda)<sup>47</sup> in lieu of general damages, commencing in the Financial Year 2005/06.” This judgment sets an important precedent by recognizing the rights of minority communities and ordering the payment of damages for the wrongs and marginalization that has been inflicted on these communities. Unfortunately, it is tenable to argue that the failure of the case to proceed to full hearing denied the Court an opportunity to pronounce itself fully on the key principles applicable to situations of this nature beyond the interests of the Benet peoples.

This evolving judicial body of precedents clearly suggests growing consensus on the legal validity of the concept of Community-Based Property Rights in both national and international law. However, in the light of the numerous cases of deprivation of indigenous peoples’ lands and rights, the limited number of cases tend to reflect a weak judicial infrastructure for protecting CBPR. Indeed, most of the communities that have been affected by decades of property rights deprivation do not have the capacity and the necessary legal representation to obtain remedy from existing international and national judicial bodies or tribunals.

## **6. The Relevance of CBPR in Contemporary Conservation and Development Policy: Beyond Constitutional and Judicial Recognition**

Generally, both in international law and constitutional practice, there is emerging conceptual clarity as regards not only Community-Based Property Rights but also the concept of indigenous peoples or communities that are entitled to these rights. It has also been argued that the existence of CBPR is not a matter for international law or constitutional law to resolve because they are founded on historical and ancestral relationships between indigenous communities and the lands and resources upon which they derive their sustenance. To that extent, CBPR and the livelihoods of indigenous

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<sup>47</sup> Article 32(1) of the Constitution provides as follows: “Notwithstanding anything in this Constitution, the State shall take affirmative action in favour of groups marginalized on the basis of gender, age, disability, or any other reason created by history, tradition or custom, for the purpose of redressing imbalances which exist against them.”

communities are not being undermined because of lack of their articulation in international law and constitutional practice but rather because of failure of Governments to implement their international law obligations and constitutional commitments in good faith.

Beyond constitutional recognition of CBPR, it is important to inquire into whether the concept of CBPR is relevant in contemporary conservation and development policy and practice. Indeed, rekindling the debate on the recognition and promotion of CBPR or even restitution of those rights where they have been expropriated can no longer be pursued as a debate based on “emotions” but rather on its relevance to conservation and national development. In this regard, three key points can be highlighted as underpinning the relevance of CBPR in contemporary conservation practice and development policy.

First, the vital role that indigenous peoples play in the conservation and management of the environment is now generally accepted in international conservation policy. This general acceptance is authoritatively expressed in Agenda 21, the Rio Declaration and the Convention on Biological Diversity already discussed above. Indeed, it is now recognized that indigenous communities are the embodiment of traditional and indigenous knowledge that could provide key insights that may be the basis for the sustainable use of the environment and natural resources. Indigenous communities are important repositories of critical knowledge systems that help in understanding the functioning of key ecological systems –the basis upon which decisions that promote conservation and sustainable development could be based. For example, fishing communities have inherent knowledge on the breeding cycle and breeding grounds for fish that could be a basis for declaring closed seasons in contemporary fisheries legislation. Forest communities have better knowledge of plants with useful chemical properties or communities living in wildlife areas have vast knowledge of ecological behavior of animal species that could provide a basis for conservation of endangered animal species, etc.

Secondly, we have seen that the constitutions of the three EAC countries commit the state to invest in programmes that promote equity and social justice, development of indigenous communities, minorities and marginalized groups and respect for cultural identity of indigenous peoples. Yet, fulfilling these constitutional obligations and international law commitments is only possible if the human rights of indigenous peoples are clearly recognized to be at the centre of the bill of rights and hence protected under the national constitutions. To this extent, contemporary conservation programmes that otherwise undermine the rights of indigenous peoples are out of tandem with the emerging constitutional practice and Jurisprudence.

Lastly, CBPR provides the basic legal foundation for indigenous communities to negotiate “meaningful” partnerships with the state and state agencies on how to manage common property resources. In a CBPR regime, the rights of the community are based on the legal ownership of the resources in question. The rights of the state to regulate resource use are premised on the constitution that vest the states with the obligation and authority to promote the “common good” of the citizens. Once these rights and obligations are defined and understood by the two parties, it then forms the basis for meaningful negotiations. In cases where the state decides to acquire the lands in question because of their critical ecological importance and the fragile nature of the resources, it is treated as an ordinary case of compulsory acquisition where full, adequate and timely compensation is a fundamental prerequisite before the “taking” is effected. In addition, CBPR provides the legal foundations for building state-community partnerships in the conservation agenda –including application of the putative concepts of community conservation, co-management, collaborative management, etc.

## **7. Essential Elements in a National Framework to Implement a CBPR Regime**

Although there is widespread support and recognition of CBPR in international law and constitutional law, the practice at the national level is entirely different. In East Africa, many communities such as the Batwa, the Basongora and the Bennet in Uganda and the Mungik in Kenya were deprived of their CBPR and associated rights by decades of colonialism, marginalization and privatization. Yet, their plight and interests have not featured much in national policy and decision making. This situation not only undermines the human rights and human dignity of these communities, it also undermines the credibility of the international and national conservation agenda. In order to change the status quo, three general interventions need to be emphasized.

### **7.1. Legislative Representation**

The rights and interests of indigenous communities have not featured prominently in national policy debates and national planning processes in East Africa. This may be explained by the fact that indigenous community issues are not serious electoral issues and hence have not acquired the political profile needed to elevate them to the political level. There is therefore need to interest legislators in the local, national and regional legislature to bring onto the political agenda the need to recognize and promote the rights of these communities. The involvement of the legislators could also help mobilize and consolidate the political momentum necessary to address issues of restitution



and compensation where the land rights of indigenous communities were expropriated by government policies or actions.<sup>48</sup>

## 7.2. Legal Representation

Secondly, public interest organizations could play a central role in assisting indigenous communities to access justice and judicial redress. As highlighted above, many communities in East Africa have either lost their ancestral lands or are living in perpetual uncertainty since governments can simply take over their lands without compensation. However, in a number of cases such as the Rufiji Delta in Tanzania and the Butamira Forest Reserve in Uganda, public interest organizations have helped the communities defend their rights against government and other private interests. It is therefore apparent that in the absence of well developed legal aid schemes, public interest law organizations must become and remain an integral part of a scheme to protect, promote and defend the Community-Based Property Rights of indigenous communities.

## 7.3. Research Agenda

Finally, it is apparent that the conceptual distortions that pervade the global and national conservation agenda is leading to serious distortion in the understanding of what constitutes CBPR at the national level. Generally, the dominant usage of such concepts as community conservation, co-management, collaborative management, etc has made the full recognition and promotion of CBPR elusive. Donors, international conservation organizations and governments have found comfort in the widespread use of these conservation concepts while indigenous communities have been comforted by “involvement” and “participation” in this conservation agenda. However, enfranchisement of these communities and security of their livelihoods is only possible once a genuine recognition of their ancestral land rights is achieved. To inform national policy, legislation and planning, a more action-based comprehensive research agenda is needed. The research agenda must be designed to enable us understand the social, economic and political status of these communities, the basis of their claims to CBPR and a better understanding of how the situation of the different communities could be changed through redesigning of interventions.

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<sup>48</sup> Tumushabe, Godber and Bainomugisha, Arthur, 2004. Constitutional Reform and the Environmental Legislative Representation in Uganda: A Case Study of Butamira Forest Reserve in Uganda. ACODE Policy Research Series No. 10, 2004

## **8. Conclusion**

The concept of Community-Based Property Rights has been continuously evolving over time and currently has strong foundations in international human rights jurisprudence and national conservation theory and practice. As a conservation concept, CBPR presents the opportunity to create the necessary legal basis for indigenous and marginalized communities to rightfully claim their legitimate roles in the conservation of natural resources and the environment. State recognition of CBPR is also a necessary condition for tapping the wealth of traditional knowledge and practices that can help reverse the current trends in the degradation of biological diversity and loss of species.

As a human rights concept, recognition of CBPR is an essential tool for integrating the human rights of indigenous and marginalized communities in national constitutions and other legal instruments. The human, cultural and political values embedded in CBPR can become important sources of enfranchisement, empowerment and full integration of these communities in the mainstream of society. The plight of such communities as the Batwa, the Basongola and the Bennet of Uganda clearly suggests that the complete translocation of these communities from their ancestral lands to create protected areas and give way for private investments has largely been associated with gross violations of human rights and often counter-productive. Consequently, recognition of their rights and the attendant duty of the state to provide restitution or full and adequate compensation is an important step towards the empowerment of these communities.

Finally, it has been argued that at the national level, CBPR is perpetually confused with the more recent conservation notions such community conservation, collaborative management or the more encompassing term - Integrated Conservation and Development. The attempts to incorporate these notions in national legislation have provided an essential "escape root" for Governments and conservation practitioners from the full recognition of CBPR. To change the mind-set, there is need for more empirical case study based research to understand the scope and content of CBPR of selected communities as an input into more meaningful legal protection of such rights in national legislation.



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