

# Detailed recommendations supplementing the Overview Report of the Research Project

## Emanating from the validation Workshop, May 2009, organized by the Working Group on Indigenous Populations/ Communities and the ILO, Banjul, The Gambia

### Group 1: Recognition, Identification and Non-Discrimination, Consultation, Participation and Self Management

1. **Challenges (Recognition):** The criteria proposed to identify Indigenous persons or populations were based almost entirely on the ILO Convention 169. These criteria emanated from a study of non-African countries and it is debateable whether the findings are appropriate for African states, given the differences in political trajectory of the case studies.

**Suggestions for Recommendations:** There is a need to review the criteria for identifying indigenous peoples to make it more relevant to the African context. This may make the criteria more acceptable to states.

At a more specific level on the issue of recognition, the group suggested a recommendation that indigenous peoples should be recognised and national education programs should be carried out on the rights of indigenous peoples. States need to be encouraged to use terminologies that enhance the protection and rights of indigenous peoples rather than those that undermine such protection. Examples were drawn from legislation dealing with forests in DRC which undermines the lifestyle of forest-dwellers, as well as legislation in some parts of West Africa that curtail the lifestyle of pastoralists. It was recommended that the content of legislation should take into account the lifestyles of indigenous peoples and seek to protect them. Indigenous peoples should be encouraged to participate in the formulation of legislation that affects them.

2. **Challenge (Citizenship):** With regard to citizenship, it was observed that indigenous peoples often did not have access to documents denoting their nationality.

**Suggestions for recommendations:** A recommendation that states should put in place mechanisms that addressed this problem and facilitate access to nationality documents such as identification cards, birth certificates and so on was therefore necessary. The ACHPR should urge states to take appropriate steps to address this challenge.

3. **Challenge (Discrimination):** Indigenous peoples suffer from several types of discrimination. The report differentiates between discrimination perpetrated by the state and by individuals. Significantly, and as a matter of concern, situations

where the state fails to protect indigenous peoples from discrimination are not identified. The conclusions and recommendations are vague in respect of this type of discrimination.

**Suggestions for Recommendations:** The conclusions and recommendations should identify specific cases where the state has failed to protect indigenous peoples from discrimination. NGOs should draw the attention of states to these types of discrimination.

- 4. Challenges (Consultation and Participation):** The definition of self management is at the centre of many difficulties for indigenous peoples. States equate this term to independence or autonomy thus causing misunderstandings.

**Suggestions for Recommendations:** There is need for comprehensive information defining the concept of self-management, and education on this issue, both for states and indigenous populations. It should be emphasised that the concept of self-management is conceived of within the framework of the nation state and not separate from the state. Decentralisation measures should be put in place to cater for the needs of indigenous populations, for example identified constituencies, to encourage the participation of indigenous peoples in their own affairs as well as national affairs. Electoral measures that respond to the situation of indigenous peoples should be put in place to encourage their participation in the electoral process.

The ACHPR and states should take measures to acknowledge the need for self-management and participation in affairs at the local level by indigenous populations.

## **Group II: Land Rights; Indigenous Peoples in Border Areas and Transboundary Situations**

- 1. Challenge:** Indigenous peoples are unable to obtain recognition of their ownership rights in their traditional territories; states often assert ownership over territories, and may sell those rights to third parties.

### **Suggestion for recommendations to address the challenge:**

- Review of national legislation to ensure that traditional, communal forms of land tenure are recognized as a matter of law.
- Review of policies to ensure indigenous peoples' claims to lands, including titling and demarcation, are dealt with promptly.
- Review of judicial practice in the area of indigenous land rights to ensure that judges apply the law consistent with existing international obligations; this would include training and monitoring.

**Main actors to be involved: states** – all three branches of government

**Priority actions:** The group considered that the kinds of challenges indigenous peoples face with respect to land tenure require urgent, multidisciplinary

approaches in many areas, and that such measures are interdependent. The challenges and recommendations identified are all considered to be priorities.

**Note:** In the beginning of this section, it might be useful to include a cross reference to the information concerning the right to effective judicial protection and guarantees. In practical terms, it is difficult for indigenous peoples to enforce their right to their traditional territories if the courts are not available and effective.

2. **Challenge:** Even when indigenous peoples have ownership rights to surface territory, the state may hold the rights to subsurface resources. There is often no framework in place to ensure respect for indigenous peoples' right to use and control their territories when the state or third parties exploit those resources. A priority challenge in this regard is developing effective means to consult with the community in question, so that they have participation in decision-making that is free, fair and informed.

**Suggestion for recommendations to address the challenge:**

- Free, fair and informed consultation requires access to information, in languages and forms that are meaningful for the affected community.
- In some countries the legislation that applies to freedom of expression may need to be amplified to set out the right of individuals and groups to petition the state for information about matters affecting fundamental interests.
- Indigenous peoples must be able to participate in the design and implementation of the consultation process.
- The framework must recognize that indigenous peoples often don't have equal bargaining power in decision-making processes, vis-à-vis the state or large companies and mechanisms must be put in place so they have access to legal and other forms of advice. The African Commission Working Group on Indigenous Peoples could play a role in providing technical support to indigenous communities in this situation. [Would the Working Group be able to take on a project of coming up with some basic principles for free, fair and informed consultation?]

**Main actors to be involved:** This challenge requires multidisciplinary efforts. The state has certain obligations under national and/or international law, and is required to work with companies and other third parties to enforce applicable rules. In addition it must seek resources and cooperation from private actors [namely companies] for the development of more constructive approaches in this area.

**Note:** In the initial part of the chapter, it might be useful to cross reference the information about participation in land and natural resource management and decision-making (p. 68 of the English), because it is also crucial with respect to questions of land tenure and control. In connection with the right to be consulted, it might also be useful to briefly indicate that the right to freedom of expression includes the right to have access to information.

3. **Challenge:** When the state carries out development activities in indigenous peoples' traditional territories, or licenses third parties to do so, the community that is disadvantaged often receives little or no benefit. In more extreme cases, the exploitation of natural resources on indigenous lands has led to severe environmental degradation with devastating long-term effects.

**Suggestion for recommendations to address the challenge:**

- States must put standards in place to determine who should receive the benefits of such activities and how those should be allocated.
- In cases in which indigenous peoples have already experienced significant harm, including environmental degradation, remedial mechanisms must be put in place to restore the lands to the extent possible and compensate the losses experienced.
- Indigenous peoples must be consulted about how such remedial mechanisms would be designed and implemented.

**Main actors to be involved:**

- This would require action by all branches of government, as well as with large companies and civil society more generally.

4. **Challenge:** An important aspect of the right to consultation and participate in decision-making is participation in government, from the most local to the national level. Indigenous peoples and their cultures are seldom represented, so their forms of land tenure and resource management are not taken into account, and the economic or market structures related to land use often do not serve their needs or ways of life.

**Suggestion for recommendations to address the challenge:**

- This point could be cross-referenced to the more general section on political participation.
- In some instances, existing political structures have the effect of excluding or dissuading participation by indigenous representatives, in others it is a question of measures to support and enable such participation in conditions of equality with other candidates.

**Main actors to be involved:** The challenge of political participation requires action by the state, to ensure that the electoral framework enables candidates representing indigenous peoples to participate, and also requires work with political parties in particular.

5. **Challenge:** Our group found that many of the challenges identified have their roots in the incompatibility of the modern state and its legal framework with the customary structures and practices of indigenous peoples. The failure to take into account the views of indigenous peoples not only places them in a situation of structural disadvantage, it also means the state is failing to apply the rich experience and capacity of indigenous peoples to manage land and resources in a sustainable way.

**Suggestion for recommendations to address the challenge:**

- A number of the suggestions above go to this more general point.
- There should be a review of law, policy and practice to take into account the customs, perspective and lived experience of indigenous peoples.

**Main actors to be involved:** Since this is not just about laws, but also about attitudes and values, this would have to be a multi-sectoral effort, including not only different state entities, but also civil society, especially community-based organizations of affected indigenous peoples, national NGOs, lawyers' associations, media, international NGOs etc.

- 6. Challenge:** Indigenous peoples with populations that expand over one or more borders, or whose traditional practices include the movement of people and/or goods across borders face severe limitations in seeking to preserve their culture and in having freedom of movement. While international law seeks to protect indigenous culture, as the report indicates it has yet to produce comprehensive standards to assist states in this area, and national practices vary widely.

**Suggestion for recommendations to address the challenge:**

- Incorporation of more flexible visa and movement standards for members of indigenous peoples [carrying out activities of cultural significance].
- Establishment of bi-national commissions and/or agreements to facilitate their free movement, and the movement of goods [of cultural significance].
- This is an area in which regional organs of supervisions such as the African Commission on Human and Peoples' Rights, and its Working Group on Indigenous Peoples, working in conjunction or consultation with representatives from states, indigenous peoples and civil society more generally, could play a constructive role in generating some applicable standards.
- Vis-à-vis conflict (cattle raiding); the establishment of elders councils and joint committees comprising elders councils, government, NGOs etc.



## Group 3: Access to Justice and Socio-Economic Rights

### ACCESS TO JUSTICE

Issue/ Challenge	Recommendations to address challenges	Actors
<p><b>1. Geographic remoteness</b></p> <p>Indigenous people live in remote rural areas, far removed from cities and towns with formal courts</p>	<ul style="list-style-type: none"> <li>• Set up informal community judicial systems such as use of elders, recognized community leaders;</li> <li>• Establish traditional/ customary courts;</li> <li>• Establish mobile courts to specifically target areas where indigenous people live;</li> <li>• Ensure equal representation of indigenous people in court structures, e.g. have special desk for indigenous communities like we have for women, children, people with disabilities, etc</li> </ul>	<ul style="list-style-type: none"> <li>• Primary</li> <li>• Indige</li> <li>• Legitim</li> <li>of indig</li> <li>workin</li> <li>rights</li> </ul>
<p><b>2. Costs of legal proceedings</b></p> <p>High costs of legal proceedings hinders access to justice of indigenous communities</p>	<ul style="list-style-type: none"> <li>• Adequately funded legal aid which includes exemption of court fees for indigenous communities;</li> <li>• Adequate support to indigenous communities in the form of information dissemination, awareness campaigns by , for example Ministries/Departments of Justice, NGOs working on access to justice issues, etc</li> <li>• Guarantee legal aid as a right, including the right to be represented in a language that indigenous people understand</li> </ul>	<ul style="list-style-type: none"> <li>• Primary</li> <li>• Indige</li> <li>• Legitim</li> <li>of indig</li> <li>workin</li> <li>rights</li> </ul>
<p><b>3. Generally dysfunctional legal system</b></p> <p>General dysfunctionality of legal systems, including factors such as inexperienced and incompetent judges, court officials, etc</p>	<ul style="list-style-type: none"> <li>• Include legal training or sensitization programmes on indigenous processes in the formal legal training for judges;</li> <li>• Advocate for the representation of indigenous communities within the judicial system.</li> </ul>	<ul style="list-style-type: none"> <li>• Primary</li> <li>• Indige</li> <li>• Legitim</li> <li>of indig</li> <li>workin</li> <li>rights</li> </ul>
<p><b>4. Lack of knowledge of the law and language of the law</b></p> <p>Indigenous people's limited, and in most instances lack of comprehension and knowledge of the law, often due to language and other complexities of the law.</p>	<ul style="list-style-type: none"> <li>• Translation of laws into indigenous languages;</li> <li>• Guarantee in country constitutions as a right "the right to be tried in a language of choice , including the right to interpretation" during court proceeding</li> </ul>	<ul style="list-style-type: none"> <li>• Primary</li> <li>• Indige</li> <li>• Legitim</li> <li>of indig</li> <li>workin</li> <li>rights</li> </ul>
<p><b>5. Customary Law</b></p> <p>Lack of recognition of customary laws and practices</p>	<ul style="list-style-type: none"> <li>• Governments to undertake to record indigenous laws that can be used to train judges;</li> <li>• Guarantee in national constitutions traditional/ customary, as well as religious and linguistic rights, which are to be practiced within acceptable human rights standards;</li> <li>• Establish traditional/ customary courts, if non-existent and where present, provide the necessary legal recognition and support</li> </ul>	<ul style="list-style-type: none"> <li>• Primary</li> <li>• Indige</li> <li>• Legitim</li> <li>of indig</li> <li>workin</li> <li>rights</li> </ul>
<p><b>6. Alternative Institutions</b></p> <p>Limited alternative institutions for</p>	<ul style="list-style-type: none"> <li>• Establish traditional/ customary courts</li> <li>• Establish NHRIs with quasi judicial mandates</li> <li>• Empower existing NHRIs with special mandates to focus on indigenous people's rights</li> </ul>	<ul style="list-style-type: none"> <li>• Primary</li> <li>• Indige</li> <li>• Legitim</li> <li>of indig</li> </ul>

**Issue/ Challenge****1. Socio-economic rights  
incl. education**

Disproportionate impact of denial of socio-economic rights of indigenous people

**1. Intellectual property**

Intellectual theft of Indigenous people's traditional knowledge

**Recommendations to address challenges**

- In addition to the general affirmative action policies, states should build in special affirmative action processes/ dispensation specifically for indigenous communities;
- Encourage states to have socio-economic rights justiciable within their constitutions;
- Encourage respect of socio-economic rights with attention to the culture and traditions of indigenous people;
- Important to consult indigenous people on processes that impact on their lives rather than making decisions for them;
- Establish schools in indigenous communities with indigenous languages as the primary medium of instruction;
- States should provide special dispensation for intellectual property rights of indigenous people, i.e. a custodial protection of the rights of indigenous people

**Actors**

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indigenous people to access justice and where in existence, have limited resources to fulfil mandate

working rights

**CULTURE AND LANGUAGE**

<b>Issue/ Challenge</b>	<b>Recommendations to address challenges</b>	<b>Actors</b>
Denial of culture, language and religion threaten identity of indigenous peoples	<ul style="list-style-type: none"> <li>• Guarantee as a right "good cultural, religious and linguistic practices which are consistent with human rights standards</li> <li>• Recognise that indigenous people have the right to be educated in their own languages. This imposes a positive obligation on the state to provide that education</li> <li>• Establish heritage centres to preserve culture.</li> </ul>	<ul style="list-style-type: none"> <li>• Primary</li> <li>• Indige</li> <li>• Legitim</li> <li>• of indig</li> <li>• working</li> <li>• rights</li> </ul>

## Group 4: Egalité des genres ; enfants autochtones

### Egalité des genres

Questions/défis	Recommandation pour faire face aux défis identifiés	Acteurs principaux à identifier	Actions prioritaires
<b>Discrimination</b>	<ul style="list-style-type: none"> <li>• prévoir des lois protégeant spécifiquement les droits des femmes autochtones</li> <li>• Actions de sensibilisation, de renforcement des capacités en direction de tous les acteurs (Etats, OI, société civile, autres communautés...)</li> <li>• Les politiques et plans d'action protégeant les droits des femmes autochtones</li> <li>• La mise en œuvre de projets protégeant spécifiquement les droits des femmes autochtones</li> <li>• Un plan d'action régional impliquant les différents acteurs soit proposé par la CADHP</li> </ul>	Etats parlementaires Société civile/partenaires techniques Organisations régionales et internationales Chercheurs médias	Actions de plaidoyer et de lobbying auprès des décideurs politiques  Ratification de la convention 169 et la mise en œuvre effective des conventions ratifiées à travers des lois, des politiques et des programmes  Identifier et appuyer les ONG qui travaillent pour la protection des droits des PA
<b>Nécessité d'amélioration les conditions socio économiques et culturelles</b>	<ul style="list-style-type: none"> <li>○ Donner des bourses aux filles autochtones afin qu'elles puissent facilement accéder à l'école</li> <li>○ Mettre sur pied des écoles pour adultes dans lesquelles on retrouverait des femmes autochtones</li> <li>○ Inclure les problèmes spécifiques aux femmes autochtones dans les lois visant à mettre en œuvre les instruments juridiques de protection des droits des femmes à l'instar du Protocole sur les droits des femmes en Afrique</li> <li>○ Mettre sur pied des programmes et projets spécifiques de protection des droits des femmes autochtones</li> <li>○ La mise sur pied d'activités génératrices de revenus conformément à leurs cultures dans leurs milieux</li> <li>○ La revalorisation de la pharmacopée en milieu autochtone</li> <li>○ Mener des études visant à comprendre la culture autochtone</li> </ul>	Etats Organisations Internationales (organisations du système des NU...) Société civile (organisations autochtones, organisations d'appui)	<ul style="list-style-type: none"> <li>• Structuration des femmes autochtones en entités capables de les représenter</li> <li>• Comprendre la culture autochtone</li> <li>• Sensibiliser les services sociaux sur les spécificités des droits des peuples autochtones</li> </ul>

<b>méconnaissance de leurs droits</b>	Sensibilisation et renforcement des capacités sur leurs droits	Etats Institutions nationales des droits de l'homme Société civile OI et régionales (CADHP, OIT...)	Idem (voir recommandation)
<b>Déficit d'accès à la propriété,</b>	Adoption et mise en œuvre de politiques et de mesures temporaires positives qui tiennent compte de la culture autochtone (cantines scolaires, écoles et services de santé itinérants...)		
<b>Déficit d'accès à l'éducation</b>	Formation de personnel de santé autochtone		
<b>Déficit d'accès à la santé...</b>			
<b>La condition de femmes les fragilise notamment à travers les pratiques socio-culturelles, les violences physiques, la vulnérabilité face à certains facteurs tels que le VIH</b>	<ul style="list-style-type: none"> <li>• L'intégration de l'aspect genre dans les programmes et politiques existant</li> <li>• Sensibiliser les différents acteurs sur les droits spécifiques des femmes autochtones</li> </ul>	Etats Institutions nationales des droits de l'homme Société civile OI et régionales (CADHP, OIT...)	Sensibiliser les différents acteurs sur les droits spécifiques des femmes autochtones

### Enfants autochtones

Questions/défis	Recommandations pour faire face aux défis identifiés	Acteurs principaux à impliquer	Actions prioritaires
<b>discriminations</b>	<p>Intégrer la culture et la langue autochtone dans les curricula scolaires et de formation, Adapter le calendrier scolaire aux activités des peuples autochtones</p> <p>Campagnes de sensibilisation pour l'inscription et le maintien des filles à l'école</p> <p>rapprocher les services de l'état civil des milieux autochtones et les doter de moyens humains, matériels et financiers adaptés et suffisants.</p> <p>Insertion de dispositions spécifiques protégeant les droits des enfants autochtones dans les textes de lois y compris des mesures de discrimination positives (gratuité de l'école, gratuité des fournitures scolaires...)</p>	Etats et collectivités territoriales décentralisées Institutions nationales des droits de l'homme Société civile Organisations régionales et internationales (CADHP, OIT...)	Travaux de recherche sur les problèmes des enfants autochtones qui pourraient aboutir l'élaboration de textes de lois ainsi qu'à la mise sur pied de plans d'action
<b>Travail des enfants</b>	Les Etats doivent assurer le respect et la mise en œuvre des règles et principes visant	Etats Institutions	L'élaboration des mesures de

	à éliminer le travail des enfants conformément aux instruments juridiques internationaux	nationales des droits de l'homme Société civile OI (CADHP, OIT...)	protection sociale visant à protéger les droits des enfants autochtones
<b>Persistance de pratiques culturelles néfastes : MGF, mariages précoces, gavage... Tolérance et persistance des violences domestiques</b>	Adopter et mettre en œuvre des lois qui interdisent les pratiques coutumières néfastes et les violences domestiques Mettre en place des services d'accueil, assurer le soutien psychologique des enfants affectés	Etats Institutions nationales des droits de l'homme Société civile OI (CADHP, OIT...)	Sensibilisation des communautés sur les risques encourus par l'exercice des pratiques culturelles
<b>La prise en compte des droits des enfants handicapés</b>	Des mesures doivent être prises afin de tenir compte des problèmes rencontrés par les enfants autochtones handicapés au niveau des infrastructures sociaux de base	Etats Institutions nationales des droits de l'homme Société civile OI (CADHP, OIT...)	Scolarité gratuite, bourses d'études,
<b>Absence de données désagrégées sur les enfants autochtones</b>	Faire des recensements dans les communautés autochtones sur les enfants en âge d'aller à l'école	Etats Institutions nationales des droits de l'homme Société civile OI (CADHP, OIT...)	La mise sur pied d'un comité au niveau national ayant en charge de collecter les données désagrégées sur les enfants autochtones

#### Recommandations générales :

recommandation	Action prioritaire pour la mise en œuvre de la résolution	Acteurs principaux à impliquer	période
<b>Ratification de la convention 169 de l'OIT</b>	Actions de plaidoyer et de lobbying auprès des Etats Organisation d'ateliers d'information	OI Société civile Etats Parlementaires Institutions nationales de protection des droits de l'homme Peuples autochtones média	Janvier 2010
<b>L'élaboration d'une loi de promotion et de</b>	Implication de tous les acteurs dans l'élaboration des textes de loi (Gouvernements société civile, peuples	Etats Société civile CADHP	

<b>protection des droits des PA dans chaque pays</b>	autochtones...) Organisation d'ateliers d'information et de sensibilisation Enquêtes de terrain	Peuples autochtones Organisations internationales	
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