

**EXAMINING CONSTITUTIONAL, LEGISLATIVE  
AND ADMINISTRATIVE PROVISIONS  
CONCERNING INDIGENOUS AND TRIBAL  
PEOPLES IN AFRICA**

**WORKSHOP TO DETERMINE THE SCOPE AND  
METHODOLOGY OF THE RESEARCH**

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## PART I

### 1 Introduction and background to the research project

The International Labour Organisation (ILO) and the African Commission on Human and Peoples' Rights' (ACHPR) Working Group on Indigenous Populations/Communities in Africa (WGIP) jointly hosted a workshop to explore the research methodology and process to be adopted in a research project examining constitutional, administrative and legislative provisions within African states concerning the protection and promotion of the rights of indigenous communities on the continent. The Centre for Human Rights (CHR) University of Pretoria is the implementing institution and convened the workshop. The workshop was held in Yaoundé, Cameroon on 18-20 September 2006 and coincided with the hosting of a sensitisation workshop the previous week by the African Commission's Working Group on Indigenous Populations/Communities in Africa.

The workshop in Yaoundé was the first in a series of three workshops envisaged in a three year research project on the promotion of indigenous peoples' rights through the principles of ILO Convention No. 169 and the African Charter on Human and Peoples' Rights. The research project is an initiative of the ILO and the WGIP to examine the extent to which legal frameworks of African countries impact upon and protect the rights of indigenous peoples. The research project has two broad aims: The first aim is to contribute to the development of suitable policy and legal framework for the protection of the rights of indigenous peoples. The second aim is to build the capacity of relevant actors amongst indigenous peoples and government institutions. The workshop was held with the aim of garnering views and recommendations from various experts, actors, resource persons and some indigenous representatives on the most efficient and suitable way of conducting the proposed research.

The research will involve *inter alia* a comprehensive review of constitutions, legislation, case law, administrative and state policy in Africa with a view to determining the extent to which indigenous peoples' rights are protected within domestic legal frameworks of African Countries. The research will cover all the 54 African countries through desk reviews and a more detailed study of selected ten countries. This research is crucial to the promotion and protection of the rights of indigenous peoples in Africa.

The need for undertaking this research is premised on that fact that the rights guaranteed in ILO Convention No. 169 and the African Charter will not be meaningful unless they are actually guaranteed in the domestic legal framework. This is because the domestic legal framework is the one with which indigenous peoples have close contact and can easily access in the event that their rights are violated. Furthermore, ensuring compliance with ILO Convention No. 169 and the African Charter evidences a state party's commitment to the protection of the rights of indigenous peoples.

It is therefore important to carry out research in various African countries to determine the level of compliance with principles of ILO Convention No. 169 and the African Charter in protecting indigenous peoples. This is important in order to have a comprehensive database from which information on the domestic legal framework for the rights of indigenous peoples may be readily drawn. Such information will be useful to indigenous peoples themselves by providing a catalogue of information on the legal framework designed to protect them. Lack of information is a major hindrance to the realisation of rights generally and the rights of indigenous peoples in particular. The information will also be useful to defenders of indigenous peoples. The information will certainly be important to states in that they will have a source from which to draw information regarding their compliance with international standards protecting indigenous people. Similarly, states will be in a position to borrow best practices and learn from the experiences and legal frameworks of other states. The research is therefore not intended to expose states' failures to protect indigenous peoples but rather assist all parties concerned to ensure an effective protection of the rights of indigenous peoples.

The Yaoundé workshop was therefore held as a precursor to the proposed research in order to determine the methodology and scope of the proposed research project through engagement in consultations with relevant actors and experts in this subject area in the African region. Participants in the workshop included members of the ACHPR, the ILO, CHR (University of Pretoria), International Working Group on Indigenous Affairs (IWGIA), indigenous experts, other experts and researchers on subjects related to indigenous peoples, and NGOs working with indigenous peoples( See the annex for a description and contact details of the participants).

This report covers a summary of the main deliberations and recommendations arising from the workshop. It is divided into two parts. Part one is the introduction and also sketches the objectives and methodology of the workshop. It also covers the main issues highlighted in the ILO

Convention No. 169 training and a brief on the presentation on the African Commission's Working Group. Part two is subdivided into seven themes, following the headings and sequence in the research background paper for ease of reference and identification of the main issues and recommendation arising from discussions and presentations during the workshop.

### **1.1 Objectives of the workshop**

The following were the proposed objectives of the workshop by the implementing institution:

- Participants to discuss and agree on criteria that will assist in identifying the indigenous groups in Africa that the research should focus on.
- Participants to propose and discuss issues to be considered in order to achieve the overall aims and outcomes of the research project.
- A discussion and identification of the legal framework to be investigated in the research.
- A discussion and proposals on ways and means of enriching the scope of the research.
- Participants to give views and suggestions on a suitable and efficient methodology of executing the research project.
- Identification of existing research on indigenous issues in the African region.
- A discussion of the criteria for selecting the ten countries for the in-depth research that will assist the Steering Committee in making the final selection.

### **1.2 Workshop methodology**

Commissioner Rezag Bara, the chair of the African Commission's Working Group on Indigenous Populations/Communities in Africa co chaired the workshop with Ms Birgitte Feiring of the ILO. Professor Michelo Hansungule from the Centre for Human Rights, University of Pretoria, was the Workshop Rapporteur. Training by the ILO on 18 September 2006 preceded the workshop aimed at giving an overview of the project, the ILO's involvement with indigenous peoples' issues and standards on indigenous and tribal peoples. Basic principles and concepts for the protection of the rights of indigenous peoples were outlined, in order to provide guidance for the discussions on the scope and methodology for the research project that followed in the last 2 days of the workshop. Commissioner Rezag Bara also made a brief presentation on the African Commission's Working Group on Indigenous Populations.

The Rapporteur, made presentations on each theme based on the workshop background paper proposals during a plenary session. The participants then divided into four main groups (two English speaking and two French speaking) to deliberate and make recommendations during the report back session in plenary. Issues arising, comparative lessons and recommendations were discussed and where required, consensus was sought.

## **2 Presentation on the ILO Convention No. 169 and basic principles to guide the research**

Birgitte Feiring and Francesca Thornberry conducted and facilitated the ILO training which principally covered the general principles of ILO Convention No. 169 and its application. The training was also used as an opportunity by participants to discuss the main challenges and issues facing indigenous peoples in Africa. William Langeveldt, a participant and member of the United Nations Permanent Forum on Indigenous Issues, also presented and facilitated a discussion on indigenous rights and development, with specific reference to poverty reduction.

The main issues highlighted in the ILO presentation were:

- The training began with a brief on the ILO and its mandate of adopting and supervising international standards as well as technical cooperation. This was linked to the ILO's involvement with the issue of indigenous peoples which has a bearing on the present research project. It also covered some of the ILO standards relevant to indigenous peoples and workers generally. The presentation also highlighted the adoption and development of the ILO Convention No. 107 and No. 169 and their fundamental differences.
- The general principles covered by the ILO Convention No 169 on the rights of indigenous and tribal peoples were discussed such as:
  - Non-discrimination which was identified as a fundamental, cross-cutting principle of ILO Convention No. 169. Indigenous and tribal peoples have the right to benefit from the full range of human rights and fundamental freedoms without hindrance or discrimination. This includes general rights of citizenship; equality between men and women and non discrimination on issues of access to, and at work;
  - Recognition of the cultures and specificities of indigenous and tribal Peoples;

- The need to adopt and implement special measures in order to take into account the specific, often vulnerable situation of indigenous and tribal peoples, in addition to their cultural, economic and political specificities;
  - The need to ensure that indigenous peoples are consulted and participate in decision making. The elements for consultation should include but not limited to: prior consultation; in good faith; through appropriate procedures and processes; with the representative institutions of indigenous and tribal peoples and with the objective of achieving agreement or consent;
  - Indigenous peoples right to decide priorities for development; and
  - The presentation also identified some of the main challenges of implementing the Convention as follows: lack of legal recognition of indigenous peoples' rights at national level (particularly Africa and Asia) due to lack of political will; and lack of capacity of government and indigenous institutions at all levels for implementation of indigenous rights due to weak institutions and incoherence of legislation.
- The presentation also covered the criteria for identifying indigenous and tribal peoples on the basis of ILO Conventions No. 107 & 169 which was key and useful in understanding the Conventions' application and in guiding the ensuing discussion and debate on the criteria for identifying indigenous peoples in Africa. Some of the key issues and application criteria arising were that:
    - ILO Convention No. 107 of 1957 applies to indigenous and tribal peoples but was based on an outdated assumption that indigenous and tribal populations constitute temporary societies and as such the solution was to integrate them into the mainstream communities.
    - While ILO Convention No.107 still applies to countries that had ratified it, ILO Convention No. 169 is the main instrument that is currently relied upon. It applies to: tribal peoples vest with distinct social, cultural and economic conditions and whose status is regulated wholly or partially by their own customs or traditions or by special laws or regulations; and indigenous peoples who descend from populations which inhabited the country or region at the time of conquest, colonization or establishment of state boundaries and irrespective of their legal status retain some or all of their own social, economic, cultural and political institutions.

- ILO Convention No. 169 is also particularly useful by providing that ‘self-identification’ shall be regarded as a fundamental criterion for determining the groups, which is a criterion that has been endorsed by the African Commission’s Working group and other international processes.
- In conclusion and in order to guide the discussion that would ensue, especially on the criteria for identifying the groups that the research would focus on, the presenters cautioned against using the ‘definition debate’ as a pretext for not addressing issues affecting indigenous peoples in Africa. The need to focus on substantial issues, as opposed to becoming held back by the definition debate, was highlighted.
- It was therefore pointed out it was more important and crucial to address the issues and rights claimed by indigenous peoples through respect for indigenous and tribal peoples as a principle of good governance and human rights. On the issue of terminology it was suggested that given the lack of consensus on a single term, the research could employ national and/or local terms as found suitable.

### **3 Presentation on the African Commission’s Working Group on Indigenous Populations**

Commissioner Rezag Bara made a brief presentation on the involvement of the African Commission on Human and Peoples’ Rights on the question of indigenous peoples on the continent. He revealed that the African Commission was initially opposed to the concept of indigenous peoples in Africa and it was until the Commission’s 29<sup>th</sup> ordinary session, through the intervention of former Commissioner Barney Pitso Moseneke that the issue was granted audience and have since been on the agenda of all the Commission’s ordinary sessions. A Working Group was subsequently established in 2001 to among others examine the concept of indigenous populations/communities in Africa; study the implications of the African Charter on Human and Peoples’ Rights on the well being of indigenous communities; and consider appropriate recommendations for the monitoring and protection of the rights of indigenous populations/communities.

He stated that the Working Group had among other researches, studies and missions, since produced and disseminated a report which would be important for the present envisaged research in providing guidance particularly in understanding the concept of indigenous peoples in Africa.

This he stated was particularly due to the fact that the concept was very controversial on the continent mainly due to misunderstandings and the unique circumstances of all communities in Africa with reference to colonial history. He emphasised that the question of indigenous peoples in Africa should be approached with caution and not generalised in a bid to ensure that groups who identify themselves as such, and are marginalised, discriminated and exhibit unique cultural and traditional way of life, are protected.

## **PART II**

### **1 Criteria for identification of indigenous peoples in Africa**

#### **1.1 Summary of the Rapporteur's presentation**

The Rapporteur reiterated the fact that the concept of 'indigenous peoples' is controversial in Africa especially among governments due to the varied connotations attached to the term and the belief that all Africans are indigenous to the continent. However, he pointed out that whilst acknowledging that indeed most Africans, can claim to be indigenous, on the basis that they originate, since time immemorial to the continent, the term 'indigenous peoples' is today applied by certain groups to seek rights and protection that accrue from international standards protecting similarly situated peoples. The Rapporteur emphasised that it was therefore more important to outline the major characteristics that can help identify indigenous peoples in Africa, rather than engage in semantics of who is indigenous. He noted that this was indeed the approach adopted by the WGIP, the ILO and other international processes engaged with indigenous peoples.

#### **1.2 Summary of debate and issues arising**

Discussions ensued after the ILO Convention 169 presentation and the Rapporteur summary of the Workshop background paper proposals on the criteria for identifying indigenous peoples on the continent. Given the controversial nature of defining 'indigenous peoples' in Africa, participants agreed that there was no need to revisit the debate but rather settle for criteria that would assist in identifying the groups the research would focus on. However, in order to have a common understanding and for purposes of identifying the groups that form the subject of the research, the approach of the ILO Convention No. 169 and the African Commission's Working Group, as outlined on day 1 of the workshop, was endorsed. This approach identifies the issues

affecting and not indigenous peoples specific groups, focusing on the social, cultural and economic similarities amongst indigenous peoples.

There was debate as to the use of the terminology ‘tribal’ and ‘indigenous peoples’ in Africa on the grounds that the terms were controversial and evoked unnecessary debates and denials by states and other communities. It was agreed that for purposes of the research the terminology ‘indigenous peoples’ would be applied for the English translations and for the French, the term ‘peuples *autochtones*’ and not ‘*peuples indigènes*’. It was noted and agreed by participants that the use of the term ‘tribal peoples’ is not suitable for the research due to its colonial and negative connotations.

While endorsing the criteria identified in the workshop background paper for identifying indigenous peoples, participants recommended that the research should identify indigenous peoples on a country-by-country basis. This was due to the fact that different countries perceived the issue differently and there was need to ensure that the research took into account the diversity of the groups. It was noted that indeed in some countries the issue of indigenous peoples might not be an issue in reality and not mere political denial like in others. However, it was agreed that the research should investigate all the countries bearing in mind the different dynamics and situation of indigenous peoples on the various countries on the continent.

### **1.3 Recommendations**

The following criteria were therefore proposed by participants as providing a guide to groups identifying themselves as indigenous peoples on the continent and will therefore be utilised for purposes of the research:

- Indigenous peoples are socially, culturally and economically distinctive.
- Their cultures and ways of life differ considerably from the dominant society and their cultures are often under threat, in some cases to the extent of extinction.
- They have a special attachment to their lands or territories. A key characteristic for most indigenous peoples is that the survival of their particular way of life depends on access and rights to their traditional lands and the natural resources thereon.
- They suffer discrimination as they are regarded as ‘less developed’ and ‘less advanced’ than other more dominant sectors of society.

- They often live in inaccessible regions, often geographically isolated and are subjected to various forms of marginalisation, both politically and socially.
- They are subject to domination and exploitation within national political and economic structures that are commonly designed to reflect the interests and activities of the national majority.
- In addition to the criteria outlined above, participants highlighted the primary importance of self-identification, whereby the people themselves acknowledge their distinct cultural identity, way of life, and seek to perpetuate and retain their identity.

## **2 Research aims and outcomes**

### **2.1 Summary of Rapporteur's presentation**

The Rapporteur presented the aims of the research project as follows:

- The research will contribute to the development of suitable policy and legal framework for the protection of the rights of indigenous peoples; and
- It will build the capacity of relevant actors for example, governments and indigenous peoples.

He identified the research outputs as to:

- Produce a comprehensive report which would be translated into the four official languages of the AU; and
- Develop a database accessible through the internet of a comprehensive review of the domestic legal framework of African countries.

### **2.2 Issues arising and recommendations**

To achieve the research aims and objectives, the participants suggested that the following issues and recommendations should be factored in the execution of the project:

- Throughout the research there should be coherence of the terminology 'indigenous peoples' and stick to the broad conceptual framework outlined in ILO Convention No. 169 and the African Commission's Working Group's Report.
- There should be a problematisation of the indigenous peoples issue whilst examining the legal framework. This could be in the form of a clear explanation of the need to

undertake the research and the legal framework to be surveyed. The research should therefore not just restate the *status quo* but rather analyse the existing legal framework. The research should clearly highlight the context within which the research is conducted and the reasons why it is necessary to conduct such research. For example, it should highlight the lack of adequate legal framework, lack of knowledge of indigenous peoples' rights and point out how the research fits into the broader ILO/ACHPR project.

- There should be clarity of aims of the research, particularly on capacity building, which should mainly focus on information sharing amongst stakeholders.
- Indigenous women and children issues should be mainstreamed across all themes and issues, and not addressed as singular and specific elements. However, where necessary, specific issues bedevilling indigenous women and children should be highlighted. Participants noted that indeed women and children were specifically vulnerable and as such, even in a broad analysis and discussion in the research there was need to highlight and emphasize their particular vulnerabilities.
- The research should focus on implementation mechanisms and not just what is provided for in legislation and international instruments by for example assessing the impact of provisions and stipulations of the legal framework. The implementation of the legal framework should therefore be reflected clearly in the objectives of the research.
- There is need to broaden the range of stakeholders beyond indigenous peoples and governments by engaging other relevant actors in the research such as development agencies, human rights institutions, academic and research institutions.
- The research team should facilitate a comprehensive dissemination strategy of the report which could include strategic launches, and translations to some key non official African Union languages such as Swahili. It should also consider other means of dissemination of the report targeting indigenous communities in a user-friendly manner.

### **3 Scope and format of the research**

#### **3.1 Summary of the Rapporteur's presentation**

The research will cover all the 54 African Union member states. However, a more extensive research will only cover 10 countries. The 10 countries will be based on the five regions of the AU in the research project that will last until the end of 2008.

The scope of research is limited to the legal framework affecting and protecting indigenous peoples. However, other laws, administrative policies and institutional mechanisms generally will

be explored. The research will entail a description of the existing formal legal 'framework' regarding the protection of the rights of indigenous communities, according to substantial categories as identified in a proposed research template. Practical insights regarding the implementation mechanisms and actual implementation of such provisions, including institutional and process-related implementation issues, focussing in particular on the participation of indigenous and tribal peoples in action to implement legal instruments that concern them. This information will be organised according to substantial categories as proposed in the template. The template is based on sixteen main themes as inspired by the provisions of the ILO Convention No. 169 and the African Charter on Human and Peoples' Rights. It will highlight relevant constitutional, legislative provisions and case laws affecting and protecting indigenous peoples in each country. This will be based but not limited to the identified themes in a bid to analyse the extent to which such provisions comport to the ILO Convention No. 169 and the African Charter on Human and Peoples' Rights.

Each template will have a brief factual background on each country's legal framework and an analysis of how it impacts upon and protects indigenous peoples. The template will then be furnished with relevant information on the basis of the sixteen themes and related sub themes classified as either constitutional, legislative, case law, policy and existing institutional support. The information will mainly comprise of specific provisions and for case law the case citations, final decisions and references. The institutional framework will identify and list institutions and organs dealing with and protecting indigenous peoples' specific issues and themes in each country.

An analysis should thereto be made highlighting and discussing the implementation mechanisms and institutional framework. It should measure the impact and extent the legal framework impacts upon and protects indigenous peoples by means of various standards and indicators. The template (attached hereto as an annex) includes the following main themes:

- Cultural rights
- Identification
- Territories (Lands and natural resources)
- Participation
- Autonomy
- Environment
- Language
- Health
- Education
- Economic rights

- Religious and spiritual freedom
- Indigenous women
- Indigenous children
- Family rights
- Indigenous peoples in border areas
- Indigenous institutional and policy bodies

### **3.2 Summary of discussions and issues arising**

There was debate as to whether to limit or broaden the scope of research due to limitations of time, resources and capacities which need to be weighed against the need for comprehensive research. There was also concern that the proposed time frame may be inadequate and therefore a challenge to fit the objectives of the research within the time available noting that the thematic content of the research seemed too wide in as much as all the categories identified were important

It was noted that it is absolutely necessary to ensure that the research did not suffer from a legitimacy crisis due to generalisation of issues instead of making an adequate and deep analysis. To address the concern of generalisation and scope of the research it was suggested that the format of the final report could be a common core document covering cross-cutting information and background details with individual country reports using identical topical templates, which would satisfy both the desire to be comprehensive and the need to have manageable sized reports.

### **3.3 Recommendations**

The following recommendations were made with a view to enriching the scope of the research:

- It was suggested that one way of limiting the scope of the legal framework to be examined, is by focusing on the core issues or core claims made by indigenous peoples. The following were identified as some of the core claims often made by indigenous peoples at various fora: the right to political participation, non-discrimination, cultural rights and land rights. In this regard the research could limit itself to examining the extent to which the domestic legislation makes provision for these rights or claims. It was however noted that different regions will have different concerns, and thus the scope of research needs to take this into account and therefore should avoid a narrow focus.
- The research could also regroup the thematic issues under main broad categories: civil and political rights; economic, social and cultural rights; and group rights (right to development, indigenous collective and land rights).The substantial categories of the

- research should also include: access to justice, intellectual property rights, conflict/humanitarian issues, civil and political rights including political participation.
- The research and the reports should be structured into the substantial categories but identify additional categories according to the specific country's context in which the research is taking place. This would ensure that the research will reflect and address the specific needs at the country level.
  - In relation to gender, the issue should be a mainstreamed element of each thematic issue rather than a standalone issue. Every issue must be looked at not only in 'generic' indigenous terms but from the perspective of how they may be protected and realized differently for men and women. It will also be important to measure the extent indigenous women are protected in a given country .
  - Whilst acknowledging the special vulnerabilities of women and children, it was agreed that there is need to define the extent to which the research will focus on the issue of women and children without deviating from the broad objectives of the research. In this regard, the participants recommended that the research should only highlight certain issues with respect to women and children such as domestic violence, child labour and discrimination.

#### **4 Legal framework to be investigated in the research**

##### **4.1 Summary of the Rapporteur's presentation**

The Rapporteur highlighted the proposed legal framework to be investigated as outlined in the workshop background paper. This essentially entails a survey of the domestic legal framework which would include national constitutions and statutes. For example, the research will examine the extent to which provisions have been made for the rights of indigenous peoples. In the event provision is not made for the rights of indigenous peoples, then the research will explore ways in which the legal framework can be brought in line with international law. The legal framework includes instruments that may not be directly geared towards indigenous peoples but nevertheless impacts on the rights of indigenous peoples. Examples of such instruments are land statutes, local government legislation, forest legislation, water statutes and environmental statutes.

Over and above legislation, the research will also examine administrative policies, circulars and directives. The research will also examine the extent to which customs, usages and traditions are recognised while acknowledging that some of them might be controversial. It was observed that

some countries recognised dual land tenure laws and that the majority of people were actually governed by customary law, which might not be easily identifiable on the ground.

Case law would also be examined due to its importance as part of the domestic legal framework and as a source of law. Superior courts' decision will be examined as would decisions of inferior courts which may be useful to the extent that they may be pointers to the law. The research will also examine implementation as an integral part of the research. For example the research will examine the enforcement of court decisions and whether they are made a practical reality for indigenous peoples.

#### **4.2 Debate and issues rising**

It was noted that in most African countries, the reporting system is still lagging behind and therefore it might be difficult to have access to relevant jurisprudence. Concern was also raised of the unavailability of official data and statistics with respect to administrative policies and directives. Participants and their networks were called upon to avail useful data and information to the research team whenever called upon and when seized with relevant information that would enrich the research. It was also suggested that statistics could also be sought from sectoral ministries, the central statistics offices as well as United Nations agencies.

The difficulty of discerning customs, traditions and practices was also highlighted in most countries in Africa. It was therefore suggested that there is need to bring out the status of traditions and customs in various countries in the research which might sometimes be traced from court rulings, particular traditional and local courts. Access to justice was cited as a key issue that did not feature prominently in the Rapporteur's presentation which should be captured prominently by the research.

#### **4.3 Recommendations**

The following issues and recommendations emerged in relation to the legal framework to be investigated in the research

- The research should examine other non-legal mechanisms and policies and not just legislation and constitutions. Examples of the non-legal measures that should be investigated would include non technical parameters or instruments that regulate life in a

polity for example policies such as poverty reduction strategy papers (PRSPs), ministerial directions, circulars, development plans and such others which have implications on life, cultures and existence of indigenous peoples.

- The issue of access to justice should be included, both as part of the legal framework analysis and as a separate thematic issue (including key elements such as language, literacy, knowledge of legal systems, prejudice and discrimination in legal systems and access to information).
- The legal framework should also include amicable solution mechanisms sought by indigenous peoples such as out of court land settlements.
- In considering international legal obligations in each country, the research should consider not only the relevant texts but also state reports, concluding observations for example under the African Commission on Human and Peoples' Rights, the United Nations treaty monitoring mechanisms and the ILO Conventions and recommendations, and the ILO's supervisory system.
- The research should encompass both implementation and monitoring and it was therefore recommended that following should be added to the list of implementing institutions/mechanisms: NGOs, legislatures, media, external development cooperation institutions such as the World Bank, the African Commission which play key monitoring roles.
- The research should also consider the implementation mechanisms employed by multi-lateral institutions such as the international finance institutions for example the World Bank, IMF, African Development Bank and conservation agencies.
- The research should also examine domestic implementation of international obligations. In other words, the research should analyse how international law is implemented domestically and the extent to which it is being done effectively.
- The legal framework should also consider national colonial archives, laws and treaties signed between states and indigenous peoples.
- While investigating the legal framework, fundamental consideration should also be given to the level of participation of indigenous peoples in the drafting process possibly through a public consultative process and particularly the implementation of the legislation and related institutional and administrative framework.

## 5 Methodology of the research

### 5.1 Summary of Rapporteur's presentation

Noting that the research would have both an in-depth study for ten selected countries and 54 desk top reviews, the Rapporteur presented the Implementing Institution's proposals on the methodology of the research. On desk reviews:

- The CHR, University of Pretoria team will develop a questionnaire and research template to guide the desk research
- Using the template as a starting point, the team will gather relevant information and conduct an analysis of issues arising paying special regard and attention to the legal framework's impact and protection of indigenous peoples/communities.
- The Centre for Human Rights' resource persons will conduct desk research on all the 54 countries in Africa to gather information on the current legal and constitutional protection of indigenous populations in the countries under study with a special emphasis on the situation of women and children. This research will mainly rely on Constitutional and legislative provisions of all the countries *vis a vis* the ILO Convention No. 169, the Draft Declaration on the Rights of Indigenous Peoples, the African Charter on Human and Peoples' Rights, and the African Commission's Working Group Report.
- Copies of constitutions, relevant legislations, judicial precedents, cases, policy documents will be acquired for further analysis and establishment of a data base.
- It will also entail review and analysis of domestic court's jurisprudence from information gathered from indigenous peoples on efforts they have mounted to espouse their rights.
- Government policies, directives and related mechanisms will be sourced from Government and other official sources based on information and data seized from indigenous peoples and other stakeholders such as universities, human rights organisations and agencies.
- For all the countries, including the detailed 10 case studies the CHR and its resource persons will carry out and coordinate the desk reviews through the assistance of the Centre's alumni throughout the continent, contacts and partner institutions.
- The research team will on the basis of information gathered from the desk research identify key issues that call for primary sourcing, corroboration and feedback from various stakeholders in the countries under study.

Following the initial desk reviews, ten selected in-depth country research will be conducted, and the following factors will be considered in implementing the in depth research:

- The in-depth study will seek to interact with woman and children among indigenous peoples to gather attitudes, experiences and proposals on possible best practices.
- The in-depth study will vary from the desk reviews which will rely heavily on secondary materials in that primary sources will be sought to corroborate and provide first hand experiences on how the legal framework affects and protects indigenous peoples in the countries under study
- The resource persons from the Implementing Institution will identify and establish contact with relevant government institutions and officials, relevant indigenous peoples/communities/populations' representatives and organisations, human rights institutions, law societies, universities, and other stakeholders for corroboration of archival information and data to facilitate subsequent country visits.
- Where necessary, country visits will be conducted in order to document, analyse and acquire copies of relevant legislation and judicial precedents for establishing a comprehensive database. These country visits will also engage in consultations with relevant actors to determine the level of effective implementation of constitutions, legislative and administrative provisions, and to determine the good practices and challenges in their implementation.
- Where necessary, indigenous and other resource persons will be engaged in order to provide advice, and engage in more in-depth consultations at the national level
- The in-depth research will involve as much as possible the participation of indigenous organizations, and communities, ensuring gender and age balance in any relevant consultations through interviews, interactions, consultation meetings and general discussions as necessary
- Report writing and submit six monthly activity reports that will form part of the final report for dissemination during final two workshops.

## **5.2 Debate and issues arising**

Participants noted that while the draft template sought to capture most of the issues that concern indigenous peoples' issues, there was need to ensure that the core claims made by indigenous peoples were particularly investigated. It was therefore necessary to formulate a research guide rather than a questionnaire to ensure consistency and give room for variances in the different case

studies. The research guide should also provide thematic guidance on what exactly to investigate. It was noted for example that reference to indigenous peoples in various countries may come in various terminologies which could be couched in different terminology, such as vulnerable groups or marginalised communities.

The need to measure impact and implementation of the legal framework was underscored. The use of various indicators to measure the level of compliance could be discerned from examples such as the number of domestic court cases and level of awareness of such decisions affecting indigenous peoples as well as from other indices developed by international organizations. The involvement of national partners and participants in the workshop to provide expertise, information and guidance was also called upon.

### **5.3 Recommendations**

While endorsing the research methodology proposed in the background research paper, the following issues and recommendations arose:

- The questions to guide the research should be formulated as a research guide rather than a 'questionnaire'.
- The role of indigenous peoples should be taken into account as part of the consultation especially in identifying some of the country specific issues and groups the research should focus on.
- Clear criteria should be applied to identify the researchers and organisations to consult. For example, in the selection of the research team, gender balance and indigenous peoples' representation should be factored in to ensure credibility and ownership of the project.
- The implementing institution should identify and work with local partners/experts in various countries if necessary to assist in some elements of the research and conduct field work.
- There is need to ensure that the researchers are conversant with the different languages and cultures on the continent where they will be undertaking the research. It was suggested that resource persons to be involved, including past students of the Centre for Human Rights, should be persons working in the interest of indigenous peoples.
- The research team should identify organisations that represent indigenous peoples to take part in the decision making, and in undertaking the actual implementation of the research.

- The research team should identify and conduct interviews with lead resources in all the countries under study who would give the real and exact information.
- There should be thematic guidance on what exactly to investigate. For example reference to indigenous peoples in various countries may be couched in different terminology, such as vulnerable groups or marginalised communities.
- Appropriate impact assessment measures and indicators should be identified and developed. It was suggested that the research team could benefit from indicators developed or in the process of being developed by development agencies such as UNDP, World Summit on Sustainable Development, the Inter-Agency Support Group on Indigenous Issues and the UN Permanent Forum on Indigenous Issues.
- The use of indicators should for instance measure the extent to which people are aware of and know of the existence of the legal framework. The extent people use the laws could be discerned for example from the number of cases or administrative procedures available for espousing indigenous peoples' rights and claims in each country, and the number of successful outcomes in this regard.
- While carrying out the research, professional ethics must be adhered to for instance free, prior and informed consent before undertaking interviews and research amongst indigenous peoples as well as ensuring appropriate acknowledgement of the sources of information including oral information.
- An advisory group to be consulted through out the process should be established who will guide and conduct periodic reviews on the progress of the research.
- Each country should have a reader in the finalisation of the report who would also act as a reviewer.
- The use of various terminologies in the research either in French or English may have different meanings and as such there is need to ensure the research employs more inclusive terms that are also gender sensitive.
- For the 10 countries the in-depth research will be undertaken there should be indigenous peoples' focal points in each country who would facilitate the research and involve the indigenous communities.
- There should be a higher focus on implementation mechanisms, and not just the international and national legislation and obligations. The research should therefore place high importance on measuring the impact on the ground of the various legislative instruments and implementation mechanisms.

- A broader range of actors should be involved in the project and not just indigenous peoples and governments such as universities, media, private sector, development agencies and such other relevant actors in a state.
- The dissemination and use of the research as an advocacy tool and instrument for sensitization in the region should be of key importance through launches and translation into indigenous peoples' languages.
- The dissemination of the report should use modern technology such as CD roms for wider circulation.

## **6 Identification of existing research on indigenous issues in the African region**

### **6.1 Summary of Rapporteur's presentation**

The Rapporteur highlighted some of the main sources the research will seek information, data and lessons. He noted that there exists relevant and related research on the issue of indigenous peoples on the continent by the African Commission's Working Group, United Nations bodies and institutions particularly the ILO, International Work Group for Indigenous Peoples (IWGIA), various Non Governmental Organisations (NGOs) and academic publications.

The Rapporteur however drew a distinction between the existing literature with the proposed research in that the envisaged research will be *sui generis* with reference to a comprehensive review of the domestic legal framework in Africa. None other research, he noted has attempted to do such an analysis, stating that it would cover all the 54 countries and is aimed at setting standards and provide a unique and detailed reference database of the domestic legal framework protecting indigenous peoples on the continent. The Rapporteur invited submissions and further suggestions from participants and other stakeholders which he said will continue being received and reviewed even after the commencement of the research.

### **6.2 Recommendations**

Apart from the literature identified by the background research paper, the following additional sources of information were suggested for consideration as references:

- Indigenous peoples' organisations could be requested to submit their publications and information of relevance to the research for example there is a Socio Economic Report on Rwanda by CAURWA.
- Available research by scholars and activists on indigenous issues should be consulted.
- The Integrated Regional Information Networks (IRIN) which is a humanitarian news agency covering *inter alia* sub-Saharan Africa, and contains a summary of all the indigenous peoples in Africa and is available online.
- Reports and concluding observations of the ordinary sessions of the African Commission on Human and Peoples' Rights and proceedings of the NGO forum that precedes the ordinary sessions.
- ILO Committee of Experts Reports.
- International Work Group for Indigenous Affairs (IWGIA) reports publications and website.
- United Nations treaty bodies information and reports from Charter bodies including reports of Special Rapporteurs.
- The implementing institution should consider making an appeal and request for information relevant to the research in the form of a brochure with contact information and brief of the project aims and objectives during the public session of the ordinary sessions of the African Commission and also circulate it to partners and networks.
- There is a compilation of laws related to environment and land in DRC and Cameroon by USAID which was suggested by Dr Barume.
- The Centre for Legal Aid at the University of Dar Es Salaam headed by Prof Ringo Tenga has a useful information resource on indigenous peoples' issues.
- NEPAD-Peer Review Reports on South Africa, Rwanda, Ghana, Kenya and others that will be forthcoming could be provide vital information
- Minority Rights Group International Reports for example the World Directory o Minorities.
- World Bank Website especially on poverty reduction strategy papers.
- United Nations Commission on Human Rights Guidelines on Human Rights approach to development.
- CIA Country profiles.
- US State Department profiles.
- OXFAM GB office in Nairobi has a lot of information on pastoralism.

- Khartoum University has a useful resource on pastoralists in Sudan.
- TAMAYNUT/ILO study on customary law.
- Netherlands Centre for Indigenous Peoples (NCIV) Netherlands.
- The Dutch development foundation (CORDAID)(Netherlands).
- CEFAC.
- Central Africa Forests Commission (COMIFAC).
- Committee for Economic development (CED) Reports in Cameroon
- African studies institutes.
- IRCAM (Instut Royale de la Culture Amazigh, Morroco).
- Boutrais, J., La Haute terre : Cameroon.
- AGE Research on pastoralists in Sudan
- Library of Congress has most of printed information in the world.
- World Bank country offices.
- Bilateral and aid agencies such as USAID, DANIDA.
- The Pastoralist Network in Ethiopia would be a source of information on pastoralists in Ethiopia.
- Forest Peoples Programme website and publications.
- In North Africa, the University of Morocco and other Universities should be consulted.
- All other countries university libraries, are also important sources of information

The list is certainly not exhaustive and the research team as well as participants would explore more sources of information particularly on a country-by-country basis as well as seek other possible sources via email and correspondences.

## **7 Selection criteria for countries in which the research will take place**

### **7.1 Summary of Rapporteur presentation**

The Rapporteur enumerated the criteria proposed by the implementing institution in deciding the ten countries the in depth research would focus on, as follows:

- The selection must ensure regional representation of the five main regions in Africa: Southern Africa, Eastern Africa, Central Africa, West Africa and North Africa.
- It must be representative of the main legal systems in Africa: Common law, civil law and Islamic (Shari'a) law.

- The two main groups identified as indigenous peoples based on economic activities namely hunter-gatherers and pastoralists must be considered.
- Logistical considerations such as accessibility, established and existing contacts with organisations working on indigenous issues will be considered.
- The research should not duplicate existing research, and should not be carried out in countries in which extensive research has already been undertaken
- The existence of innovative developments and best practices in the protection of indigenous people especially women and children.
- Relationship of the country with the African Union and the International Labour Organization.

## **7.2 Debate and issues arising**

While endorsing the criteria proposed by implementing institution, the following issues were raised and suggested for consideration in identifying the 10 countries for the in- depth study:

- The research should not be limited to pastoralist and hunter gatherers, since in some instances there are indigenous farming communities.
- There was debate as to whether limiting the countries for the survey to two per region would not exclude or limit the extent some indigenous groups for example the Batwa would be considered in the study. There were suggestions that Central Africa should further be subdivided into Central Africa and the Great Lakes region to take into account the diversity of the region's indigenous peoples and the large number of Batwa people in the area.
- However, some participants noted that this being a legal research the question of demographics should not be the biggest considerations. The issue of numbers or demographics should therefore not be the main criterion. Rather, the key criteria should be a study where the outcomes of the research would best inform or representative of the precarious situation faced by indigenous peoples on the continent.
- Some participants were of the view that using the AU regional system for regional representation might be limiting, and recommended that some regions could be sub divided to ensure equitable representation in the research.
- In choosing the countries to represent each region for the in-depth study, there was need to contrast effort and non-effort as criteria to be applied, juxtaposing best practices with lack of achievements and reluctance to address indigenous issues.

- It was suggested that a crucial factor for consideration should be accessibility of the country for the in-depth research. However, it was agreed that it was also important to include countries where indigenous peoples' issues have not been researched thoroughly. This was notwithstanding the level of accessibility since the failure to conduct research on the basis that the country was inaccessible, continued to exclude research in certain communities. For example in Congo (Brazzaville) in as much as indigenous peoples issues are now being addressed objectively, there exists little research.
- It was agreed that the research should not be reinventing things but should complement existing research as highlighted in the audit of the research. It was agreed that there was no need to duplicate efforts and as such it was useful to conduct research that will add value to the question of indigenous issues in Africa.
- There was consensus that the research should be of high quality and in-depth such that it would be a reference point for countries that would need to improve as well as avoid or learn from mistakes made by others.
- It was proposed by a participant that Cameroon should be one of the countries where the in-depth study should take place on the grounds that: It was an example of one of the few African Countries which was not hostile to the issue of indigenous peoples and had both the easily recognizable groups of indigenous peoples: pastoralists and hunter-gatherers.
- While Morocco is not a member of the African Union, it was agreed that it would be included in the desktop research owing to the progressive developments taking place in the country as well as its strategic importance in North Africa with reference to indigenous peoples' issues.

## **8 Conclusion**

The Steering Committee of the project was mandated to make a final decision on the 10 countries where the in-depth research would take place. It was also agreed that there was need to ensure that the research contributes to the aim of capacity building and that participants at the workshop and other identified stakeholders are involved in the project implementation and dissemination. This would be realized through implementing of the recommendations and giving due regard to the issues raised under the various themes.

## **Annex 1**

### **Proposals on the 10 countries for the in-depth research**

Subsequent to the Yaounde workshop, and in view of the suggestions and issues raised with regard to selection of the 10 countries for the in-depth research, the implementing institution proposes that the in-depth study be undertaken in the following countries:

- **Southern Africa:** South Africa and Namibia
- **Eastern Africa:** Kenya and Ethiopia
- **Central Africa:** Central African Republic and Burundi
- **Northern Africa:** Algeria and Egypt
- **West Africa:** Mali and Nigeria

**Note:** While countries for in-depth study in Southern and Eastern Africa are already settled, discussion and consultations are still ongoing to determine the countries to represent the other three sub regions. Desk top research is currently ongoing for all the 10 countries and it will be useful in providing relevant information on the need and viability of conducting in depth research in the suggested countries.

## Annex 2: List of participants

	PARTICIPANT'S NAME	Organizational affiliation	Email contact details
1.	Dr Naomi Kipuri	Member of the African Commission's Working Group and indigenous peoples representative from the Arid Land Institute( Kenyan NGO)	aridlands@iconnect.co.ke
2.	Mr. Korir Singoei	Director -Centre for Minority Rights Development- Kenya	Korir.singoei@cemiride.info
3.	Mr. William Langeveldt	Member, United Nations Permanent Forum on Indigenous Affairs( South Africa)	langeveldtw@yahoo.com
4.	Ms Liberate Nicayenzi	Member of Parliament and representative of an indigenous NGO in Burundi (UNIPROBA)	liberateni@yahoo.fr
5.	Mr. Valentin Mavoungou	Direction Generale de Droits Humains et da Libeits fundamentals (Congo)	mvconsulting1955@yahoo.fr
6.	Prof. Michelo Hansungule	Centre for Human Rights University of Pretoria	hansungule@postino.up.ac.za
9.	Mr. Hitous Abdallah	Representative of a indigenous NGO (Tamarymut) Morocco	abdamazigh@hotmail.com
10.	Ms. Saoudata Aboubacrine	Representative of a indigenous NGO from Burkina Faso(TINHINAN)	tinhinan@yahoo.fr
11.	Mr. George Mukundi	Centre for Human Rights University of Pretoria	mukundi@saifac.org.za
12.	Mr. Kealeboga Bojosi	Centre for Human Rights University of Pretoria	Kealeboga@saifac.org.za
13.	Mr. Zephyrin Kalimba	Member of the African Commission's Working Group and indigenous peoples' representative from CAURWA( Rwandan NGO)	caurwa@rwanda1.com
15.	Adv. Tseliso Thipanyane	CEO, South African Human Rights Commission	tthipanyane@sahrc.org.za
16.	Ms Francesca Thornberry	ILO- Geneva	thornber@ilo.org
17.	Mr. Thwadi Komane	ILO- Pretoria	komane@ilo.org
18.	Commissioner Kamel Rezzag-Barra	Member of the ACHPR and Chairperson of the African Commission's Working Group	mkrezagbara@hotmail.com/ rezbakam@yahoo.fr
19.	Ms Marianne Jensen	IWGIA( Denmark)	mj@iwgia.org

20.	Commissioner Musa Ngari Bitaye	Member of the ACHPR and Member of the African Commission's Working Group	mnbnet@gamtel.gm
21.	Mr. Robert Eno	ACHPR- Legal Officer	Legal8@achpr.org
21	Mr Nega Lulessa	ACHPR- Legal Officer	Legal2@achpr.org
22.	Ms. Dina Berenstein	IWGIA( Denmark)	db@iwgia.org
23.	Dr. Albert Barume	CHERCHEUR- Activiste (DRC)	nmkra@hotmail.com
24.	Ms Treva Braun	Forest Peoples Programme (UK)	treva@forestpeoples.org
25.	Mr. Venant Messe	Indigenous Peoples' Representative from Association OKANI( Cameroon NGO)( Cameroon)	messe_venant@yahoo.fr
26.	Mr. Serges Bouopda	Centre pour L'environnement et le developpement (CED) (Cameroon)	bougueser@yahoo.fr
27.	Mr. Ibrahim Njobdi	Indigenous Peoples Representative from MBOSCUDA( Cameroon NGO)	injobdi@yahoo.fr
28.	Ms. Birgitte Feiring	ILO- Geneva	feiring@ilo.org
29.	Mr. Joseph Momo	ILO- Cameroon	momo@ilo.org
30.	Tabue Tchwaket Jean Thomas	Representative of the Ministry of Social Affairs Cameroon	ttjtresor@yahoo.fr

### Annex 3: ILO/AFRICAN COMMISSION'S WORKSHOP PROGRAMME

#### DAY ONE (Monday 18 September 2006)

0900 - 0915	Opening of the seminar Commissioner Rezag Bara
0915 – 0930	Introduction by the ILO Birgitte Feiring
0930 – 1030	Ice-breaking session and introduction of participants Facilitator: Professor Hansungule
1030 – 1115 (30 minutes presentation 15 minutes questions)	Presentation on the African Charter on Human and Peoples' Rights and the Report of the Working Group Commissioner Rezag Bara
<b>1115 – 1130</b>	<b>TEA BREAK</b>
1130 – 1200	Introduction to ILO work and standards on (30 minutes presentation) indigenous and tribal peoples Francesca Thornberry
1200 – 1245 (2 x 15 minutes presentations 15 minutes questions)	Introduction to the “statement of coverage” contained in ILO Convention No. 169 as well as the discussions on definition issues at the regional level Birgitte Feiring + Marianne Jensen
<b>1245 – 1345</b>	<b>LUNCH BREAK</b>
1345 – 1430	Plenary discussion on definition and identification and main challenges and issues in Africa.
1430 – 1515 (30 minutes presentation 15 minutes questions)	Presentation on the general principles of ILO Convention No. 169 Francesca Thornberry
<b>1515 – 1530</b>	<b>TEA BREAK</b>
1530 - 1700	Presentation and plenary discussion on indigenous rights and development issues, with specific reference to poverty reduction Birgitte Feiring + William Langeveldt

#### DAY TWO (TUESDAY 19 SEPTEMBER 2006)

TIME	ITEM NUMBER	
0845 - 0930	1	Presentation by the Centre for Human Rights on the

project outline and workshop documents including guidance for the first group discussions on aims and outcomes of the research  
Professor Hansungule

- |                    |   |  |
|--------------------|---|--|
| 0930 – 1030        | 2 | Group discussions: research aims and outcomes  |
| <b>1030 – 1045</b> |   | <b>TEA BREAK</b>   |
| 1045 - 1145        | 3 | Group presentations and recommendations for the research aims and outcomes   |
| 11:45 – 12:00      | 4 | Presentation on the importance of a legal Framework, proposed scope of the research, and substantial categories for the research<br>Professor Hansungule |
| 1200 – 1300        | 5 | Group discussions on the proposed scope of the research: Which are the legal, implementation and substantial categories for the research                 |
| <b>1300 – 1400</b> |   | <b>LUNCH BREAK</b>   |
| 1400 – 1500        | 6 | Group discussions continued  |
| <b>1500 – 1515</b> |   | <b>TEA BREAK</b>   |
| 1515 – 1700        | 7 | Group presentations and plenary Discussion/recommendations: legal and implementation framework, and substantial categories for the research              |
| 1700 – 1730        | 8 | Summary and closing of day's proceedings   |

### **DAY THREE (WEDNESDAY 20 SEPTEMBER 2006)**

<b>TIME</b>	<b>ITEM NUMBER</b>
0830 – 0900	1 Opening remarks by Chairpersons and summary of the previous day
0900 – 0915	2 Presentation on proposed methodology of the Research Professor Hansungule
0915 - 1045	3 Group discussions: research methodology and proposed next steps and timeframe for the research
<b>1045 - 1100</b>	<b>T E A BREAK</b>
1100 - 1200	4 Group presentations and plenary discussion on research methodology and proposed next steps and timeframe for the research
<b>1200 - 1300</b>	<b>LUNCH BREAK</b>
1300 - 1345	5 Plenary discussion and identification of existing research on indigenous issues in the African region
1345 – 1400	6 Presentation on proposed selection criteria for countries in which the research will take place Professor Hansungule
<b>1400 – 1415</b>	<b>TEA BREAK</b>
1415 - 1500	7 Plenary discussions to make recommendations on selection of 10 countries and criteria for identification of the groups concerned in the countries
1500 – 1600	9 Plenary discussion and adoption of workshop recommendations, and process for next steps
1600 - 1615	11 Close of the Workshop by the Chairpersons

