

The Doctrines of Discovery, 'Terra Nullius' and the legal marginalisation of indigenous peoples in contemporary Africa.

Statement by the Indigenous Peoples of Africa Coordinating Committee to the 11th Session of the UN Permanent Forum on Indigenous Issues (UNPFII)

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Dear Madame Chairperson and distinguished members of the Permanent Forum,

IPACC represents 158 member organisations in 23 African countries. Our presentation here today refers to a Regional approach to redressing legal discrimination against indigenous peoples on our continent.

The modern concept of '*indigenous peoples*' in Africa is associated with the legal marginalisation of mobile hunter-gatherers and pastoralists and the abrogation of aboriginal title in pre- and post-independent States. To understand the vulnerability and poverty of most indigenous peoples in Africa, requires understanding the harmful legacy of the Doctrine of Discovery in Africa.

The principle '*terra nullius*' was used by colonial authorities to justify non-recognition of indigenous peoples' territories and natural resource tenure. The '*terra nullius*' principle was combined with a twin discriminatory concept that only cultivation of land by agricultural production could be considered effective use of land, or '*mise en valeur*'. These principles were not applicable to sedentary agricultural peoples who were used as labour reserves for colonial economies. The application of these principles mostly targeted mobile and nomadic First Peoples in Africa.

German, French and British colonisers used this concept of '*terra nullius*' in combination with the principle that cultivation of land was the only basis for claiming tenure to justify land seizures. There are numerous examples of this, but one simple example is the German imperial decree of 15 June 1896 which states that private or concessionary title in Cameroon had to be proven to the colonial state authorities, and that all other lands will be considered vacant and without a master.

As most indigenous peoples in Africa are mobile land users, living from subsistence hunting and gathering or pastoralism, they were unable to show that they were permanently resident or cultivating their lands, even if they had occupied and sustained these territories from time immemorial.

The 2002 ruling of the International Criminal Court set aside the use of '*terra nullius*' as a justification of disenfranchisement or abrogation of rights. This decision was taken in relation to an African case, and yet has not been absorbed into African domestic legislation or consistently applied by the African Commission on Human and Peoples' Rights.

The first major legal effort to address this historical problem came in 2001 when the Constitutional Court of South Africa ruled on the land and mineral rights issue of the indigenous Nama pastoralists

against mining interests. The *Alexor Ltd and another vs. Richtersveld Community and Others* case regarding land tenure is a land-mark for Africa and indigenous rights' globally.

The South African Constitutional Court found that the annexation of indigenous lands by the colonial State did not constitute an extinction of aboriginal title. The right in question was a right of communal ownership under indigenous law, which includes the right to exclusive occupation and use by the members of the indigenous people.

IPACC wishes to draw the attention of UNPFII and the Africa Group to the fact that African indigenous people's legal systems are more appropriate in terms of conserving natural resources and the ecology of ecosystems than the European legal tradition that has displaced them. Indigenous peoples have or had legal systems which controlled access to natural resources, limited their exploitation to the capacity of the natural system to recover, and allowed for mobility within territories to not over stress the environment in times of drought.

The legacy of the Doctrine of Discovery and '*terra nullius*' pose particular threats to Africa's sustainability at this time of growing human populations and the negative impacts of climate change and biodiversity loss. The failure to resolve the legacy of these doctrines continues to cause human rights violations, promotes poverty and degrades the environment.

IPACC believes that it is in the interests of all Africans to continue the process of decolonising African legal systems, and creating global norms and standards relating to the protection of the tenure rights of indigenous peoples. This requires a better understanding of how the Doctrine of Discovery impacted in all regions affected by colonialism, and the continued use of discriminatory principles to benefit elite ethnic groups who dominate indigenous peoples in the contemporary situation.

IPACC recommends to the 11th session of the UNPFII that:

1. UNPFII and the UN Special Rapporteur on the Human Rights and Fundamental Freedoms of Indigenous Peoples hold a special dialogue session with the African Commission on Human and Peoples Rights, in cooperation with IPACC, to study the importance of the Richtersveld constitutional case on aboriginal title and the problem of '*terra nullius*' legal discrimination across Africa;
2. UNPFII, the Human Rights Council and EMRIP cooperate to identify specific problems faced by nomadic indigenous peoples in relation to land and natural resource tenure, as a result of '*terra nullius*' and agricultural and sedentary biases in colonial and post-colonial legislation and constitutions. EMRIP should be invited, in cooperation with UNESCO, UNDP and UNEP, to develop a study on the institutional capacity of mobile indigenous peoples to govern and conserve the biodiversity and ecosystem capacity in their traditional territories, according to their own laws, norms and governance systems;
3. The Inter-agency support group for indigenous peoples convene a session to identify inter-agency opportunities for cooperation in studying how indigenous land and natural resource tenure systems are more consistent with sustainable land and resource use, and are in line with the aims of the UN Convention on Biological Diversity, in contrast with the discriminatory legislation which arose due to colonial laws. This study should involve contributions by African indigenous peoples and look at viable resolutions to land and natural resource tenure through the harmonisation of indigenous peoples' laws with national and multilateral legal and normative systems.