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Panel Discussion on Access to Justice for Indigenous Peoples

ACCESS TO JUSTICE AND INDIGENOUS PEOPLES IN AFRICA

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Chairperson of the United Nations Human Rights Council, the Special Rapporteur on the rights of indigenous peoples, Excellencies, ladies and gentlemen:

Thank you for according me and the continent of Africa an opportunity to intervene on the question of access to justice for indigenous peoples.

According to a report of the African Commission on Human and Peoples Rights' Working Group on Indigenous Populations/Communities, Indigenous peoples in Africa be they nomadic pastoralists, hunter gatherer or traditional fishing communities experience numerous human rights violations including: dispossession of lands and territories ancestrally held, over-exploitation of natural resources on their lands with little benefit accruing to them, gender based violence, state perpetrated massacres, arbitrary arrests, denial of social economic rights, non-support of their livelihood systems, discrimination in access to social economic opportunities, and non-recognition of their identity among others.[1] Access to justice to address some of these human rights violations is hampered by discrimination, illiteracy and lack of awareness as well as the financial means to access legal services.

Justice for indigenous people is not just a court centred process. Many disputes are resolved using customary institutions and applying long held norms the enforcement of which lead to the restoration of social harmony. In contexts where customary norms are subordinated to the repugnancy clause within statutory and constitutional provisions, such justice mechanisms are considerably undermined. In criminal cases, customary institutions' intervention may fail to meet statutory thresholds, with individuals exposed to possible double jeopardy in which those who have already complied with penal sanctions under custom are forced to undergo a criminal trial in formal courts and vice versa. While recognized as important to the cultural history of many countries, multilateral agencies and investment firms in Africa promote legal monism — single, unified systems that provide foreign investors with a more familiar legal platform.[2] Yet developing foreign monist legal systems has been

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1 Report of the African Commission's Working Group of Experts, Submitted in accordance with the "Resolution on the Rights of Indigenous Populations/Communities in Africa", Adopted by the African Commission on Human and Peoples Rights at its 28th ordinary session (2005).

2 McAuslan Patrick (2005), Legal pluralism as a policy option: Is it desirable? Is it doable? In

CAPRi Policy Briefs: "Land rights for African development: From knowledge to action." Available online at: www.capri.cgiar.org/pdf/brief_land-04.pdf. See also, United Nations, *Building multicultural democracies* In "Human Development Report 2004."

identified as a factor in the disenfranchisement of the poor, rural, and less educated in African societies, including indigenous peoples.[3]

Court's jurisdictional rules such as *locus standi* or rules relating to limitation of time for the commencement of certain claims often prevent indigenous communities from accessing judicial remedies in formal courts in at least two ways. First, given that juridical recognition is not granted to indigenous communities in many African states, community claims are rarely entertained by courts. Instead, courts treat some of the claims as individual claims that need to be strictly proved in relation to each claimant. Not only does this approach encumber the determination of such claims, but it also renders their prosecution lengthy and costly and therefore beyond the reach of many indigenous groups. Second, the historical nature of many indigenous claims particularly those relating to land meet the challenge of retroactivity in many courts in Africa, which often apply a strict form of the defence of *laches* to defeat such claims.

The refusal/failure of states to enforce judicial decisions relating to indigenous peoples' rights is emerging as the greatest challenge to access to justice for these communities. In Kenya, two years after the African Commission on Human and Peoples Rights, a regional treaty body, determined that the state should restitute ancestral land back to the Endorois, the state has done little to comply.[4] Similarly, in Uganda, five years after a court ruled that the forced removal of the Benet from Mt. Elgon was unlawful and ordered restitution, no enforcement has taken place.[5] The Botswana state too has continued to frustrate the decision of its constitutional court in Roy Sesane case where the court determined that the Basarwa should have access to water in Central Kalahari Game Reserve.[6] This failure to enforce judicial decisions not only frustrates a community's right to remedy, but also seriously undermines the legitimacy of the administration of justice and discourages groups from using courts to mediate disputes.

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3 Benton Lauren (1994) "Beyond legal pluralism: Towards a new approach to law in the informal sector" *Social and Legal Studies* 3(2): 223-242.

4 The East African Standard, *Cheers turn to tears for Endorois waiting for land* (June 18, 2011) at http://www.standardmedia.co.ke/?articleID=2000037356&pageNo=1>.

5 DITSHWANELO – The Botswana Centre for Human Rights (March 2008), *List of issues presented to the UN Human Rights Committee in the context of its examination of Botswana Periodic report, regarding the human rights situation in Botswana.*

6 High Court in Mbale, Case No. 001 of 2004, Uganda Land Alliance (on behalf of the Benet) v Uganda. See also, Cases examined by the Special Rapporteur (JUNE 2009 – JULY 2010), XXXI. *Uganda: Situation of the Benet Living in the Kapchorwa District of Eastern Uganda, on the edges of Mount Elgon* at http://unsr.jamesanaya.org/cases-2010/31-uganda-situation-of-the-benet-community-living-in-the-kapchorwa-district-of-eastern-uganda-on-the-edges-of-mount-elgon>

Weak legal aid schemes in many African states militate against access to justice by many individuals belonging to indigenous communities most of whom are poor. This challenge is exemplified by the Batwa in Uganda who despite facing constant harassment by state officials and other dominant neighbouring communities have not been able to access courts due to the absence of legal aid.[7] The situation is further compounded by the physical remoteness of areas inhabited by indigenous peoples. A trip to a district capital where most courts are based may require a day or two on the back of a truck. Peoples' social economic situations rarely allow them to take on the burden of a journey to the district capital to file a case or attend court as a complainant or witness. Costs of transport are high and there are additional costs for overnight stay and food. Taking into account also the charges courts impose for filing cases, there are little incentives for indigenous people to access courts.[8] In recognition of the challenge of access, the Committee on Elimination of Racial Discrimination's concluding observation recommended that the Kenyan state for instance, "ensures the provision of free legal aid throughout the country, including by rolling out the National Legal Aid Scheme which should involve the use of Paralegals in the rural and Arid and Semi-arid Areas of the country."[9]

While most indigenous cultures are positive, a few practices can be challenging from an access to justice perspective. Cultural support for female genital mutilation or early marriages prevents some of the violations suffered by indigenous women and youth from being submitted before formal courts contributing to the perpetuation of practices that limit the realization of various fundamental rights by indigenous women.

Despite the foregoing challenges, various models for ensuring access to justice for indigenous communities are emerging across the continent:

- Pluralistic legal systems where traditional justice systems operate side by side with formal systems have tended to improve access to justice for indigenous communities in Mozambique, Tanzania and Malawi.[10] The challenge that lies ahead for African governments is to create a legal system that embraces the cultural identity enshrined in customary law while providing the stability required for reducing ethnic tensions and fostering pluralism.

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7 Report of the African Commission's Working Group on Indigenous Populations/Communities, Research and Information Visit to the Republic of Uganda (2009): 46-52.

8 Tanja Chopra (2010) , "Peace versus justice in Northern Kenya: The dialectics of State and community laws" in Yash Ghai and Jill Cottrell (eds), Marginalized Communities and Access to Justice (2010): 188

9 *Concluding observations of the Committee on the Elimination of Racial Discrimination*, Kenya (September 2, 2011): Para 10(b).

10 De Sousa Santos Boaventura (2006) "The heterogeneous state and legal pluralism in Mozambique" *Law & Society Review* 40(1): 39-76.

- Documentation of customary land transfer and inheritance practices and ensuring the regular review and updating of these practises by organizations such as the Land and Equity Movement is securing land rights of Teso and Karamojong women in Uganda while addressing frequent inter-ethnic violent conflicts.

- Use of strategic public interest litigation by indigenous groups in Kenya, South Africa and Tanzania- both within domestic and regional courts- to address not just the rights of an immediately aggrieved indigenous group, but also set standards that have implications for similar situated indigenous communities is improving social consciousness on the need for more legal innovation.

In conclusion, the apparent aversion of domestic courts to indigenous rights claims in Africa cannot be taken as givens. In certain circumstances, judicial officers lack understanding of international human rights standards or comparative and progressive jurisprudence on indigenous rights and are thus incapable of applying these principles to a given indigenous claim. The need for mainstreaming of indigenous rights in judicial trainings as well as general legal trainings in the continent is crucial.

I thank you.