

# The Issue of Indigenesness in Ethiopia: A Jurisprudential Dearth

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## Abstract

Despite the significant legal developments and support under international and regional instruments, the issue of indigenous people in Ethiopia has been ignored within the current national policy frameworks. While Ethiopia's current federal political order seems to recognize group rights, there is little or no direct reference as far as indigenous people are concerned. The country is not a party to the ILO Convention 169 and was absent during the adoption of the UN Declaration on the Rights of Indigenous People. Dealing with indigenous people remains contentious in the political discourse and there is little academic exposition on the subject matter. Nor do judicial doctrines elucidate the issue taking into account Ethiopia's reality and its commitments. The Ethiopian government on different occasions claims that granting distinct status as indigenous people would be inconsistent with the principle of 'equal protection' of nations, nationalities and peoples on which the Constitution is founded. In a similar vein, it also argues that all ethnic groups are indigenous since the defining elements are similar with the definition adopted for nations, nationalities and peoples under the FDRE (Federal Democratic Republic of Ethiopia) Constitution. This chapter establishes that these claims are largely due to a misreading of the Constitution. It further argues clear legal recognition is not always necessary for communities/groups to be considered as indigenous and exercise the legal rights out of such a status. For this purpose, the article assessed relevant laws and some practical self-identification claims.

**Keywords:** *indigenous people, legal recognition, peoples' right, Ethiopia*

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## Introduction

Recognition and support of the rights of indigenous people has become an essential component of international human rights law and policy in the last three decades. Significant legal developments have been observed in the adoption of the UN Declaration on the Rights of Indigenous people<sup>36</sup> and the ILO Convention concerning Indigenous and Tribal Peoples.<sup>37</sup> At the African level, however, little or no legal instruments have been dedicated to indigenous people. The region's first ever comprehensive human rights instrument, the African Charter on Human and Peoples' Rights, does not specifically recognize and employ the term 'indigenous people'. Only one African country has ratified the ILO convention so far,<sup>38</sup> and many either abstained or voted against during the adoption of UN Declaration on the Rights of Indigenous people.<sup>39</sup> African states, generally, tend to ignore the indigeneity of peoples and the accompanying rights in their national legal order mainly for the sake of development projects.<sup>40</sup>

Similarly, the Ethiopian legal system hardly recognizes indigenous people. The issue, generally, has been ignored in the past and present national policy frameworks of the country. The question, however, remains whether statutory recognition is necessary for groups to be considered as indigenous and exercise the legal rights arising out of such status. The international experience indicates a move from a positivist approach to constructivism or a realist trend.<sup>41</sup> Experts in the field are of the opinion that it is not always mandatory to have a clear legal recognition as long as the communities in question fulfil the

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36 UN General Assembly, *United Nations Declaration on the Rights of Indigenous people*, resolution/adopted by the General Assembly, 2 October 2007, A/RES/61/295.

37 International Labour Organization (ILO), *Indigenous and Tribal Peoples Convention*, C169, 27 June 1989 and C107, 26 June 1957. According to the ILO, C169 has replaced C107 of 1957, which had an inherent assimilationist orientation that was typical of its time. C107 is now closed for ratification and countries are encouraged to ratify the newer convention. The ILO is, however, under continues supervision of C107 for countries who have ratified it but not yet C169 of 1989.

38 The Central African Republic (CAR) has ratified the convention on 30<sup>th</sup> of November 2010.

39 Viljoen (2012:228-238)

40 Salomon and Arjun (2003:18)

41 Anaya (2005)

defining notions in understanding the indigeneity of peoples.<sup>42</sup> And, the approach that should be adopted, or have been adopted, in the Ethiopian context is still dubious.

Despite the absence of specific legal documents in Ethiopia, the African Commission Working Group on the Rights of Indigenous people has identified some pastoralist communities in Ethiopia as 'indigenous people'.<sup>43</sup> The identification process of these indigenous groups, however, has been challenged as ill-informed and unsystematic.<sup>44</sup> In addition, statutory laws in Ethiopia such as the wildlife development, conservation and utilization proclamation explicitly make reference to indigenous people.<sup>45</sup> In financing different 'development induced' projects, the World Bank has also triggered the application of its operational policy on indigenous people (OP.4.10) in the pastoral lowlands of Ethiopia.<sup>46</sup> After conducting a field-based research, the World Bank identified thirty-four groups as 'indigenous people' within the meaning of paragraph four of the operational policy.<sup>47</sup> The Ethiopian government, on the other hand, was concerned on the application of OP.4.10; singling out ethnic groups for distinct treatment, the government argued, would be inconsistent with the principles of the Ethiopian Constitution, in particular with the definition of 'nation, nationality or people' under Article 39(5).<sup>48</sup> The government further contends that the concept of 'nation, nationality or people' is described in similar terms to those of the World Bank's policy on indigenous people and thus based on the county's Constitution "all people in

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42 See Kingsbury (1998)

43 African Commission Working Group on Indigenous Populations/Communities Report Summary, 'Indigenous people in Africa: The forgotten peoples?', Banjul, Gambia 2006. According to the working group, the Somalis, Afars, Borena, Kereyu (Oromo) and Nuer have been identified as indigenous people in Ethiopia. It is important to take note that all the identified lists here are predominantly pastoralists who live the lowlands of Ethiopia.

44 See Bojosi and George (2006)

45 Development, Conservation and Utilization of Wildlife Proclamation, Proc. No. 541/2007, *federal Negarit Gazette*, Art. 2(10). This law in defining 'wildlife reserve' makes clear reference to "indigenous local communities".

46 The World Bank Inspection Panel, 'Ethiopia: Promoting Basic Services Phase III project Investigation Report,' November 2014, Para 189-208.

47 Ibid

48 The World Bank, 'Management Response to Request for Inspection Panel Review of the Ethiopia Protection of Basic Services Program Phase II Additional Financing (P121727) and Promoting Basic Services Phase III Project (P128891)', November 2012, Para 46.

Ethiopia are indigenous according to the policy” and have equal protection.<sup>49</sup>

Dealing with the question of indigenesness has not been an easy task in Ethiopia. The issue remains contentious in the political discourse and in the academia; only few studies have attempted to embrace the issue from Ethiopia’s socio-economic and political context.<sup>50</sup> Other existing scholarships in the area are limited mainly in dealing with the nexus between development projects and indigenous people in the country without addressing the legal source.<sup>51</sup> This contribution is thus meant to identify the scholarly gaps and discuss possible implications by critically examining the question of indigenous people in Ethiopia in light of international and regional human right jurisprudence. The article does not intend to make classification or characterization of different communities in Ethiopia as indigenous or otherwise. It is rather a legal analysis of indigeneity within the possible legal and policy implications in the country. To this end, relevant laws and practical self-identification claims were assessed.

The article is structured as follows. This introduction section is followed by a brief discussion on the general understanding of the indigenesness phenomenon. It also analyzes the defining notions of indigenous people in different human right systems. The third section assesses indigenous people and the approach that has been adopted by Ethiopia. The fourth section is devoted to examining the common justification forwarded by the Ethiopian government towards indigenous status while the fifth part examines the application of international human right instruments in dealing with indigenous issue in Ethiopia followed by a section on concluding remarks.

## **Understanding the Indigenesness Phenomenon: A Descriptive Overview**

### ***Justifications: What is in the Name?***

Evidences depicts that ‘indigenous’ people make up nearly 5 percent of the world’s total population.<sup>52</sup> These category of peoples generally

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49 Ibid

50 Tilahun (2019); Seyoum (2017); Meron and Dereje (2015)

51 See Tsegaye (2017); Cambou (2015); Bahar (2010); Adem (2009)

52 Judith et. al. (2007:288); see also Amnesty International, ‘Indigenous people,’ available at <https://www.amnesty.org/en/what-we-do/indigenous-peoples/>

comprises of more than 5,000 different indigenous groups from ninety countries in the world.<sup>53</sup> The characterization of these people as 'indigenous' is not without justification and consequences.<sup>54</sup> International human rights law grants special rights to 'indigenous' people, although largely in relation to self-determination over land and other natural resources; they have the right, among others, to maintain access and ties to, and control over, their traditional and ancestral land.<sup>55</sup> States are duty bound to consult and cooperate in good faith with indigenous people in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources.<sup>56</sup> This obligation of states has now arguably become customary international law.<sup>57</sup>

Human rights law confers special protection on indigenous people, mainly for two reasons. The first reason is that indigenous people are often historically marginalized and vulnerable and that they need a different treatment from the rest of the population.<sup>58</sup> Although indigenous people across the globe have different customs and traditions, they face relatively similar reality such as eviction from ancestral land and cultural extinction. The second reason is from the viewpoint of the majority non-indigenous society and the environment. Although indigenous people comprise only 5 percent of the world's population, they safeguard 80 percent of the planet's biodiversity by preserving indigenous knowledge.<sup>59</sup> Evidence shows that more than 20 percent of the carbon stored above the ground in the world's forests is found in the land managed by indigenous people in the Amazon

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53 Ibid

54 Barten (2015)

55 UN Declaration supra note 1, Articles 3, 4,25-28 and ILO convention supra note 2, Article 13-16. Although the two important human right instruments, the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights, do not explicitly confer similar rights to indigenous people, there have been interpretations by the UN human rights Committee and by the Committee on Economic, Social and Cultural Rights in different cases (see section 4 below). Also, Similar interpretation of the African Charter on Human and Peoples Right has been made by the African Court on Human and Peoples' Rights and the African Commission on Human and Peoples' Rights (see section 2.2.2 below).

56 UN Declaration, supra note 1, Article 32(2)

57 James (2015)

58 Gilbert (2011); Anaya (2004); Behara (1998); Arsanjani (1996)

59 Amnesty International, supra note 17.

Basin, Mesoamerica, Indonesia and Democratic Republic of Congo.<sup>60</sup> Their local knowledge of the natural world, particularly sustainable land use system, could help fight climate change and build resilience against natural disasters.<sup>61</sup> The Convention on Biological Diversity (CBD) also recognizes the dependency of indigenous communities on nature and their unique role in conserving biodiversity.<sup>62</sup> In addition, the 1992 Rio Declaration on Environment and Development recognizes the vital role of indigenous people in environmental management and development because of their knowledge and traditional practices.<sup>63</sup>

### *Defining 'Indigenous'*

One of the big sticking point in dealing with indigenous people is definition. Recognition and identification of indigenous groups is highly contested<sup>64</sup> and politicized.<sup>65</sup> Different approaches and trends have been employed by human rights systems, scholars as well as organs having adjudicatory power. This sub-section, therefore, explores the defining notions adopted under international and regional human rights systems.

### *The UN Human Rights System*

Despite the considerable support and recognition, the UN human rights system and its machineries have not provided a conclusive definition to indigenous people.<sup>66</sup> Attempts to define indigenous people remain non-binding, although they are still persuasive playing an important role for the jurisprudential developments in the area. One of these attempts was by the former special rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities, Jose

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60 Ibid

61 See UNESCO (2018)

62 The Convention on Biological Diversity (CBD), Rio de Janeiro, 1992, Article 8(j).

63 Rio Declaration on Environment and Development, Rio de Janeiro, 1992, Para. 22

64 Meron and Dereje (2015: 117)

65 See Felix (2011)

66 Permanent Forum on Indigenous people, "Background paper on the concept of indigenous people," May 2004; See also, UN office of the High Commissioner for Human Rights (OHCHR), Fact sheet No.9, Rev. 2, Indigenous people and the United Nations Human Rights System, August 2013.

Martinez Cobo, which reads as follows:

*Indigenous communities, peoples and nations are those which, having a historical continuity with pre-invasion and pre-colonial societies consider themselves distinct from other sectors of the societies now prevailing in those territories or part of them. They form at present non-dominant sectors of society and are determined to preserve, develop and transmit to future generations their ancestral territories, and their ethnic identity, as the basis of their continued existence as peoples, in accordance with their own cultural patterns, social institutions and legal systems.*<sup>67</sup>

In the above definition, Martinez points out four factors that would differentiate indigenous people from other segments of the society. These are (1) shared history with ancestral territories, (2) ownership, or at least occupation, of ancestral land, (3) common cultural manifestations such as language, religion, social institutions and customary laws, and (4) being a non-dominant group of a society and commitment to preserve their identity throughout generations.

Martinez's understanding of the concept has influenced the subsequent developments regarding the rights of indigenous people. The ILO Convention, for example, states the rights in the convention are applicable to:

*peoples...who are regarded as indigenous on account of their descent from their populations which inhabited the country, or a geographical region to which the country belongs, at the time of conquest or colonization or the establishment of present state boundaries and who, irrespective of their legal status, retain some or all of their own social, economic, cultural and political institutions.*<sup>68</sup>

This is not a definition per se, rather determines the scope of application of the convention. The convention further provides that 'self-identification as indigenous' is a fundamental criterion to determine

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67 UNCHR (Sub-Commission), 'Report of the Special Rapporteur on the Problem of Discrimination against Indigenous Populations' (1986) UN Doc E/CN.4/Sub.2/1986/7/Add. 1-4.

68 ILO Convention, supra note 2, Article 1(b).



the groups to which the provisions of the convention apply.<sup>69</sup> A further survey on international legal instruments, both hard and soft, shows recognition of the rights of indigenous people, however, without definition.<sup>70</sup>

Considering the absence of a governing definition within the UN human rights machineries, the Permanent Forum for Indigenous People stressed on defining indigenoussness at international level taking into account strong link to territories and surrounding natural resources, distinguished socio-economic and political system, and distinct belief and culture.<sup>71</sup>

### *The Regional Experiences*

The African Charter on Human and Peoples' Rights (the African Charter), the African Commission and the African Court on Human and Peoples' Rights have been key institutional and legal frameworks in Africa when it comes to interpretation of human rights in general and the rights of indigenous people in particular. Though the African Charter has no specific reference to indigenous people, Dersso argued the charter's "embodiment of group or peoples' right could be taken as addressing" the rights of indigenous people.<sup>72</sup> Further, it was also claimed that the African Charter jurisprudence on "peoples" right has undoubtedly paved the way for the protection of indigenous people.<sup>73</sup> The International Work Group for Indigenous Affairs further noted that all Africans are indigenous to the continent and that no particular group would claim indigenous status, providing justification for the

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69 Ibid, Article 1(c).

70 See, among other, UN Declaration, supra note 1; UNDP, Draft guideline for support of indigenous people, 1995; Vienna Declaration and Program of Action, adopted by world conference on Human Rights, 1993, Part II; UN General Assembly, "Transforming our world: the 2030 Agenda for Sustainable Development", 21 October 2015, A/RES/70/1. Specifically goal 2.3 and 4.5 of the 2030 Sustainable Development Agenda talks about equal access to land and elimination of gender disparities in education in indigenous communities.

71 UN Permanent Forum for Indigenous people, supra note 33.

72 Solomon (2006)

73 Bojosi and George (2006:383)



non-inclusion of the term 'indigenous people' in the African Charter.<sup>74</sup> The African Commission, in its advisory opinion regarding the adoption of the UN Declaration on the Rights of Indigenous people, recognized the existence of indigenous people in Africa.<sup>75</sup> It also noted the following guiding characteristics to identify African indigenous communities.

- a. Self-identification;
- b. A special attachment to and use of their traditional land whereby their ancestral land and territory have a fundamental importance for their collective physical and cultural survival as peoples; and
- c. A state of subjugation, marginalization, dispossession, exclusion, or discrimination because of difference in culture, ways of life or mode of production with the national hegemonic and dominant model.<sup>76</sup>

In this, the African commission added to the criteria subordination, subjugation, marginalization, exclusion or discrimination by the dominant group because of socio-economic or cultural differences. The commission noted that indigenous groups have been marginalized by mainstream development policies due to past and ongoing processes, and thus need recognition and protection of their basic human rights and fundamental freedoms.<sup>77</sup>

Arguably, the commission also stressed that "in Africa, the term indigenous populations does not mean "first inhabitants" in reference to aboriginality as opposed to non-African communities or those having come from elsewhere".<sup>78</sup> This puts any native communities in Africa as legitimately indigene to the continent.<sup>79</sup> This position of the commission, however, inherently departs from the understanding of

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74 IWGIA Indigenous world (2001-2002:453)

75 See African Commission on Human and Peoples' Right Advisory opinion on the rights of Indigenous people (2007)

76 Ibid, P. 4.

77 Ibid

78 Ibid

79 Ibid

indigenous people at international level, particularly from Martinez's approach of historical continuity with pre-invasion and pre-colonial societies. These interpretations and jurisprudential developments in the continent have been substantiated and applied later in the *Endorois*<sup>80</sup> and *Ogiek*<sup>81</sup> cases by the Commission and the African Court, respectively.

The question of indigenous status is less contested in the inter-American human rights system. Though the Inter-American Convention on Human Rights does not employ the word 'indigenous people' in its provisions, the Inter-American Court on Human Rights highlighted the criterion of 'self-identification' as a positive advancement in the 2001 Bolivian population census.<sup>82</sup> The court noted that collective self-identification of indigenous communities is a "socio-historical fact that forms part of their autonomy".<sup>83</sup> It has also confirmed this position in another case stating that the right to identify once own name, composition and ethnic affiliation, without having the state or other external entities contestation.<sup>84</sup> This demonstrates that state or any other entity recognition is not a must for a group to identify itself as indigenous and to claim the rights out of such a status.

In conclusion, there is no clear and universal definition given for indigenous people. The defining elements vary between human right systems. Nowadays, the absence of a governing definition has even been taken as an opportunity. Given the

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80 See Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v. Kenya, 276/2003, African Commission on Human and Peoples Right, 4 February 2010,

81 The African Commission on Human and Peoples' Right V. Kenya, 006/2012, African Court on Human and Peoples' Right, 26 May 2017.

82 IACHR, Access to Justice and Social Inclusion: The Road towards Strengthening Democracy in Bolivia. Doc. OEA/Ser.L/V/II, Doc. 34, June 28, 2007, Para. 216.

83 Ibid, Para. 217.

84 IACHR, Case of the Xákmok Kásek Indigenous Community v. Paraguay. Merits, Reparations and Costs. Judgment of August 24, 2010. Series C No. 214, Para. 37; See also, Mayagna (Sumo) Awas Tingni Community v. Nicaragua case, Judgment of August 31, 2001, Inter-Am. Ct. H.R., (Ser. C) No. 79 (2001).

diversity of the indigenous people across the world, a strict and closed definition will risk being over or under inclusive.<sup>85</sup>

### **The Ethiopian Experience: A Resistance Approach**

Although Ethiopia's current federal political order recognizes group rights, there is little or no reference to indigenous people. The 1991 ethnic federal arrangement taken the Marxist-Leninist legacy of 'nations, nationalities and peoples' to accommodate the issue of indigenous people.<sup>86</sup> The 'nations, nationalities and peoples' narrative, as a central discourse in crafting the Ethiopian polity after 1991, has tried to incorporate ethno-cultural justice in the federation, including the right to self-determination. The right to self-determination has been considered as a backbone of indigenous people under human rights law. For indigenous people, the right, among others, can be manifested in the context of utilization of land and natural resources, customary laws and indigenous political institutions.

Self-determination is the foundation for the 1995 FDRE Constitution, as clearly shown in the preamble, which provides that:

*we, the Nations, Nationalities and Peoples of Ethiopia:  
Strongly committed, in full and free exercise of our right  
to self-determination, to building a political community  
founded on the rule of law and capable of ensuring a lasting  
peace, guaranteeing a democratic order, and advancing our*

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85 Inter-American Commission on Human Rights, "Indigenous and tribal peoples' rights over their ancestral lands and natural resources: Norms and jurisprudence of the Inter-American human rights system" (OEA/Ser.L/V/II., Doc. 56/09). The African Commission (*Supra note 42*) has also noted that "...definition is not necessary or useful as there is no universally agreed definition of the term and no single definition can capture the characteristics of indigenous populations. Rather, it is much more relevant and constructive to try to bring out the main characteristics allowing the identification of the indigenous populations and communities in Africa." Even non-governmental organizations working on the rights of indigenous people have a common position and rejected the proposal of formal definition forwarded by states. This had been manifested during the many years of debate at the working group on indigenous populations. For example, on 27 July 1996 Indigenous people Preparatory meeting at the World Council of Churches, representatives of indigenous people categorically rejected attempts made by governments to define indigenous people. They, however, endorsed Martinez's approach of understanding indigenouness.

86 It is not clear on whether this issue was considered at the time of writing the constitution. It appears that the argument comes as a defensive position towards recent claims from right groups. See also, Ethiopia: Promoting Basic Services Phase III project Investigation Report, *supra note 11*, Para. 190.

*economic and social development.*<sup>87</sup>

Furthermore, the Constitution introduced a fundamental arrangement towards the right to internal and external self-determination of Ethiopian sub-national groups or 'nations, nationalities and peoples'.<sup>88</sup> Internal self-determination of nations, nationalities and peoples is manifested through expressing, developing, promoting and preserving one's own culture and history.<sup>89</sup> Full measure of self-governance, which includes the right to establish institutions of government in the territory that nations, nationalities and peoples inhabit could also be within the scope of internal self-determination.<sup>90</sup> The Constitution, however, does not clearly refer to self-determination over the utilization of land and other natural resources in local communities.<sup>91</sup> Under Article 40(3) of the FDRE Constitution, land and other natural resources are owned by the people and the Ethiopian government. Yet, control of groups over land and other natural resources is the core of human rights law. For indigenous people, the exercise of the right, among other, could be manifested through the principle of free, prior and informed consent. In fact, both Article 43(2) and 92(3) of the Constitution provides the right to participate in national development programs; the right to be consulted with respect to policies and projects affecting their community and environment in particular. Neither the Constitution, nor other subordinate statutory laws of Ethiopia clearly use the language of 'free, prior and informed consent'. However, 'consultation in good faith' is different from the principle of free, prior and informed consent. While the first is essentially procedural, the latter is predominantly a substantive right.

Interestingly, the Constitution has also recognized the need to provide special assistance in economic and social development to 'least advantaged' nations, nationalities and peoples.<sup>92</sup> These could be taken as one way of addressing the historical marginalization and exclusions

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87 The Federal Democratic Republic of Ethiopian Constitution, Proclamation No 1/1995, preamble para.1 and 2.

88 Ibid, Article 39(1)

89 Ibid, Article 39(2)

90 Ibid, Article 39(3)

91 Fasil (2013)

92 Ibid, Article 89(4)

of indigenous people. The Constitution, however, does not make a clear characterization as to which group of communities would fall under the scope of Article 89(4). The reference to least advantaged people under the Constitution is associated with developing some regional states (currently Gambella, Benshangul-Gumuz, Afar and Somali), Ethiopian pastoralists and national minorities. The 'developing regional states' narrative, however, has no constitutional base. All regional states of the federation have equal rights and power.<sup>93</sup> In addition, applying the Constitutional phrase 'least advantaged' to regional states seems unclear with the different ethnic groups that comprise of these regions.

Ethiopian pastoralists and agro-pastoralists are also within the conventional understanding of the 'least advantaged' people. However, the Constitution does not offer differential treatment between pastoralists and agriculturalists; both have the right to obtain land and protection against dispossession pursuant to Article 40(4) and 40(5) of the Constitution. In practice, however, the government has recognized pastoralists as one of the most marginalized communities in need of special assistance.<sup>94</sup> Most pastoralists in Ethiopia live in the lowland peripheries of the country and are characterized by 'nomadic' way of life.<sup>95</sup> To them, the question of land, territories and natural resources is inextricably intertwined to their life and to exercise other fundamental collective rights. They have less political representation, as manifested in the formation of the EPRDF, the former ruling party coalition. Ruling parties from pastoralist and agro-pastoralist regions were not part of the EPRDF coalition, relegated with a status of 'partner parties'. The argument from EPRDF was that these largely pastoralist regions lacked the agrarian class structure that "revolutionary democracy" demands.

Ethiopia writers in the academia such as Mohammud Abdulahi have also argued that "pastoral groups in Ethiopia are indigenous people".<sup>96</sup> He explicitly pointed out that:

*being groups whose cultures are mainly based on communality and who have suffered marginalization by the State throughout the history of the country, pastoralists in*

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93 Ibid, Article 47(4)

94 Meron and Dereje (2015:130)

95 Fratkin (2014)

96 Abdulahi (2007)

*Ethiopia fulfil the definition of the term indigenous people provided in various international conventions such as ILO Convention 169.*<sup>97</sup>

What is incorrectly positioned in this argument, however, is the issue of definition under international instruments including the ILO Convention 169. As we have previously seen, most instruments only provide scope of application and some defining characteristics for indigenous people without adopting a definition. In this regard, the African Commission Working Group on the rights of indigenous people in Africa has identified some pastoral people, specifically the Afars, Somalis, Keryus, and Borenas, as indigenous people in Ethiopia.<sup>98</sup> The process of identification, however, was challenged as ill-informed and unsystematic as it “does not claim to have done an empirical data sourcing and analysis”.<sup>99</sup>

Different nongovernmental organizations often assume that pastoralist and sometimes agro-pastoralist communities in Ethiopia have indigenous status.<sup>100</sup> Some group of communities in Ethiopia have also identified themselves as indigenous on different occasions. For example, the Anuak of the Gambella region, largely agro-pastoralist, explicitly identified themselves as indigenous when they submitted a claim to the World Bank Inspection Panel regarding the impact of the Bank’s funded projects in their ancestral land in 2012.<sup>101</sup> They argued that the Anuak fulfil the definition of indigenous people and possesses characteristics described under paragraph four of the Bank’s

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97 Ibid

98 African Commission Working Group on Indigenous Population, *supra* note 8.

99 See Bojosi and George (2006:9)

100 The Human Rights Watch in many of its report regarding Ethiopia’s villagization program in the Gambella region and other lowland peripheries of the country employed the term “indigenous people”. It is well-known work entitled “Waiting here for death: displacement and villagization in Ethiopia’s Gambella Region” that is worth mentioning among others. The Oakland institute has also published several reports regarding villagization, development cooperation/aid and pastoralists in Ethiopian lowlands with particular emphasis to South Omo, Afar, Gambella and Benshangul-Gumuz. The same hold to other nongovernmental organization such as Amnesty international and Cultural Survival. Particularly Cultural Survival is an organization who have been advocating about the people of Gambella region of Ethiopia since 1980’s.

101 The World Bank Inspection Panel, ‘Request for Inspection,’ Para 51.

operational policy on indigenous people.<sup>102</sup> The Anuak claimed the World Bank failed to conduct a thorough analysis in the presence and attachment of the indigenous people to the Bank's project area.<sup>103</sup>

The World Bank inspection panel then accepted the claim and analyzed it in light with its policy (the OP 4.10). For the World Bank, indigenous people refer to "a distinct, vulnerable, social and cultural group possessing the following characteristics in varying degrees":

- (a) self-identification as members of a distinct indigenous cultural group and recognition of this identity by others;
- (b) collective attachment to geographically distinct habitats or ancestral territories in the project area and to the natural resources in these habitats and territories;
- (c) customary cultural, economic, social, or political institutions that are separate from those of the dominant society and culture; and
- (d) an indigenous language, often different from the official language of the country or region.<sup>104</sup>

Based on this, the inspection panel agreed that the Anuak people meet the criteria and can be considered indigenous under the Bank's policy.<sup>105</sup> The panel ruled that there was non-compliance with OP 4.10 noting that livelihoods, well-being and access to basic services, which are closely tied to the Anuak's access to land and natural resources, was not taken into account in the design and implementation of Promoting Basic Services Project (PBS III).<sup>106</sup> The World Bank further commissioned a field-based study to screen out the relevance and appropriateness of applying OP 4.10 in the Ethiopian context;<sup>107</sup> a study focusing on sixty-four nations, nationalities and peoples in

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102 Ibid

103 Ibid

104 The World Bank, "Operational Policy (OP4.10) on Indigenous people," adopted on July 2005 and revised April 2013, Para. 4

105 Ethiopia: Promoting Basic Services Phase III project Investigation Report, supra note 11, Para. 208

106 Ibid

107 Ibid, Para. 194



five regional states (Afar, Oromia, Somali, SNNPR and Gambella). The study revealed that, out of the selected communities, thirty-four groups meet all screening criteria of OP 4.10. The details of the study, including the list of groups, however, was not disclosed to the public.

The World Bank has now updated its operational policy on indigenous people as part of its new environmental and social framework and has employed the term “Sub-Saharan African Historically Underserved Traditional Local Communities”.<sup>108</sup> In defining these people, the Bank employed a broader definition than paragraph four of OP 4.10,<sup>109</sup> which will help accommodate the interest of sub national groups whose indigeneness is under contestation such as the Anuak of the Gambella.

Despite these developments and consciousness regarding indigenous people, the Ethiopian government is usually reluctant in accommodating the interest of such groups in its national frameworks. Neither the Constitution nor subordinate laws refer to indigenous people. The only reference is in the development, utilization and conservation of wildlife proclamation.<sup>110</sup> In this law, however, it was not clear whether the reference to indigenous people was intentional or incidental. There is even a discrepancy between the Amharic and English version of Article 2(10). The Amharic version says “*sefrew yeneberu sewoch*”, which is not equivalent to “indigenous local communities”, the interpretation used in the English version.

The Ethiopian legal system generally follows a resistance approach towards indigenous language. In a document prepared by the Communications Affairs Office in 2015, the government rejected the so-called ‘indigenous people’ claim.<sup>111</sup> The document was prepared as a response to different right groups such as the Human Rights Watch, Okland Institute, Amnesty International and Cultural Survival for their alleged claim that the government is violating the right of indigenous people through its villagization program in the lowlands of Ethiopia. The African Commission on Human and Peoples’ Right, in its concluding observation to Ethiopia’s 2015 periodic report, has also expressed its concern towards Ethiopia’s resistance to accept the

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108 The World Bank (2017)

109 Ibid, Para. 7 and 8.

110 Proclamation No. 541/2007, supra note 10.

111 FDRE Government Communications Affairs Office (2015)

criteria of indigenous people set by the commission.<sup>112</sup> The commission further noted that Ethiopia's denial of indigenous status to certain ethnic groups would negatively impact their human rights.<sup>113</sup> The Ethiopian government, however, provides different claims and narratives to its resistance.

### *The Equal Protection Narrative*

One of the reasons behind resisting the recognition of indigenous people in Ethiopia is the government's claim of 'equal protection' of nations, nationalities and peoples of the federation. The government explicitly argues categorizing some ethnic groups for distinct treatment as indigenous people would be inconsistent with the principles of the FDRE Constitution.<sup>114</sup> This narrative is unfounded, and even for some 'a misreading of the Constitution'.<sup>115</sup>

Article 89(4) of the Constitution has recognized the need to provide special assistance to least advantaged nations, nationalities and peoples in economic and social development. This presupposes the existence of socio-economic and political inequality among groups. It also recognized the presence of 'national minorities' and have tried to accommodate their representation at the two federal houses.<sup>116</sup> The government is formulating policies and programs for what they call 'developing' or 'historically disadvantaged' regions. This, in one way or another, recognizes inequality between different groups from socio-economic and political perspective. Granting indigenous status does not mean conferring special protection of a group over others, rather it is a legitimate way to redress marginalization and vulnerability.

The equality narrative on the side of the government can be seen from two perspectives. First, recognition of indigenous status will be an

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112 African Commission on Human and Peoples' Rights, "Concluding Observations and Recommendations on the 5<sup>th</sup> and 6<sup>th</sup> Periodic Report of the Federal Democratic Republic of Ethiopia," 56<sup>th</sup> Ordinary Session, May 2015, Banjul, The Gambia, Para. 41

113 Ibid

114 The World Bank Inspection Panel, 'Management Response to Request for Inspection Panel Review of the Ethiopia Protection of Basic Services Program Phase II Additional Financing (P121727) and Promoting Basic Services Phase III Project (P128891)', November 2012, Para. 65

115 Tilahun (2019:15)

116 FDRE Constitution (1995) Article 54(3) and Article 61

exception to the joint ownership land policy of the country as it would confer them to have better autonomy (as sons of the soil) over their lands and natural resources than other actors. This ultimately may have an implication in relation to state mediated development project programs in and around indigenous people locality. Thus, the equality claim is presumably designed to pre-empt such implications. Secondly, there seems to be a fear that giving distinct treatment of few groups would escalate ethnic tensions in the country. Dealing with “local nativism” in countries like Ethiopia would create competition over claim to have arrived first and thereby triggers conflict over resources. In this regard, Jan Erk argued that the local nativism narrative would create ‘insider’ and ‘outsider’ among the country’s citizens and could exacerbate existing political divisions.<sup>117</sup> A case in point is an inter-group conflict between the Anuak and Nuer of the Gambella region following the latter’s representation in government organization by virtue of being ‘vulnerable’ and ‘marginalized’ pastoralist group.<sup>118</sup> The Anuak, however, deny the recognition of Nuer as pastoralist and thereby the support to hold government positions.

### *The Nations, Nationalities and Peoples’ Narrative*

The Ethiopian government claims that all ethnic groups are indigenous since the defining elements of indigenous people in the different human rights systems is similar with the definition adopted for nations, nationalities and peoples under the FDRE Constitution.<sup>119</sup> This would then imply that all Ethiopians are indigenous, an argument that most African governments use when indigenous issues are contested. The African Commission has once said that “any native communities in African can legitimately consider indigene to the continent” in its advisory opinion regarding the adoption of the UNDRIP.<sup>120</sup>

The question here, however, is whether the definition of nations, nationalities and peoples under Article 39(5) coupled with the general spirit of the Constitution would accommodate the contestation over indigenous status. Article 39(5) provides that:

*a nation, nationality and people is a group of people who have or share large measure of a common culture or*

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117 Erk (2017)

118 Meron and Dereje (2015:130)

119 The World Bank Inspection Panel, supra note 79, Para. 65

120 The African Commission, supra note, 40

*similar customs, mutual intelligibility of language, belief in a common or related identities, a common psychological make-up, and who inhabit an identifiable, predominantly contiguous territory.*

It is true that most defining elements of nations, nationalities and peoples such as, common culture, language, belief in common related identities, psychological make up and inhabiting specific predominantly contiguous territory are similar to the criteria of indigenous people developed in different legal systems.<sup>121</sup> However, other criteria such as special attachment to land, and being a non-dominant or 'marginalized' segment of the population within the state are still missing.<sup>122</sup> Moreover, it is too general to conclude that every Ethiopian is indigenous given the countries past and present day socio-economic and political arrangement.

### **Resort to Human Rights Instruments for Ethiopia**

Ethiopia is a state party to several human right instruments, which recognize indigenous people or incorporate provisions relevant to them. These instruments include the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights (ICESCR), the Convention on Biological Diversity, the International Convention on the Elimination of All Forms of Racial Discrimination, and the African Charter on Human and Peoples' Rights. The FDRE Constitution provides that all international agreements ratified by Ethiopia are an integral part of the law of the land.<sup>123</sup> It also provides that fundamental freedoms and rights enshrined in the Constitution shall be interpreted in a manner conforming to the principles of the universal declaration, international covenants and instruments on human rights, adopted by Ethiopia.<sup>124</sup> The question that needs worth discussion is the extent under which these instruments addressed indigenous people and the accompanying rights.

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121 Tilahun (2019:15)

122 Ibid

123 FDRE Constitution (1995) Article 9(4)

124 Ibid, Article 13(2)

The ICCPR, as a champion of individual rights, does not expressly deal with indigenous people' rights issues. This, however, does not mean it is an irrelevant legal tool to address indigenous people' issues.

It has been construed by the UN Human Rights Committee (HRC) in a way that it also confers protection to indigenous people particularly in the context of access and ties to traditional land.<sup>125</sup> The most important provision of the ICCPR is Article 27, which regulates the protection of ethnic, linguistic and religious minorities in a state. Although Article 27 was initially intended in the context of minorities, it has proved to generate jurisprudence on indigenous people' issues as well.<sup>126</sup> Similarly, the UN Committee on Economic, Social and Cultural Rights found violation of the right to self-determination of indigenous people under Article 1 of the ICESCR, particularly in relation to utilization of land.<sup>127</sup>

The convention on biological diversity obliges state parties to respect the knowledge of indigenous people in the conservation of biological diversity, to encourage traditional cultural practices in the use of biological resources.<sup>128</sup> The convention also requires the 'approval' and involvement of indigenous people in utilizing their unique knowledge regarding conservation and sustainable use of biological diversity.<sup>129</sup> The approval requirement under the convention can be interpreted as free, prior and informed consent.<sup>130</sup> Ethiopia has also enacted a law to provide access to genetic resources and community knowledge and community rights based on the African model law and the biodiversity convention.<sup>131</sup>

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125 See Concluding Observations: Sweden, UN Doc. CCPR/ CO/74/SWE (2002), Para. 15; Colombia, UN Doc. E/C.12/COL/CO/5, (2010), Para. 9

126 Evatt (1998:114)

127 CESCR, Concluding Observations: Brazil, UN Doc. E/C.12/BRA/CO/2 (2009), Para. 9; CESCR, Concluding Observations: Cambodia, UN Doc. E/C.12/KHM/CO/1 (2009), Para. 15-16

128 Convention on Biological Diversity, entered into force 29 December 1993, Article 8(j) and Article 10

129 Ibid, Article 8(j)

130 MacKay (2004:21)

131 Proclamation to Provide for Access to Genetic Resources and Community Knowledge and Community Right No. 482 /2006.

The International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), to which Ethiopia is a party, is also another important instrument towards indigenous people. The monitoring body of the convention, the CERD, in its general recommendation XXIII on the rights of indigenous people recognize sustainable economic and social development compatible with cultural characteristics of indigenous people.<sup>132</sup> It also recommends state parties to ensure equal rights in respect to effective participation in public life and mandatory informed consent in making decisions directly relating to their rights and interests.<sup>133</sup> The committee has also emphasised on the need to recognize and protect the rights of indigenous people to own, develop, control and use their communally owned lands and traditionally owned resources.<sup>134</sup>

In addition, as we discussed in the previous section, progressive interpretation of the African Charter has been made by the African Commission, African Court, and by the Working Group on Indigenous people in Africa for indigenous people and their rights.<sup>135</sup>

Ethiopia as a state party is, therefore, duty bound to abide by the above human right treaties and the jurisprudential developments within the instruments, which are an integral part of the law of the land. Nevertheless, Ethiopia is not yet a party to the ILO Convention 169 on Indigenous and Tribal Peoples. The country was also reluctant during the adoption of the UN Declaration on the Rights of Indigenous people and was absent during the voting on 13<sup>th</sup> of September 2007. It would, however, be very unrealistic to argue that both the ILO convention and the declaration would not have a bearing on Ethiopia. Some of the principles in the convention such as, 'consultation in good faith' arguably are deemed part of the customary international law or general principles.<sup>136</sup> In addition, the declaration is not just simply a declaration, but an authoritative document with a significant status under international law. In this regard, the UN special rapporteur on indigenous people once noted that the declaration is "an authoritative

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132 General Recommendation XXIII Concerning Indigenous people, adopted at the Committee's 1235th meeting (1997), UN Doc. CERD/C/51/Misc.13/Rev.4., Para. 4

133 Ibid

134 Ibid

135 See section 2.2.2 of this article for further discussions.

136 Phillips (2015)

common understanding, at the global level, of the minimum content of the rights of indigenous people, upon a foundation of various sources of international human rights law".<sup>137</sup>

## **Concluding Remarks**

Given the current ethnic federal arrangement and Ethiopia's nation building and re-building history, dealing with the question of indigenous status is problematic and sometimes far less than useful. The challenge is more visible particularly in the political and social sphere. This, however, does not mean the issue is unworthy of discussion from a legal point of view. There are laws, which refer to indigenous people within the Ethiopian legal system. There is also a growing interest from international organization such as the World Bank and the African Commission on Human and Peoples' Rights towards the recognition of indigenous people in Ethiopia. Ethiopia has entered into commitments by ratifying different international instruments, which recognize indigenous people or contains provisions relevant to them.

Despite all these facts, the Ethiopian government is resistant towards claim of indigenous people; the reason behind is the absence of constitutional recognition. Nevertheless, the international experience tells us that having legal recognition is not always a must for a group to be considered as indigenous. Rather we need to consider the common defining notions such as ties to ancestral land, distinctive socio-economic and cultural background, self-identification and group consciousness, marginalization or subordination, and non-dominance within a state. The challenge in the Ethiopian context is the dearth of academic and judicial exposition on the issue. It is hoped that this contribution would inspire further scholarly work on the issue of indigenesness in Ethiopia.

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