



## Theoretical Recognition of the Enforcement of Indigenous Peoples' Rights: Making a case for the Batwa in Uganda

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### Article Information

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### Abstract

The Paper discusses theoretical recognition of indigenous people's rights vis-à-vis implementation through a case study of the Batwa. The article relies on secondary data analysis and literature review. The Batwa, who are indigenous peoples under international law, have not been recognized as such under Ugandan law. They were forcefully evicted from their ancestral lands in 1991 for the creation of Bwindi and Mgahinga National Parks, leaving them landless, dispossessed, and marginalized. The Paper examines international, regional, and domestic laws on indigenous peoples' rights, highlighting their limitations and the extent to which they are enforced. It addresses the complexity in defining and identifying indigenous peoples in Africa and how this stalls progress in promoting their rights. Many African states have resisted the concept of indigeneity as understood under international law, arguing that all Africans are indigenous. As will be seen, this protracted debate on the applicability of indigeneity has made the implementation of indigenous peoples' rights problematic. The paper concludes that while vibrant laws providing for the protection of indigenous peoples' rights exist, many are unimplemented. For a paradigm shift, legal recognition of indigenous peoples in Uganda's law is key, and political will to enforce their rights.

**Keywords:** Rights, Enforcement, Indigenous, Eviction, Batwa

## INTRODUCTION

In a landmark decision, the Constitutional Court of Uganda in 2021 ordered the government of Uganda to take full responsibility for its illegal eviction of the Batwa from their ancestral land and to pay them adequate compensation.<sup>1</sup> The Batwa, on February 8, 2013, submitted a petition to the Constitutional Court of Uganda seeking, among others, recognition of their status as Indigenous People under international law and redress for their historic marginalization and continuous human rights violations that they have experienced as a result of illegal eviction from their ancestral lands.<sup>2</sup>

The Court found that government actions had rendered the Batwa landless and severely affected not only their livelihoods but also destroyed their identity, dignity, and self-worth as people and as equal citizens.<sup>3</sup> The court, however, declined to pronounce itself on aspects of international law concerning the concept of indigenous peoples and whether this concept could “be read” into various provisions of Uganda’s Constitution in the absence of the Constitution expressly referring to it.<sup>4</sup> The Court further held that doing so is a legislative exercise and the Court would be usurping the role of parliament.<sup>5</sup> The Court instead approached the case by referring to Article 32 of Uganda’s Constitution that creates a duty to take affirmative action in favour of marginalized groups.<sup>6</sup> The matter was referred to the High Court for hearing and determination of the affirmative measures to be taken as a remedy.<sup>7</sup>

While this judicial intervention is welcome, court battles have not proven to be the optimal path for vindicating indigenous people’s rights. Even favorable court decisions can be unhelpful, as they often come after a long, protracted, and expensive period of litigation.<sup>8</sup> As seen, therein is an apparent judicial restraint as the Court failed to resolve the most “biting” issues of the Batwa, which is legal recognition as indigenous people. The Court’s decision is also subject to challenge on appeal. The government has since filed its appeal against the decision to the Supreme Court.<sup>9</sup> The hope of the Batwa, therefore, now lies in the Supreme Court. This protracted litigation is problematic and further compounds the Batwa’s suffering. The 1995 Constitution of Uganda under Article 10<sup>10</sup> sweeps over 65 tribes as indigenous, making all Ugandans indigenous, and this undermines the rights of indigenous people guaranteed under international law.

Based on this background, the paper seeks to examine the main forces behind the lack of express law and political will to recognize the Batwa and other indigenous groups as “indigenous” as understood under international law and the reasons for the lack of legal machinery to redress their plight.

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<sup>1</sup>United Organisation for Batwa Development in Uganda (UOBU) and 11 Others V Attorney General and 2 Others (Constitutional Petition No 3 of 2011) 2021 UGCC 22 (19 August 2021). See, Chris Kidd: Landmark judgment in Uganda highlights conservation’s difficult history, (Press Release, Forest Peoples Programme (Sept. 17, 2021), <https://www.forestpeoples.org/en/press-release/2021/batwa-uganda-conservation> (Last Visited July 26, 2025)

<sup>2</sup> United Organization for Batwa Development and Forest Peoples Programme (July 9, 2014): The Batwa petition before Uganda’s Constitutional Court at <https://www.forestpeoples.org/en/topics/rights-land-natural-resources/news/2014/07/batwa-petition-uganda-s-constitutional-court#:~:text=On%208th%20February%202013%2C%20the,as%20a%20result%20of%20bein> (Last visited May 30, 2025).

<sup>3</sup> Ibid., 41-43.

<sup>4</sup> UOBU Versus Attorney General (n 2) 15-16

<sup>5</sup> Ibid.

<sup>6</sup> The 1995 Constitution of Uganda, Art. 32 provides for affirmative action in favor of groups marginalized based on age, gender, disability, and reasons created by history or custom.

<sup>7</sup> United Organization for Batwa Development (n 1) 44-45

<sup>8</sup> Melissa Tatum, *Customary Law of Indigenous communities: Making Space on the Global Environmental Stage*, 9 MICH. J. ENV’T L. & ADMIN. L. 77 (2020) at 90.

<sup>9</sup> Ntezza M, *Batwa community furious as Government Appeals compensation Ruling*, Chimpe Reports, at <https://chimpreports.com/batwa-community-furious-as-govt-appeals-compensation-ruling/> (Last visited July 29, 2025).

<sup>10</sup> Article 10 (a), and Third schedule to the Constitution of Uganda, 1995 as amended.

## Defining and Identifying Indigenous Peoples

Controversies have long existed with respect to defining and identifying who qualifies as “Indigenous.” The controversies range from the technicalities in defining the term itself to various aspects of the politics surrounding the entire subject.<sup>11</sup> It matters a great deal who is recognized by the law as indigenous, as those who meet the legal definitions are entitled to certain legal rights. Such definitions also identify and impose obligations on states to provide particular services to Indigenous Peoples.<sup>12</sup> Law can determine who has access to particular international platforms to voice their concerns, seek recognition, and protection of their rights.<sup>13</sup>

The definition of “Indigenous Peoples” is particularly important in helping them to assert their identity, dignity, sense of community, and political ties in the face of historic injustice and contemporary marginalization.<sup>14</sup>

Despite its importance, as Rodolfo Stavenhagen notes:

There is no internationally agreed upon definition of Indigenous Peoples. Different states do adopt different definitions based on their circumstances and contexts. Indigenous as a term is used interchangeably with other terms such as Aboriginal, native, original, first nations or tribal or other similar related concepts.<sup>15</sup>

Neither of the two main international instruments on the rights of Indigenous Peoples - ILO Convention No.1<sup>16</sup> nor the United Nations Declaration on Rights of Indigenous Peoples (UNDRIP)<sup>17</sup> defines the term “indigenous Peoples.” Instead, these instruments validate indigenous rights such as self-determination, self-identity in line with their customs and traditions, and discuss their distinct features such as collective title and special attachment to their lands and territory.<sup>18</sup>

In Africa, many governments assert that in accepting the “indigenous peoples” concept, they place question marks against their own political authority since that was exactly what they demanded of the colonial powers in their own struggle.<sup>19</sup> Further, most native peoples in Africa self-identify as indigenous and belong to tribes. Self-identification may not apply in the African context because every African may self-identify as indigenous, as is the case in Uganda, where every Ugandan is categorized as indigenous as long as they were present in the country as of February 1926.<sup>20</sup>

If everyone were indigenous, it would lead to being complex for those who meet the international criteria for indigenous peoples to claim their rights, as each one would demand that similar rights be accorded. At the adoption of the UNDRIP, the African group of experts on Indigenous peoples' issues expressed concerns that the UN Declaration on Rights of Indigenous Peoples would, on the African continent,

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<sup>11</sup> Ben Saul, *Identifying indigenous people in International Law*, Legal Studies Research, No 16144, Sydney Law School (2016) at 1.

<sup>12</sup> Ibid., 4.

<sup>13</sup> African Commission on Human and Peoples Rights and International Work Group for Indigenous Affairs (IWGIA): *Report of the African Commission's working Group of Experts on Indigenous populations /communities adopted by the African Commission on Human and Peoples Rights at its 28<sup>th</sup> ordinary session* (2005) at 90.

<sup>14</sup> Saul (n 4).

<sup>15</sup> Rodolfo Stavenhagen: *Indigenous peoples in comparative perspectives: problems and policies*: UNDP, Background paper for HDR (2004) 1, [https://hdr-undp.org/sites/default/files/hdr2004\\_rodolfo\\_stavenhagen.pdf](https://hdr-undp.org/sites/default/files/hdr2004_rodolfo_stavenhagen.pdf) (Last visited June 14 2025).

<sup>16</sup> The ILO Convention on Indigenous and Tribal Peoples, No. 169, [https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:55:0::NO::P55\\_TYPE,P55\\_LANG,P55\\_DOCUMENT,P55\\_NOD E:REV,en,C169,/Document](https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:55:0::NO::P55_TYPE,P55_LANG,P55_DOCUMENT,P55_NOD E:REV,en,C169,/Document) (Last accessed Sept. 1, 2022).

<sup>17</sup> The United Nations Declaration of Rights of Indigenous peoples, Coalition Handbook, 2007, <https://www.afn.ca/wp-content/uploads/2018/02/UN-Declaration-on-the-Rights-of-Indigenous-Peoples-Coalition-Handbook.pdf>

<sup>18</sup> Jide James-Eluyode, *Corporate Responsibility and Human Rights: Global Trends and Issues concerning Indigenous Peoples* (London: The Rowman & field publishing group, Inc. (2020) at 10-11.

<sup>19</sup> Mohamed Sahn, M.A, *Indigenous peoples and the state* in Veber, H., DAHL, J. Wilson, F& Waefle. (1993), (Eds)” *Never drink from the same cup*”: Proceedings of the conference on indigenous peoples in Africa, (Tune, Denmark Copenhagen IWGIA & the Center for Development Research. 1993) 88.

<sup>20</sup> Article 10, Schedule 3 of the 1995 Constitution of Uganda

exacerbate inter-ethnic tensions and question territorial integrity, compromise the state's control over natural resources, and conflict with national legislation.<sup>21</sup>

The focus should be on singling out the characteristics that are used to identify a community as indigenous. These include special attachments to and use of their ancestral lands and territories, self-identification as Indigenous Peoples, spiritual and fundamental importance of their lands as a foundation for their survival, and having an experience of marginalisation and exclusion because they have ways of life different from that of the dominant populations.<sup>22</sup>

Due to controversies, the African Commission's Working Group on Indigenous Peoples, a subsidiary body of the African Union established by a resolution of the African Commission on Human and Peoples' rights in 2000 at its 28<sup>th</sup> ordinary session in Benin,<sup>23</sup> in 1995, the United Nations adopted four main principles to be considered in any definition and identification of Indigenous Peoples. These are:

Priority in time with respect to the occupation and use of a specific territory, the voluntary perpetuation of cultural distinction which may include the aspects of a language, social organization, religion and spiritual values, the modes of production, laws and institutions, self-identification as well as recognition by other groups or by the states as distinct collectively and an experience of subjugation, marginalization, dispossession, exclusion or discrimination whether or not these conditions persist.<sup>24</sup>

The above identification criterion is fundamental because, as will be seen in the next section, it brings indigenous peoples like the Batwa under the rubric of indigenous peoples along with the protection of their human rights as provided for under international law.

The African Commission Working Group emphasized that when some marginalized groups use the term indigenous to describe their situation, they use the modern analytical form of this concept.<sup>25</sup> This modern concept does not merely focus on aboriginality to draw attention to and alleviate the particular form of discrimination they suffer from, and by which they can seek protection in international human rights law and moral standards.<sup>26</sup> The criterion adopted by the Working Group on Indigenous Populations applies to Africa's Indigenous Peoples rather than the self-identification stated in Article 1 of the ILO Convention 169<sup>27</sup> and the UNDRIP under Articles 9 and 32.

Applying the criterion adopted for identifying indigenous peoples, the next section discusses the Batwa and determines whether they satisfy the definition and should be treated as indigenous.

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<sup>21</sup> African Group of Experts, *Response Note to the Draft Aide memoire of the African Group on the UN Declaration on the Rights of indigenous peoples*, section 1-3 (2007) available at

[http://cendoc.docip.org/collect/cendocdo/index/assoc/HASHfee9/e34be826.dir/response\\_to\\_draftafrgroup.pdf](http://cendoc.docip.org/collect/cendocdo/index/assoc/HASHfee9/e34be826.dir/response_to_draftafrgroup.pdf)

<sup>22</sup> S. James Anaya, *International Human Rights and Indigenous peoples*, New York: Aspen publishers (2000) 32-35.

<sup>23</sup> Se African charter of Human and Peoples Rights, <https://achpr.au.int/en/mechanisms/working-group-indigenous-populationscommunities-and-minorities-africa> (Last visited July 29 2025).

<sup>24</sup> Rodolfo (n 16) 99.

<sup>25</sup> African Commission on Human and Peoples Rights and International Work Group for Indigenous Affairs (IWGIA): Report of the African Commission's working Group of Experts on Indigenous populations /communities adopted by the African Commission on Human and Peoples Rights at its 28<sup>th</sup> ordinary session (2005) at 87.

<sup>26</sup> African Commission on Human and Peoples Rights and International Work Group for Indigenous Affairs (IWGIA): *Report of the African Commission's working Group of Experts on Indigenous populations /communities adopted by the African Commission on Human and Peoples Rights at its 28<sup>th</sup> ordinary session* (2005) at 87.

<sup>27</sup> Article 1(2) of the ILO Convention states indigenous self-identification or Tribal as the fundamental criterion for determining the groups to which the provisions of the convention apply.

## The Batwa as indigenous peoples

The Batwa, commonly known as pygmies<sup>28</sup> are believed that they are the original inhabitants of the equatorial forest of the Great Lakes Region of Central Africa.<sup>29</sup> The Batwa are currently found in about ten countries in East and Central Africa, including Burundi, Uganda, Rwanda, the Central African Republic, Democratic Republic of Congo (DRC), Tanzania, Cameroon, and Gabon.<sup>30</sup> In Rwanda and Burundi, they are called the Twa, and in DRC, they are called the Twa, Mbuti, or Bayanda.<sup>31</sup> In Uganda, they are called the Batwa and Bayanda.<sup>32</sup> Most of the Batwa are at an average height of 1.5 meters.

Since the advent of colonial rule in Africa, many indigenous communities like the Batwa have been denied their ancestral lands and natural resources by way of unjust state policies and legislation. Conservation strategies that pursue protectionist and exclusionist policies have continued to alienate the rights of Indigenous Peoples like the Batwa, negating their rights to livelihoods.<sup>33</sup>

On August 13, 1991, the Uganda government passed a resolution turning two forests and game reserves into Bwindi Impenetrable National Park by statutory instrument 3 under the 1952 National Parks Act. It then gazetted Bwindi and Mgahinga forests as National Parks with support from the World Bank, which led to forced evictions of the Batwa from their forests.<sup>34</sup>

The Batwa were dispossessed and unable to acquire alternative land for settlement, living as squatters on land belonging to the dominant neighbors adjoining protected areas.<sup>35</sup> The Batwa are under an imminent threat of extinction.<sup>36</sup> The 1991 designation of the Batwa forest as a National park was a final blow to the Batwa. They were evicted without following the due process of law. Because of domination by neighboring groups, the majority of the Batwa have been assimilated and forced to adopt the lifestyles of the dominant groups. Their language is becoming increasingly a mixture of Kinyarwanda, Congolese, Rukiga, and Kifumbira<sup>37</sup> as their cultures and languages are represented as primitive, static, uncivilised, and immoral.<sup>38</sup>

<sup>28</sup> Pygmy is a derogatory term used mainly by other ethnic groups to mock or marginalize the Batwa. See Relief web: Forgotten Peoples: *The Batwa “pygmies” of the Great Lakes Region of Africa* (Aug. 12, 2003) at <https://reliefweb.int/report/burundi/forgotten-people-batwa-pygmy-great-lakes-region-africa> (Last accessed July 28, 2025).

<sup>29</sup> Lewis Jerome, *The Batwa Pygmies of the Great Lakes Region*. 19, Minority Rights Group (2000) 50.

<sup>30</sup> Kabanukye, K., & Kwagala D., *Culture, Minorities and Linguistic Rights in Uganda: The Case of the Batwa and the IK*: Kampala: Human Rights and Peace Centre, HURIPEC Working paper No.1. (2007).

<sup>31</sup> Mukasa, N.: *The Batwa Indigenous peoples of Uganda and their traditional forest Land: Eviction, non –collaboration and unfulfilled needs*. Indigenous policy journal (2014) at 4.

<sup>32</sup> Pygmy is a derogatory term used to describe the Batwa because of their height. See Mukasa, N.: *The Batwa Indigenous peoples of Uganda and their traditional forest Land: Eviction, non –collaboration and unfulfilled needs*. Indigenous policy journal (2014) 4.

<sup>33</sup> Godber Tumushabe and Eunice Musime: *Living at the margins of life: The plight of the Batwa communities of South Western Uganda*. (ACODE Policy Research Series No 17 of 2006 ) 1.

<sup>34</sup> See Solidarity Uganda, *Three decades later, Batwa continue to suffer displacement due to forceful eviction in the name of conservation*, (Oct. 25, 2021) , <https://solidarity.org/three-decades-later-batwa-continue-to-suffer-displacement-due-to-forceful-eviction-in-the-name-of-conservation/> (Last accessed June 2, 2025).

<sup>35</sup> Farooq Kasule: *Compensate the Batwa: Court – Displacement affected the Batwa’s livelihood, self-esteem and identity* The New vision (August 24, 2021), <https://www.newvision.co.ug/category/news/compensate-batwa---court-112878> (Last visited May 10 2025).

<sup>36</sup> D. Jackson and K Bammé, *Heading towards extinction? The expulsion of the Twa from the Kahuzi- Biega National Park Democratic Republic of Congo: A study of indigenous rights in Africa*, Copenhagen: Forest peoples Programme (2000). Also see UNPO (Unrepresented National and Peoples Organization), *Batwa Ethnic Group faces Extinction* (Aug. 6, 2006) <https://unpo.org/article/5101> (Last visited June 3, 2025).

<sup>37</sup> Report of the African Commission’s working Group on Indigenous Populations and communities, Research and Information visit to the Republic of Uganda (July 2006 ) 51-52 [https://www.iwgia.org/images/publications/0016\\_ACHPR\\_Uganda\\_eb.pdf](https://www.iwgia.org/images/publications/0016_ACHPR_Uganda_eb.pdf)

<sup>38</sup> Tumushabe & Musime (n 34)19.

As discussed, four main principles have been promulgated to form the standard for defining and identifying Indigenous Groups in Africa. These principles are; Priority in time with respect to the occupation and use of a specific territory, voluntary perpetuation of cultural distinction which may include the aspects of a language, social organization, religion and spiritual values, the modes of production, laws, and institutions, Self-identification as well as recognition by other groups or by the States as distinct collectively and An experience of subjugation, marginalization, dispossession, exclusion, or discrimination whether or not these conditions persist.

An examination of the history of the Batwa and their experiences with both the British colonial government and Uganda's government demonstrates that the Batwa satisfy all the relevant criteria to be considered indigenous peoples for purposes of international and Ugandan law.

### **Priority in Time with Respect to Territory**

The Batwa are the original inhabitants of the Bwindi and Mgahinga forests in Uganda.<sup>39</sup> The Batwa lived in their forests before the colonialists came and before the nation of Uganda was born.<sup>40</sup> Until the sixteenth century, the Batwa people were the only inhabitants of the regions of the Bwindi Impenetrable National Park, the Mgahinga Gorilla National Park, and Echuya Forest reserve, but were later joined and marginalized by the incoming farmers and shepherds.<sup>41</sup> They occupied their lands before the British protectorate was established and had pre-existing rights which were never extinguished by the colonial government, and have a historical continuity with their pre-colonial society.<sup>42</sup> They own and use land collectively, and the community is more important than the individual; as such, the concept of individualization of land rights was and remains undesirable to the Batwa.<sup>43</sup>

### **Cultural Distinction**

Batwa history is extraordinarily rich, full of resilience, collective ownership and use of property, a demonstration of their unique and spiritual attachment to their traditional lands and peoples that lived in harmony with the forests and wildlife like the mountain gorillas.<sup>44</sup> The Batwa act as guardians and custodians of their traditional lands for the next generations, and hence, they view losing their lands as a loss of their identity.<sup>45</sup>

As Indigenous Peoples, the survival of the Batwa traditional life depends on access to their ancestral lands and natural resources thereon, and forests are of fundamental importance for their collective physical and cultural survival as peoples.<sup>46</sup> They believe that God placed them in the forest as their home and also appointed them as custodians of these forests.<sup>47</sup> The Batwa thus attach a high level of significance to the forests as their home and place of worship.<sup>48</sup> The Batwa believe that God dwells in the forest and by living in the forest, they are nearer to God.<sup>49</sup>

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<sup>39</sup> Jerome (n 30).

<sup>40</sup> Zaninka P., *The Impacts of Forest Nature Conservation on Indigenous Peoples: The Batwa of Southwestern Uganda: A case study of the Mgahinga and Bwindi Impenetrable Forest conservation Trust*. (Forest Peoples Programme, 2012) 165

<sup>41</sup> Ibid., 165-194

<sup>42</sup> Morris H.F and James S. Read, *Uganda: The Development of its Laws and Constitution*, British Commonwealth Series, v. 93 Stevens & sons, London (1966) at 200.

<sup>43</sup> Nakayi Rose, *Historical and Contemporary Land Laws and their impact on Indigenous Peoples Land Rights in Uganda*, The case of the Batwa. (Forest Peoples Programme, 5th country series, 2009) at 9.

<sup>44</sup> The Batwa Experience <https://www.batwaexperience.org/history> (Last visited July 29 2025).

<sup>45</sup> Amnesty International – Indigenous peoples at <https://www.amnesty.org/en/what-we-do/indigenous-peoples/> (Last visited July 24, 2025).

<sup>46</sup> Kabanukye, K., & Kwagala D., *Culture, Minorities and Linguistic Rights in Uganda: The Case of the Batwa and the IK*: (Kampala: Human Rights and Peace Centre, HURIPAC Working paper No.1. 2007) 10.

<sup>47</sup> Report of the African Commission's working Group on Indigenous Populations and communities, Research and Information visit to the Republic of Uganda (July 2006) 46.

<sup>48</sup> Ibid.

<sup>49</sup> Ibid.

## Self-identification

The Batwa, as individuals self-identify as indigenous peoples' are physically identifiable from their neighbors by height, as on average they measure about four feet high.<sup>50</sup> Their spiritual and special attachment to their lands, cultures, and traditional ways of life is far different from the beliefs of the dominant populations.<sup>51</sup> The Batwa have strong social ties and recognize themselves as a distinct community.<sup>52</sup>

## Experience of marginalization, domination, and subjugation

By the end of the nineteenth century, many agricultural and pastoral tribes migrated to the Batwa forest because of population growth. They cleared the forest areas for cultivation and disrupted the Batwa's traditional ways of living.<sup>53</sup> Discriminating against the Batwa takes the form of stereotyping, segregation, and denial of their rights.<sup>54</sup> Because of subjugation and marginalization, the Batwa have lost almost all possibilities of living their traditional lifestyles and have, to a large degree, adopted the way of life of their dominant neighbors. They are seen as uncivilized and held in contempt because of their association with the forests, which is perceived as an animal-like existence.<sup>55</sup>

The Batwa are isolated, live apart from others, and collect water downstream, which is different from others.<sup>56</sup> Their past is characterized by landlessness, threatened livelihoods, gradual evictions, and legal battles over land.<sup>57</sup> Owing to the creation of the Bwindi and Mgahinga National Parks, the Batwa are prohibited from accessing the forests to perform their rituals, face legal sanctions, and are beaten by the forest rangers if found in the parks.<sup>58</sup> Such historical patterns of Batwa marginalization and discrimination mirror the settler colonial injustice associated with many Indigenous Peoples worldwide.<sup>59</sup> Over the years, very few Batwa have contested for an election at even the lowest level of governance, Local Council 1 in their villages.<sup>60</sup> They are led by non-Batwa and, given this dominance, the Batwa have become voiceless.<sup>61</sup> They were identified by the African Commission on Human and Peoples' Rights as the most marginalized groups in Africa.<sup>62</sup> Batwa are especially vulnerable to acute gastrointestinal illness due to eviction from ancestral lands and the subsequent disruption of their subsistence livelihoods.<sup>63</sup> The average

<sup>50</sup> The Batwa Indigenous peoples of Uganda and their traditional forest Land: Eviction, non –collaboration and unfulfilled needs. *Indigenous policy journal* (2014) 74.

<sup>51</sup> Christine Ampumuza, Martin Duineveld, Rene Van der Duim, *The most marginalized people in Uganda, alternative realities of Batwa at Bwindi Impenetrable National Park*. Department of Tourism and Hospitality, Kabale University, Uganda (2020) 58.

<sup>52</sup> Tumushabe & Musime (n 34) 7-10.

<sup>53</sup> Ibid.

<sup>54</sup> Jerome (n 30) 13.

<sup>55</sup> Ibid., 16

<sup>56</sup> Ibid.,14

<sup>57</sup> Forest Peoples Programme , *Indigenous peoples in Uganda: A Review of the Human Rights situation of the Batwa peoples, the Benet Peoples and pastoralist communities: Alternative report to the Initial report of the Republic of Uganda to represented at the 55th session of the UN committee on Economic, social and Cultural Rights*, 1st – 19th June 2015, at 98.

<sup>58</sup> Minority Rights: Uganda: *Decades of displacement for Batwa, uprooted in the name of conservation* (2018) at <https://www.minorityrights.org/trends2018/uganda/> (Last accessed July 28, 2025)

<sup>59</sup> Poshendra Satyal, Morten Fibieger, Byskov & Keith Hyans, *Addressing multi-dimensional injustice in Indigenous Adaptation: The Case of Uganda's Batwa community, Climate and Development*. 13-6: (2021) at 253.

<sup>60</sup> Andrea M.: *The forgotten's advocate, center for Batwa minorities* (Aug. 30, 2013) at <https://cfmuganda.wordpress.com/2013/08/30/the-forgotten's-advocate/> (Last visited July 26, 2025)

<sup>61</sup> Douglas, K.S& Jacap De visser, *The unresolved ethical questions in Uganda's district council* , Law Democracy and Development, (2015) 19.

<sup>62</sup> Report of the African Commission's working Group on indigenous Populations and communities, adopted at the 47th Session, 12th – 26th of May 2020.

<sup>63</sup> Clark, S., Berrang-Ford, L., Lwasa, S., Namanya, D. B., Edge, V. L., & Harper, S. *The burden and determinants of self-reported acute gastrointestinal illness in an Indigenous Batwa Pygmy population in southwestern Uganda*. *Epidemiology and Infection* (2015). 143(11), 2287–2298.

life expectancy for the Batwa is 28 years compared to the current life expectancy of Uganda, which is 64 years.<sup>64</sup>

The above discussion shows that the Batwa are indigenous, deserving recognition and protection under international, regional, and national laws. The next section explores the rights that accrue to the Batwa as indigenous peoples under the laws vis-à-vis their limitations.

## **INDIGENOUS PEOPLES' HUMAN RIGHTS IN CONTEMPORARY LEGAL FRAMEWORK**

International and regional human rights instruments appeal to state parties to recognize and provide special rights to groups of peoples that are vulnerable to marginalization.<sup>65</sup> As will be seen, while the scope of indigenous people's rights has expanded immensely at the international scene, in Africa, endorsement of these rights is in its infancy.

### **International Legal Framework**

International human rights law provides fundamental standards on the rights of indigenous peoples. However, implementation of these laws is poor, and many domestic legal regimes are reluctant to apply these laws in their jurisdictions, given the fact that there is no international compliance mechanism in place.

### **International Labour Organization (ILO) Convention 169**

At the moment, this convention is the only international binding treaty on indigenous peoples' rights.<sup>66</sup> The ILO Convention 169 is a visionary instrument that seeks to ensure that indigenous and tribal peoples enjoy their human rights, are autonomous, exercise control over their own development, and participate in decision-making processes that affect them.<sup>67</sup> It promotes respect for self-determination, culture, and traditional ways of life of indigenous and tribal Peoples.<sup>68</sup> ILO Convention 169 defines its scope and application.

It applies to:

Tribal peoples of independent countries whose cultural, social and economic conditions distinguish them from other sections of the national community and peoples in independent countries who are regarded as indigenous on account of their descent from populations that inhabited their country or geographical region to which the country belongs at the time of conquest or colonization or establishment of prior state boundaries and who in respect of their legal status retain some or all of their own social, economic, cultural and political institutions.<sup>69</sup>

It also provides that:

The Peoples concerned shall have the rights to decide their own priorities for the process of development as it affects their lives, beliefs, Institutions and spiritual wellbeing and the lands they occupy or otherwise use and to exercise control to the extent possible over their own economic, social and cultural development and shall participate in the formulation and

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<sup>64</sup> Fred de Sam Lazaro & Sarah Clune Hartman, Uganda's Batwa Tribe, Considered conservation refugees, see little government support (Oct 21 2021) at <https://www.pbs.org/newshour/show/ugandas-batwa-tribe-considered-conservation-refugees-see-little-government-support>

<sup>65</sup> The UN Charter of the United Nations, 24 Oct 1945, I UNTS XVI

<sup>66</sup> S. James Anaya, *Indigenous Peoples in International Law*, 129 (Eds) (2004) at 3.

<sup>67</sup> Peter Bille Larsen & Jeremie Gilbert, *Indigenous Rights and ILO Convention 169, Learning from the past and Challenging the Future*, Environmental Governance and Territorial Development Institute, University of Geneva, Switzerland, *The International Journal of Human Rights* (2020) 24 at 83.

<sup>68</sup> L.Swepston, *The Indigenous and Tribal peoples in post-colonial development discourse in Africa*, *Wisconsin International Law Journal* (2002) at 298.

<sup>69</sup> ILO Convention 169, Art 1.

implementation of plans and programs for national and regional development which may affect them directly.<sup>70</sup>

The Convention requires that due regard be made to customs and customary laws of indigenous peoples in applying national laws and regulations, and that they have a right to retain their own customs and institutions.<sup>71</sup> The Convention provides that “rights of ownership and possession of peoples concerned over lands which they traditionally occupy shall be recognized.”<sup>72</sup>

The Convention prohibits discrimination and provides that “indigenous and tribal peoples shall enjoy the full measures of human rights and fundamental freedoms without any discrimination.”<sup>73</sup> It recognizes the rights of indigenous peoples to be consulted and to participate in decision making and provides that “governments shall consult the peoples concerned through appropriate procedures and in particular through their representative institutions whenever consideration is being given to legislative or administrative and other bodies responsible for policies and programmes which concern them.”<sup>74</sup>

The Convention, however, is only binding on States that are signatories. This limitation is one of the reasons the ILO Convention 169 usually receives much less attention than the UNDRIP<sup>75</sup> and its implications and practice remain unexplained in the academic literature.<sup>76</sup> Until 2010, no African State had ratified this treaty, and there are significant controversies on the recognition of indigeneity in Africa. Only one country, the Central African Republic, has ratified the ILO Convention.<sup>77</sup> The convention’s criterion of self-identification and tribal peoples is problematic when applied to Uganda since it sweeps all Ugandans as indigenous, making the concept meaningless.

### **The United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP)**

The most recent and fundamental efforts by the international community to recognise the rights of indigenous peoples are contained in the UNDRIP.<sup>78</sup> The UNDRIP establishes a universal framework of minimum standards for the survival, dignity, and well-being of Indigenous Peoples of the world and elaborates on existing human rights standards and fundamental freedoms as they apply to Indigenous Peoples.<sup>79</sup>

The UNDRIP provides for the right of indigenous peoples to autonomy, identity, and membership.<sup>80</sup> It also guards against forced removal of indigenous peoples from their lands and territories and states that there shall be no relocation without the Free Prior and Informed Consent (FPIC) of the indigenous peoples concerned.<sup>81</sup> “Indigenous Peoples have the right to participate in decision-making in matters that affect them through representatives chosen by themselves in accordance with their own procedures.”<sup>82</sup>

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<sup>70</sup> Ibid., Art 7(1).

<sup>71</sup> Ibid., Art 8.

<sup>72</sup> Ibid, Art 14.

<sup>73</sup> Ibid, Art 3(1).

<sup>74</sup> Ibid., Art 6(1).

<sup>75</sup> Peter Bille Larsen & Jeremie Gilbert, *Indigenous rights and ILO Convention 169, Learning from the past and Challenging the Future*, Environmental Governance and Territorial Development Institute, University of Geneva, Switzerland, The International journal of Human Rights, (2020) 24 at 83-93.

<sup>76</sup> Ibid., 83.

<sup>77</sup> ILO Central African Republic ratifies ILO Indigenous and Tribal peoples convention, 1989(No.169) at [https://www.ilo.org/global/standards/WCMS\\_126250/lang--en/index.htm#:~:text=%2C%201989%20\(No.-,169\),States%20in%20which%20they%20live.](https://www.ilo.org/global/standards/WCMS_126250/lang--en/index.htm#:~:text=%2C%201989%20(No.-,169),States%20in%20which%20they%20live.)

<sup>78</sup> Godber Tumushabe and Eunice Musime: Living at the margins of life: The plight of the Batwa communities of Southwestern Uganda. ACODE Policy Research Series No 17 of 2006 at 20

<sup>79</sup> Australian Human Rights commission, UN Declaration on the Rights of indigenous peoples [https://www.humanrights.gov.au/our-work/un-declaration\\_rights\\_indigenous-peoples-1](https://www.humanrights.gov.au/our-work/un-declaration_rights_indigenous-peoples-1)

<sup>80</sup> United Nations Declaration of Rights of Indigenous Peoples, (UNDRIP) Art 4.

<sup>81</sup> Ibid., Art 10.

<sup>82</sup> Ibid, Art 18.

It mandates states to consult and cooperate in good faith with indigenous peoples concerned through their own representatives and Institutions to obtain their FPIC before adopting and implementing legislative or administrative measures that may affect them.<sup>83</sup> Such international provisions broaden the international awareness of the existence of Indigenous Peoples and are a sign of the growing recognition of indigenous peoples' human rights law.<sup>84</sup>

The UNDRIP provides for the rights of indigenous peoples to their lands, territories, and natural resources traditionally owned, occupied, or used.<sup>85</sup> It provides for the right of indigenous peoples to participate in any decision-making regarding the lands<sup>86</sup> and also gives Indigenous Peoples “the right to redress by means that include restitution or just, fair and equitable compensation for their traditionally occupied lands, territories and resources that have been confiscated or damaged without their FPIC.”<sup>87</sup>

However, its adoption was after more than 25 years, which involved deep negotiations, hearings, and intensive dialogue between nation-states and indigenous representatives.<sup>88</sup> To prevent the adoption of the Declaration by the General Assembly, some States objected to the UNDRIP's adoption initially on grounds that the provisions were overly broad, unclear, and capable of a wide variety of interpretations that could lead to reopening of existing treaties.<sup>89</sup>

The African group of experts, during the adoption of the UNDRIP, noted that the absence of a definition of the term indigenous peoples would create problems for its implementation in Africa.<sup>90</sup> This mirrors the current challenges in implementing the UNDRIP. The UNDRIP is also a declaration and not legally binding.<sup>91</sup> Since it is not an enforceable treaty, many African States are reluctant to enforce it.<sup>92</sup>

### **International Covenant on Civil and Political Rights (ICCPR)**

Uganda ratified the ICCPR on June 21, 1995, without making any reservations, and it came into force on September 21, 1995.<sup>93</sup> The ICCPR provides that “all peoples have the right to self-determination and by virtue of this right they freely determine their political structures and freely pursue their economic, social and cultural development.”<sup>94</sup> It provides that “in no case may a people be deprived of its own means of subsistence.”<sup>95</sup> The Convention provides that:

State parties to the present covenant including those having a responsibility for the administration of non- self-governing and Trust Territories shall promote the realization of the rights of self-determination and shall respect that right in conformity with the provision of the charter of the United Nations.<sup>96</sup>

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<sup>83</sup> Ibid., Art 19.

<sup>84</sup> Ronald Kakungulu Mayambala, *Indigenous peoples, Human Rights and the African Problem. The Case of the Twa, Ogiek and Maasai*: SJD Thesis, University of Arizona, James E. Rogers College of Law (2010) 27.

<sup>85</sup> UNDRIP(n 82) Art. 26 .

<sup>86</sup> Ibid., Art 27.

<sup>87</sup> Ibid., . Art 28.

<sup>88</sup> E.D. C. Res. 1982/34.UN. DOC.E/1982/82 (May 7, 1982).

<sup>89</sup> CBC News, *Canada votes “no” as UN Native rights declaration passes.*( Sept. 13, 2007),

<https://www.cbc.ca/news/canada/canada-votes-no-as-un-native-rights-declaration-passes-1.632160> (Last visited July 27, 2025)

<sup>90</sup> Response Note to the Draft Aide Memoire of the African group on the UN Declaration on the rights of indigenous peoples, presented by an African group of experts 21 March 2007.

<sup>91</sup> Mayambala (n 86) 49.

<sup>92</sup> Jill Barrette: *Indigenous peoples Human Rights in Africa: The pragmatic revolution of the African Commission Human and Peoples Rights*: ICLA Vol 60 (2011) 246.

<sup>93</sup> University of Minnesota Human rights Library, Ratification of International Human Rights Treaties (Uganda) at <http://hrlibrary.umn.edu/research/ratification-uganda.html> (Last visited July 30 2025).

<sup>94</sup> Article 1 of the ICCPR at <https://www.ohchr.org/en/instruments-mechanisms/instruments/international-covenant-civil-and-political-rights>

<sup>95</sup> Ibid. Art 1(2).

<sup>96</sup> Ibid., Art 1(3).

The ICCPR provides for equal protection of the law of all peoples and that they are all entitled without any discrimination to the equal protection of the Law, and the law shall prohibit any discrimination on grounds such as race, color, sex, language, religion, political or other opinion, or any status such as origin or nationality.<sup>97</sup> The Treaty provides that:

In those states in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right in community with the other members of their group to enjoy their own culture, to profess and practice their own religion or to use their own language.<sup>98</sup>

The Human Rights Committee, in its general comment concerning the exercise of the cultural rights protected under Article 27, observed that “culture manifests itself in many forms, including a particular way of life associated with the use of land resources, especially in the case of indigenous peoples.”<sup>99</sup>

However, the ICCPR is weak as it has no reference to the right to property.<sup>100</sup> There is no specific mention of the rights of Indigenous Peoples in this covenant.<sup>101</sup> It is, therefore, problematic for Indigenous Peoples like the Batwa to invoke such a law in Uganda to assert their rights to self-determination, more so now that all Ugandans can claim Indigeneity. The word “peoples” is not defined in Article 1 or elsewhere in the covenant. Hence, the covenant leaves room for many different interpretations as to whether the entire population of a state party constitutes peoples in the meaning of this Article.<sup>102</sup> The ICCPR is thus too wide in scope, broad in coverage, and may be ignored in places like Africa and Uganda in particular.

## Regional Laws

At the regional level, the African Charter on Human and Peoples Rights (ACHPR) is the legal instrument that implicitly provides for the rights of Indigenous Peoples on the African continent. All African states, apart from Morocco, have ratified the African Charter.<sup>103</sup> Whereas this African Charter does not expressly provide for rights of Indigenous Peoples, reference to “peoples” in its provisions serves as a basis for inclusion of Indigenous Peoples within its protective scope.

The African Charter is implemented by the African Commission on Human and Peoples Rights and the African Court on Human and Peoples Rights. The African Commission established a Working Group of Experts on Indigenous Populations/Communities to do research and develop reports on indigenous issues in Africa. The discussion below shows recognition of the presence of indigenous peoples in Africa.

The ACHPR provides that “every individual shall be entitled to the enjoyment of the rights and freedoms, recognized and guaranteed in the Charter without discrimination of any kind, such as race, ethnic group, color, sex, language, religion, political or any other status.”<sup>104</sup> The Charter provides for equality for everyone before the law and for respect of the dignity of all human beings and recognition of their legal status and freedoms from exploitation.<sup>105</sup>

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<sup>97</sup> Ibid., Art 26.

<sup>98</sup> Ibid., Art 27.

<sup>99</sup> Human Rights Committee (1994) General Comment No 23: The Rights of Minorities (Art 27) UN Doc, CCPR/C/21/Rev./Add.5

<sup>100</sup> <sup>100</sup> Scheinin Martin, *Indigenous peoples Land Rights under the International Covenant on civil and political Rights*, Aboriginal policy Research Consortium International (APRCI) (2004) at 8.

<sup>101</sup> Rebecca Tsosie, *Reconceptualising Tribal Rights: Can self Determination be actualized within the U.S. Constitutional structure*, Lewis & Clark, Law Review Vol. 15: 4(2012) at 924-26

<sup>102</sup> Ibid., 10.

<sup>103</sup> See African Commission on Human and peoples’ Rights available at <https://ijrcenter.org/wp-content/uploads/2020/05/ACHPR-one-pager-2020.pdf> ( Last visited June 14 2025).

<sup>104</sup> The African Charter on Human and Peoples Rights (ACHPR). Art 2.

<sup>105</sup> Ibid., . Art 5.

It also recognizes and protects collective rights through the use of the term peoples' in its title and provisions.<sup>106</sup> The ACHPR states that "all peoples shall be equal and shall enjoy the same respect and have the same rights and nothing shall justify the determination of a people by others."<sup>107</sup> It also recognizes the right of all peoples to existence, to an unquestionable and inalienable right to self-determination.<sup>108</sup> In this regard, "they shall freely determine their political status and shall pursue their economic and social development according to their own policy."<sup>109</sup> The ACHPR also states that colonized or oppressed peoples shall have the right to free themselves from the bonds of domination by resorting to any means recognized by the international community.<sup>110</sup>

The ACHPR provides that "all peoples shall freely dispose of their wealth and natural resources and this right shall be exercised in the exclusive interest of the peoples without deprivation."<sup>111</sup> It provides that "all peoples have the right to their economic, social and cultural development with due regard to their freedom and identity and in equal enjoyment of the common heritage of mankind."<sup>112</sup> States have the duty to individually or collectively ensure the exercise of the right to development<sup>113</sup> and the right to a general satisfactory environment favorable to their development.<sup>114</sup>

However, there is controversy regarding the applicability of indigenous peoples in Africa, and the African Commission itself did not initially embrace this concept and did not find the term "indigenous peoples" applicable to African conditions.<sup>115</sup> The use of the term populations/communities reveals a residual consideration of indigenous peoples as minorities or as a cohesive population in their own right.<sup>116</sup> Most African states maintain that all their citizens are indigenous.<sup>117</sup> At the voting of the UNDRIP, it was taken that "lack of a clear definition of indigenous communities in the draft UNDRIP created major juridical problems for its implementation and in the African context was not only legally incorrect but could create tension among the ethnic groups and instability between sovereign States."<sup>118</sup> These controversies on the concept of indigeneity in Africa explain the reluctance by African states to implement the ACHPR. There is also no enforcement mechanism for the ACHPR. Since the concept is still disputed in Africa, there is an urgent need for deeply researched studies clarifying what it means to be indigenous in Africa today.

### Domestic Legal Framework

Uganda has not formally accepted the legal existence of indigenous peoples among its populace. No law in the country expressly defines and provides for the rights of indigenous peoples, and all Ugandans are categorized as indigenous under Uganda's Constitution. One of the reasons for the denial of Indigenous Peoples relates to concerns over undermining national unity and maintaining peace amongst its multi-ethnic societies.<sup>119</sup> However, as discussed below, Uganda's legal framework contains numerous legal

<sup>106</sup> Amnesty International, 13 years in Limbo, Evictions of the Benet in the name of conservation (2021) at 12 available at <https://www.amnesty.org/en/wp-content/uploads/2021/11/AFR5941382021ENGLISH.pdf> at 394.

<sup>107</sup> The ACHPR, (n 106) Art 19.

<sup>108</sup> Ibid., Art 20(1).

<sup>109</sup> Ibid., Art 20(1).

<sup>110</sup> Ibid., Art 20(2).

<sup>111</sup> Ibid., Art 21.

<sup>112</sup> Ibid., Art 22(1).

<sup>113</sup> Ibid., Art 22(2).

<sup>114</sup> Ibid., Art 24.

<sup>115</sup> Bojosi Kealeboga, N&G. Mukundi Wachira, *Protecting Indigenous peoples in Africa: An Analysis of the approach of The African Commission on Human and Peoples Rights* 6 African Journal of Human Rights 14 (2006) at 394.

<sup>116</sup> Ibid

<sup>117</sup> RK Hitchcock & D Vinding, Introduction in RK Hitchcours & Dnndy (eds) *Indigenous peoples rights in Southern Africa* (2004) 8.

<sup>118</sup> Advisory opinion of the African Commission on Human and people's Rights on the UNDRIP, adopted by the African Commission on Human and people's Rights at its 40th ordinary session held in May 2007 in Accra, Ghana, (2007) 1.

<sup>119</sup> Thornberry and F. Vijoien, Overview Report on the Constitutional and legislative protection of the Rights of Indigenous peoples in 24 African countries (International Labour Organization and African commission on Human and Peoples Rights (Oct 2009) at 54

provisions that provide entry points for a more adequate recognition and protection of indigenous people's rights, like the Batwa.

### **The 1995 Constitution of Uganda**

Uganda's constitution recognizes the "country's struggle against the forces of tyranny, oppression and exploitation and its commitment to building a better future through establishing social-economic and political order that embraces principles of equality and democracy, freedom and social justice."<sup>120</sup> Under its derivative principles, the state is to ensure fair representation of marginalized groups in all constitutional and other bodies.<sup>121</sup>

The Constitution provides for equality and freedom from discrimination.<sup>122</sup> It prohibits deprivation of property and recognizes group ownership rights like those of the Batwa. It states that:

Every person has a right to own property either individually or in association with others and<sup>123</sup> no person shall compulsorily be deprived of property or any interest unless it is provided for under the law which makes provision for prompt payment of fair and adequate compensation, prior to the taking of possession or acquisition and a right of access to a court of law by any person who has an interest or right over the property.<sup>124</sup>

The Constitution provides for "affirmative action in favour of marginalized groups on the basis of gender, age, disability or any other reason created by history, tradition or custom."<sup>125</sup> It establishes the Equal Opportunities Commission to effect this provision.<sup>126</sup> It guarantees the rights of ethnic minorities to fully participate in the development process and for consideration of their views and interests in national plans and programmes.<sup>127</sup>

These are laudable legal provisions that provide a base for the recognition and enforcement of indigenous peoples' rights. However, despite all these impressive provisions, the Batwa are at the periphery of development. Uganda's Constitution does not define the term "indigenous peoples" nor does it provide their characteristics. It instead lists over 65 tribes as indigenous in its Article 10(a) Third Schedule. It is thus overly inclusive, and this ambiguity remains unresolved to date.<sup>128</sup> The Batwa were not involved in the decision-making process of gazettement of their forest as national parks, and neither were they adequately compensated as enshrined under Article 26 of the Constitution. To date, Uganda has not ratified the ILO Convention 169 and has ignored the Special Rapporteur communication received in 2010 regarding the rights of the Batwa.<sup>129</sup> Most of the Constitutional provisions have remained unimplemented and it is this non enforcement that led the Batwa to petition court seeking redresses for their continued suffering.

### **The Land Act of 1998**

The Land Act of Uganda<sup>130</sup> came into force on July 2, 1998, and it is the law that provides for tenure ownership and management of land and operationalizes the Constitution's provisions on land and other incidental matters. The Act provides that "any person, family or community holding land under customary

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<sup>120</sup> The 1995 Constitution of Uganda,, Preamble, paras 2 and 3.

<sup>121</sup> Ibid., Principle 11.

<sup>122</sup> Ibid., Art 21(2).

<sup>123</sup> Ibid.,. Art 26(1).

<sup>124</sup> Ibid. Art 26(2).

<sup>125</sup> Ibid., Art 32(1)

<sup>126</sup> Ibid., Art 32(3).

<sup>127</sup> Ibid., Art 36.

<sup>128</sup> African Commission on Human and Peoples Rights and International Work Group for Indigenous Affairs (IWGIA): *Report of the African Commission's working Group of Experts on Indigenous populations /communities adopted by the African Commission on Human and Peoples Rights at its 28<sup>th</sup> ordinary session* (2005) at 33.

<sup>129</sup> S. James Anaya: *Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous peoples* (June 2009-July 2010) A/HRC/15/37/Add1, Human Rights Council 15th session.at 164

<sup>130</sup> Land Act, 1998 Laws of Uganda Cap 227.

tenure on former public land may acquire a certificate of customary ownership in respect of that land.”<sup>131</sup> This certificate proves land ownership, which is held in perpetuity.<sup>132</sup> It provides for consultation and negotiations with the local owners before any compulsory acquisition of land owned, and in case of vacation, notice is required to be sent to the occupant before eviction.<sup>133</sup> However, when and if applied in the African context, “the right of Indigenous Peoples to their ancestral lands and customary land tenure creates serious problems as to what exactly the right to African customary tenure for Africa’s indigenous peoples would entail.”<sup>134</sup> To date, the Batwa do not have any titles.

The Land Act establishes areas of common land use in communally owned land and provides that the purposes for which land may be set aside for common use including grazing and watering of livestock hunting and gathering of food and building materials, gathering honey and other forest resources for food and medicinal purposes and such other purposes as may be traditional among the community using the land communally.<sup>135</sup> This caters for the communal rights of the Batwa.

Despite these provisions, the Batwa have been denied access to their forests, and they are charged and penalized once found attempting to access their ancestral lands to collect food or medicinal plants. They were evicted without consultation and without adequate compensation. The same Land Act restricts utilization of land owned and provides that one shall manage and utilize such land in accordance with the Forests Act, Mining Act, National Environment Act, Uganda Wildlife Act, and any other law<sup>136</sup> that gives the government control of environmentally sensitive areas such as natural parks, lakes, streams, wetlands, and forest reserves. Such provisions have seen indigenous Peoples like the Batwa displaced forcefully from their lands.

### **The Uganda Wildlife Act 2019**

The Uganda Wildlife Act 2019<sup>137</sup> is the law responsible for the conservation and sustainable management of wildlife. It strengthens wildlife conservation and management and repeals the Wildlife Act 2000. The Act provides for the continuation of UWA as a semi-autonomous state agency managing over ten National parks in Uganda, including the Mgahinga and Bwindi National Parks, out of which the Batwa were evicted, protected wildlife reserves, community wildlife management areas and wildlife sanctuaries.<sup>138</sup>

The Uganda Wildlife Act provides for community involvement in wildlife conservation, including through equitable sharing of its benefits and establishment of a community wildlife committee.<sup>139</sup> However, it restricts entry into the National parks and introduces punitive measures for the communities that live around the protected area if found entering the Parks or grazing their animals at the Parks with sanctions such as a fine of Ush 7,000,000 (\$2100) or up to 10 years imprisonment or both<sup>140</sup> for those found entering the Parks without permission. The Batwa are marginalized in the name of conservation.

### **The Land Acquisition Act 2000**

This Act makes provisions for the compulsory acquisition of land for public purposes and for matters incidental.<sup>141</sup> It provides that “notice to persons having an interest in the land must be published in the Gazette and exhibited at convenient places on or near the land, stating that the Government intends to take

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<sup>131</sup> Ibid., s 4.

<sup>132</sup> Amnesty International, (n 109) 15.

<sup>133</sup> Land Act (n 133)S 30.

<sup>134</sup> Mayambala, (n 86) 29.

<sup>135</sup> Land Act (n 133) s 23.

<sup>136</sup> Ibid. SS 43 and 44.

<sup>137</sup> The Uganda Wildlife Act 2019, Act No 17 of 2019, Laws of Uganda.

<sup>138</sup> Uganda Wildlife Authority at <https://ugandawildlife.org>

<sup>139</sup> Uganda Wildlife Act (n 140) s 20.

<sup>140</sup> Ibid. ss 29 and 70 .

<sup>141</sup> Section 2 and 3, Land Acquisition Act, Cap 226, Laws of Uganda (2000).

<https://www.ulii.org/akn/ug/act/1965/14/eng%402000>

possession of the land and call for all compensation claims.<sup>142</sup> However, despite this law, no prior notice was given to the Batwa before their eviction from their ancestral lands for conservation. The Act only provides for compensation as redress and does not provide for other remedies like restitution.

As discussed, progressive legal frameworks exist at the international, regional, and domestic levels, providing for indigenous peoples' rights. However, most of these laws have remained paper promises.<sup>143</sup> The domestic effect of international law has remained limited in Uganda.<sup>144</sup> The fact that the Batwa are still engaging in legal battles with the Ugandan State seeking redress for their forced eviction is evidence that the laws are largely theoretical.

## **RECOMMENDATIONS**

The proposals below are intended for possible, realistic, and constructive steps to be taken towards the recognition and implementation of indigenous peoples' rights in Uganda. They are not ultimate solutions to resolve the predicament faced by the Batwa, but are tentative options that can be deployed to change the current narrative.

### **Recognition of the existence of indigenous peoples**

The Ugandan state must acknowledge the existence of the Batwa as indigenous peoples alongside other such groups as understood under international law. The political and legal definition and identification of indigenous peoples should adopt the set international and regional criteria. It is only when there is such recognition that we can engage in a meaningful dialogue for the enforcement of indigenous people's rights.

### **Legal reform and domestication of international law on Indigenous peoples**

The Ugandan state should consider adopting a specific law that comprehensively addresses the rights of Indigenous Peoples like the Batwa. The current Ugandan law has no express provision for the rights of Indigenous Peoples. Lack of a specific law or legal provisions targeting Indigenous Peoples' rights is a big blow to the realization of these rights. The Uganda Legal Reform Commission should take up the task of ensuring that Indigenous Peoples' rights are provided for in the Ugandan legal framework. There is a need to domesticate international human rights laws on the rights of Indigenous Peoples into Uganda's legal framework. International law does not expressly apply in the domestic legal framework of Uganda.

### **Ratification of ILO Convention 169 on Indigenous and Tribal Peoples**

To show international commitment to recognition and enforcement of Indigenous peoples' rights, Uganda should ratify the ILO Convention 169. Ratification of the ILO Convention No. 169 would enable Uganda to tap into international expertise and processes on the implementation of the rights of Indigenous Peoples, like the Batwa.

### **Judicial activism**

The legal system should be made more accessible to Indigenous Peoples like the Batwa, given their predicament. Courts should ensure accountability for all human rights violations of the Batwa, and Court orders should be enforced. The Ugandan government should ensure that Indigenous Peoples have quick access to the Courts of law in terms of proximity, efficiency, and affordability. The state should devise measures to provide legal services to the Batwa free of charge. Indigenous Peoples should be given adequate remedies to alleviate their suffering.

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<sup>142</sup> Ibid., s 5.

<sup>143</sup> Kanyeihamba G. W, Kanyeihamba's commentaries on Laws, Politics, and governance. Law Africa (2006) 103.

<sup>144</sup> Thornberry and F. Vijoer, Overview Report on the Constitutional and legislative protection of the Rights of Indigenous peoples in 24 African countries (International Labour Organization and African commission on Human and Peoples Rights (Oct 2009) 154.

### **Enforcement Mechanism for Regional and International Laws**

The international community should establish an international compliance system to enforce the international human rights of Indigenous Peoples. Given the unfriendly political climate under which Indigenous Peoples' rights play, it may be unrealistic to rely only on a faith application.<sup>145</sup> A global policing force is crucial to compel compliance. Sanctions should be designed and imposed on states that are adamant and that repeatedly violate Indigenous Peoples' rights. The UNDRIP, which is currently the most comprehensive instrument providing for the rights of Indigenous Peoples, should be made an international convention to have a legally binding force on states that ratify it, rather than being a merely aspirational instrument.

### **Sensitisation and Building Civic Competence**

Experts on indigenous peoples' rights should sensitize key stakeholders, like judicial officers and the population, on the concept of indigenous peoples. Key role players should be trained on the legal recognition of indigenous peoples and their rights. This will enable an understanding of the concept and demystify the misconception of the applicability of indigeneity. Aggressive advocacy for indigenous people's rights should be intensified. Civil societies should demand the enforcement of indigenous peoples' rights by exerting pressure on the state to accord them legal recognition and implementation.

### **Empowerment of the Batwa**

The Batwa should be empowered to build internal competence and confidence. There should be grassroots empowerment and equipping of the Batwa with information on who they are under international law and what is due to them. Through this capacity building, the self-esteem of the Batwa may be stepped up, which can enable them to overcome incidents of marginalization, stereotypes, and intimidation.

### **Storytelling and media campaigns**

The press should be used to disseminate correct information about the Batwa, broadcast their plight, and provide accurate information to the populace on the concept of indigenous peoples. The media should collaborate with indigenous peoples' organizations to create avenues for recognition of their rights. The Batwa can use this avenue to tell their story. They can use music, plays, and drama to publicize their situation.

## **CONCLUSION**

The categorisation of all Africans as Indigenous to the continent has stalled progress in the realisation of indigenous peoples' rights. Laudable laws providing for the recognition and protection of the rights of indigenous peoples like the Batwa exist. These laws are, however, largely unenforced. This has obstructed the realisation of the rights of the Batwa.

The absence of a comprehensive law in Uganda designed to address the specific issues of indigenous peoples impedes the realisation of indigenous peoples' rights. Forced eviction of the Batwa from their ancestral land is a key explanation for their current suffering. Factors such as lack of consultation, non-compensation, and failure to provide alternate land have compounded the drastic effect of land loss. Whereas evictions in themselves can be justified, evicting the Batwa without their free, prior, and informed consent contravenes international, regional, and national laws. In the effort to address climate change and curb biodiversity loss, there must be recognition and protection of the human rights of the people found on such lands and who survive on them. Limited awareness of the concept of indigenous people's laws in Uganda is grounds for relegation of the Batwa, as many Ugandans argue that all Ugandans are indigenous.

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<sup>145</sup> See Vienna Convention, Article 26, UN Vienna Convention on the Law of Treaties 23 May 1969, UN, and Treaty Series Vol 11:55 a 331 puts a duty on states to meet their obligations in good faith. However, this good faith approach has enormous limitations in Uganda.