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Victimization of African Indigenous Peoples: Appraisal of Violations of Collective Rights under Victimological and International Law Lenses

Felix Mukwiza Ndahinda*

1. Introduction

In his *Paradigms and Paradoxes of Victimology*, R. Elias offers an insight of what he considers as alternatives to the dominant “right realist” or law and order ideology of crime control in victimology.¹ The latter is presented as spearheaded by proponents of a scientific victimology as opposed to the perceived utopian humanistic alternative approaches to the discipline.² The analysis has the merit of underscoring the unsettled nature of debates over the victim status under victimological perspective, given the wide range of individual and collective victimization claims.

Considered under the author’s theoretical perspective, the present study adopts what can be viewed as a combination of his “peacemaking” and “critical/radical” ideologies on victimization, grounding on existing international standards and instruments protecting victims’ rights on one hand and indigenous peoples’ rights on the other hand. It builds on the growing affirmation of the interconnectedness of all human rights and the conviction that comprehensive and effective protection stems from various combined efforts aimed at curbing violations of rights guaranteed in various instruments.³ Adopting an optimistic

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¹ R. Elias, ‘Paradigms and Paradoxes of Victimology’, pp. 16–18, <www.aic.gov.au/publications/proceedings/27/elias.pdf>, visited on 15 June 2006.

² *Ibid.*, pp. 11–12.

³ The analysis subsumes indigenous peoples’ rights into human rights, while being aware of existing theoretical formulations differentiating group rights, including indigenous peoples’ rights with mainstream human rights law deemed to protect mainly individual rights and freedoms.

perspective on the realization of a set of rights which are still subject to contestation in their most fundamental aspects, the analysis seeks to emphasise the overriding importance of inclusiveness and comprehensiveness of legal protection and remedies availed to the most destitute members of human society at the dawn of the twenty-first century.

Discourses over indigenouness take multiple forms which generally condition the nature of proposed solutions aimed at ameliorating their societal disadvantaged status. Overemphasis on socio-economic, historical, political, cultural or other purported endemic factors put forward to explain their destitute condition leads to limited or ineffective responses. Mindful of the need for a holistic approach on indigenous peoples claimed rights and of the equal importance of protection of both individual and collective rights, this analysis focuses on the necessity of protecting the latter by resorting to a multidimensional conception of the claimed rights, stretching beyond purely international human rights precepts. The rationale behind this insistence on protecting indigenous peoples' collective rights lies in the fact that while their individual rights are protected, at least in theory, under equalitarian human rights norms, national, regional and international legal framework are still widely underdeveloped as far as protecting collective rights of particular groups forming part of national populations is concerned.

This examination combines various theories and principles from different conceptual perspectives, while remaining aware of the challenges and shortcomings of such an approach, due to the prevailing tendency of underlying conceptual frameworks to operate as self-contained disciplines.⁴ If victims' rights are an integral part of human rights under various instruments, the multidimensional nature of causes and consequences of victimization and propositions for appropriate remedies thereof are better captured by adopting multidisciplinary approaches.⁵

The approach derives from a very simplistic understanding of victimization as reflected in relevant international instruments. Recent evolutions in international (human rights) law standards-setting relating to indigenous peoples have focused on promotion and protection of their often violated rights as collectives.

⁴ H. Rombouts and S. Vandeginste, 'Reparation for victims of gross and systematic violations: The notion of victim' (Third World Legal Studies, 2003) pp. 89–92.

⁵ United Nations Commission on Human Rights, 'The Right to Restitution, Compensation and Rehabilitation for Victims of Gross Violations of Human Rights and Fundamental Freedoms: Final Report of the Special Rapporteur, Mr. M. Bassiouni, submitted in accordance with Commission Resolution 1999/33', UN Doc. E/CN.4/2000/62, 18 January 2000; ECOSOC, *The right to a remedy and reparation for victims of violations of international human rights and humanitarian law*, reports of the first, second and third consultative meeting, UN Doc. E/CN.4/2003/63 of 27 December 2002, UN Doc. E/CN.4/2004/57 of 10 November 2003 and UN Doc. E/CN.4/2005/59 of 21 December 2004 respectively reports espouse this idea of victims rights as being human rights. See also Northern Ireland Human Rights Commission, *Human Rights and Victims of Violence*, Report, June 2003, pp. 46–61, <<http://cain.ulst.ac.uk/issues/victims/docs/nihrc03victims.pdf>>, visited on 28 July 2006.

Thus construed, indigenous peoples are presented not only as historical victims of expansionist and/or colonial conquests but also as victims of existing and imposed institutional and legal structures in current Westphalian modelled polities characterized by the tendency to confer rights on individuals and states at the expense of other societal groupings.⁶ ‘Victim’ in this context remains a concept to be clarified in the light of both international (human rights) law and victimology. The present analysis advocates the inclusion of indigenous peoples’ collective victimization into the evolving legal and institutional framework dedicated to victims’ rights at both national and international levels. This could prove to be a complementary, salutary dynamic in the area of the evolving protection of indigenous peoples’ (human) rights which, as it will be argued, still lacks effective institutional enforcement mechanisms, mostly in their purely collective dimensions.

2. *Evolving Indigenous Rights Promotion and Protection*

The last two decades of the 20th century saw the development of international standards and advocacy for rights of indigenous peoples. Whether under the aegis of the United Nations and affiliated bodies, regional institutions, or a combination of national and international activism, the affirmation of indigenous peoples’ rights as collectives is progressively breaking the long established state boundaries to their recognition. Despite persistent definitional challenges as to who qualifies as ‘indigenous’ and the unsettled debates over their ‘peoplehood’ attribute with correlated entitlements including to self-determination,⁷ pragmatic considerations have yielded into the renaissance, advocacy and a relative international recognition of indigenous claims beyond the Americas and Australasia; including in many post-independence African states.⁸ The importance of the ‘global’ in indigenous networking has rightly been captured by B. Kingsbury as “linking groups that were hitherto marginal and politically unorganized to transnational sources of ideas, information, support, legitimacy and money.”⁹ Participation of groups from Africa, Asia and the Pacific in what is referred to now as the ‘global indige-

⁶ C. Oguamanam, ‘Indigenous Peoples and International Law: The Making of a Regime’, 30 *Queen’s L. J.*, (2004) p. 355 *et seq.*

⁷ The controversies surrounding the definition and indigenous peoples entitlements are captured among others in S. J. Anaya, *Indigenous Peoples in International Law* (2nd Ed., Oxford University Press, 2004); R. Niezen, *The Origin of Indigenism: Human Rights and the Politics of Identity* (University of California Press, 2003); P. Alston (ed.), *Peoples’ Rights* (Oxford University Press, 2001); C. Brölmann, R. Lefeber and M. Zieck, *Peoples and Minorities in International Law* (Martinus Nijhoff Publishers, 1993); M. A. Martínez, ‘Study on Treaties, Agreements and other Constructive Arrangements between States and Indigenous Populations’, Final Report by the Special Rapporteur, E/CN.4/Sub.2/1999/20, 22 June 1999.

⁸ IWGIA, “The indigenous World Reports 1999–2000, 2000–2001, 2001–2002, 2002–2003, 2004 and 2005, at <www.iwgia.org/sw162.asp>, last visited on 27 June 2006.

⁹ B. Kingsbury, “Indigenous Peoples” in *International Law: A constructivist Approach to the Asian Controversy*, 92 *American Journal of International Law* (1998) p. 417.

nous movement', has led to a re-conceptualization of the 'indigenous' attribute; stretching the coverage of the concept beyond its original semantic confines.¹⁰ Over the last three decades, different international institutions—most notably the ILO, the World Bank as well as ECOSOC and dependant bodies—have widely contributed to the conceptualization of indigeness through the establishment identification criteria of indigenous peoples.¹¹

Definitional attempts shifted from early depictions of indigeness insisting on prior occupancy of ancestral lands before colonization by settlers' societies,¹² to more watered-down formulations, reliant on groups' self-identification and shared experiences of "subjugation, marginalization, dispossession, exclusion or discrimination."¹³ Besides socio-economic poor conditions affecting large portions of national populations from both indigenous and non-indigenous groups in most developing countries, cultural distinctiveness with special, spiritual attachment to land appears to be the salient feature characterizing indigenous groups.¹⁴ Marginality, victimization and poverty place indigenous peoples at the bottom of social strata in countries where they live.¹⁵ Henceforth, the indigenous global identity, framed mainly through international processes and civil society activism, is presented and perceived as regrouping peoples, bond together by their "historical resistance to colonialism, state formation and global capitalism",¹⁶ but who "managed to remain connected to their traditional homelands, while maintaining their cultural traditions."¹⁷

¹⁰ Niezen, *supra* note 7, pp. 53 *et seq.* (B. Kingsbury, "Indigenous Peoples" in International Law: A constructivist Approach to the Asian Controversy', 92 *American Journal of International Law* (1998) p. 417); J. Igoe, 'Becoming Indigenous Peoples: Difference, Inequality, and the Globalization of East African Identity Politics', <<http://afraf.oxfordjournals.org/cgi/reprint/adi127v1>>, visited on 28 June 2006.

¹¹ See Article 1 of the ILO Convention (169) concerning Indigenous and Tribal Peoples in Independent Countries, International Labour Conference, 76th Session, 27 June 1989; the World Bank has been active with indigenous peoples since the 1980s through an adoption of flexible approaches such as reflected in World Bank, OD 4.20: Indigenous Peoples, 17 September 1991, replaced by OP 4.10: Indigenous Peoples, January 2005, <<http://web.worldbank.org/WBSITE/EXTERNAL/TOPICS/EXTSOCIALDEVELOPMENT/EXTINDPEOPLE/0,menuPK:407808-pagePK:149018-piPK:149093-theSitePK:407802,00.html>>, visited on 2 August 2006.

¹² See among many others J. R. Martinez Cobo, *Study of the Problem of Discrimination against Indigenous Populations, Final Report*, Final Report (last part), E/CN.4/Sub.2/1986/7/Add.4, March 1987, para. 379.

¹³ E.-I. A. Daes, *Working Paper by the Chairperson-Rapporteur on the Concept of 'Indigenous People'*, UN Doc. E/CN.4/Sub.2/AC.4/1996/2, 10 June 1996, para. 69; see also D. L. Hodgson, 'Introduction: Comparative Perspectives on the Indigenous Rights Movement in Africa and the Americas', 104:4 *American Anthropologist* (2002) p. 1042.

¹⁴ P. Thornberry, *Indigenous Peoples and Human Rights* (Manchester University Press, Manchester, 2002) pp. 408–410.

¹⁵ J. Burger, *Report from the Frontier: The State of the World's Indigenous Peoples*, Cultural Survival Report No 28 (Zed Books Ltd., 1987) pp. 17–33.

¹⁶ Igoe, *supra* note 10, p. 4.

¹⁷ *Ibid.*

Legal and socio-anthropological scholarship remains widely divided as to the necessity, applicability, or appropriateness of the 'indigenous' concept on the African scene, with its perceived divisive nature and escalating political implications.¹⁸ Lack of legally binding international or regional instruments specifically protecting indigenous peoples rights—save for ILO Convention 169 not ratified by any single African state¹⁹—leaves ample room for states discretion in recognition of their legal entitlements as indigenous collectives. If the marginal and fragile position of groups claiming indigenousness in many African states is currently less contested, including by their respective governments, the latter's readiness to adopt this concept in their domestic legal order remains—with few exceptions—a protracted process.²⁰ Most challenging is a clear conceptualization of indigenousness in contexts embodying similar differential identity organizational units such as 'chiefdoms' or 'customary rules', 'clan', 'tribal' or 'ethnic' groupings recognized and institutionalized in many countries alongside modern state apparatuses, resulting even into terminological confusions.²¹

Notwithstanding the above highlighted weak positive international legal protection of indigenous peoples and related conceptual limitations,²² the ongoing development of international norms, standards and institutions with a correlated

¹⁸) Defenders of indigenousness in the African context include: E.-I. A. Daes, UN Doc. E/CN.4/Sub.2/AC.4/1996/2, Burger, *supra* note 15; Anaya, *supra* note 7, pp. 15–48; Niezen, *supra* note 7; ECOSOC, *Report of the Special Rapporteur R. Stavenhagen of Human Rights and Fundamental Freedoms of Indigenous People, Submitted pursuant to Commission's Resolution 2001/57*, UN Doc. E/CN.4/2002/97, 4 February 2002, para. 33. Contra arguments are heralded by among others: M. A. Martínez, 'Study on Treaties, Agreements and other Constructive Arrangements between States and Indigenous Populations', Final Report by the Special Rapporteur, E/CN.4/Sub.2/1999/20, 22 June 1999.

¹⁹) The Convention is ratified by 17 countries none of them African as of July 2006.

²⁰) With few exception such as South Africa (as illustrated through: *Richtersveld Community & Others v. Alexcor Limited & Another* 2003 (6) BCLR 583 (SCA) and *Alexcor Limited & Another v. The Richtersveld Community & Others* 2003 (12) BCLR 1301 (CC)), many other African countries are still reluctant to explicitly provide for legal recognition of, and standing to, groups claiming indigenous identity. See generally African Commission on Human and Peoples' Rights and International Working Group for Indigenous Affairs (ACHPR & IWGIA), *Report of the African Commission's Working Group of Experts on Indigenous Populations/Communities* (hereinafter ACHPR Report), p. 47 *et seq.*, <www.iwgia.org/graphics/Synkron-Library/Documents/publications/Downloadpublications/Books/AfricanCommissionbookEnglish.pdf>, visited on 02 August 2006.

²¹) Most illustrative is the book by O. Vaughan (ed.), *Tradition and Politics: Indigenous Political Structures in Africa* (Africa World Press, Trenton/Asmara, 2005), whereby 'indigenous' applies to different forms of local governance, contrasted with 'Western' inherited state power structure.

²²) ILO Convention 169 concerning Indigenous and Tribal Peoples in Independent Countries, International Labour conference, 76th Session, 27 June 1989 remains the only international binding treaty specifically dedicated to rights of indigenous peoples. It has been ratified by only 17 states <www.ilo.org/ilolex/english/convdisp2.htm> as of June 2006. For an overview of international instruments protecting indigenous peoples' rights see W. van Genugten and C. Perez-Bustillo, 'The Emerging International Architecture of Indigenous Rights, The Interaction between the Global, Regional and National Dimensions', 11 *International Journal on Minority and Group Rights* (2004) pp. 4–10.

progressive bending of states' positions towards their collective claims, presages better prospects with regards to advancement of their rights and interests. Leaving aside the highly relevant legalistic questioning of the applicability of the indigenous concept in Africa, the present analysis adopts a pragmatic approach to indigenous claims dictated by factual circumstances, while remaining mindful of definitional shortcomings as well as special and temporal (at times opportunistic) factors underpinning the 'identity politics' and correlated 'politics of recognition'.²³ The active participation of a number of African groups into global indigenous *fora* since the end of the 1980s following the establishment of the United Nations Working Group on Indigenous Populations coupled with the recent report of the African Commission on Human and Peoples Rights' Working Group of Experts on Indigenous Populations/Communities, created a dynamic which can hardly ever since be ignored.²⁴ Insistence on collective entitlements of indigenous peoples in the above mentioned standards allows for an examination of their victimization not only as individuals but also as collectives.²⁵

Indigenous peoples' demands for self-determination grounded on strong affirmation of cultural distinctiveness sounds at odds with the 'sameness' underlying current globalization trends which are, more than ever before, infiltrating almost every aspect of human life.²⁶ Nonetheless, the development of norms protecting groups against forced assimilation, ethnocide and hostile 'development' policies on their territories—to name but few sources of their misery—is paradoxically evolving contemporaneously to, if not because of, these globalizing dynamics.²⁷ Protection of societal diverse identities—within the context of a globalising world against the dangers of homogenization of different aspects of concerned peoples' lives—remains challenging but less contentious in the light of the progressive waning of the state-centric perception of societal organization.²⁸ Hence, notwithstanding the different schools of thought in both victimology and human rights, harmonization of victims' rights advocacy in those aspects touching indigenous peoples, with developments of international law on the latter's rights is more than needed in overcoming all impediments standing in the way of efforts aimed at redressing their historical and continuing collective victimization.

²³ The Former terminology is borrowed from Igwe, *supra* note 10, p. 3 *et seq.* while the latter is drawn from Hodgson, *supra* note 13, p. 1040.

²⁴ Thornberry, *supra* note 14, pp. 244–264; *see also* ACHPR Report, *supra* note 20.

²⁵ C. L. Holder and J. J. Cornassel, 'Indigenous Peoples and Multicultural Citizenship: Bridging Collective and Individual Rights', 24 *Human Rights Quarterly* (2002) pp. 126–151.

²⁶ Thornberry, *supra* note 14, pp. 105–114.

²⁷ *Ibid.*, *see also* Niezen, *supra* note 7, p. 1 *et seq.*

²⁸ On this subject, read among others: W. Kymlicka, *Politics in the Vernacular: Nationalism, Multiculturalism, and Citizenship* (Oxford University Press, 2001); J. Tully, *Strange Multiplicity: Constitutionalism in an Age of Diversity* (Cambridge University Press, 1995); W. Kymlicka and W. Norman, *Citizenship in Diverse Societies* (Oxford University Press, 2000).

3. *Indigenous Peoples as Collective Victims of Crime or Abuse of Power*

The major international instruments providing for victims' rights adhere, at least in theory, to individual and collective aspects of victimization.²⁹ Theorizations in victimology—a discipline developed mainly in the second half of the twentieth century due to a “perceived lack of attention for victim in criminology”³⁰—are still struggling to delineate a definition of ‘victim’.³¹ Beyond the classical focus on criminal sources of victimization, relevant instruments and a wide range of scholarship acknowledge other underlying factors, be they natural disasters, abuse of power, socio-economic or political landscapes as well as other dimensions.³²

Despite existing literature dedicated thereon, multidimensional and relativist approaches to conceptualization of ‘victim’ complicate any search for a common ground definition due to existing opposed views between proponents of ‘scientific’ and ‘humanistic’ schools of victimology.³³ Without expanding on this conceptual differentiation, it is worth noting that the current preponderance of ‘scientific victimology’ focusing on individual victims of crimes does not rule out exploration of other legitimate sources of victimization, such as abuse of power, or on its collective nature. Drawing a parallel with evolutions in the human rights field, the debate mirrors the long standing, but currently loosening, ideological categorization of rights into generations, namely civil and political; economic,

²⁹) *Declaration of Basic Principles of Justice for Victims of crime and Abuse of Power* (hereinafter UN Victims' Rights Declaration), G. A. Res. 40/34L, 96th Plenary Meeting, 29 November 1985, defining victims of crimes as persons who: “individually or collectively, have suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that are in violation of criminal laws operative within Member States, including those laws proscribing criminal abuse of power”(para. 1); while victims of abuse of power are construed as: “persons who, individually or collectively, have suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that do not yet constitute violations of national criminal laws but of internationally recognized norms relating to human rights” (para. 18).

Rule 85 of the International Criminal Court Rules of Procedure and Evidence (U.N. Doc. PCNICC/2000/1/Add.1) elaborating on Article 68 of the Statute of the International Criminal Court (adopted at Rome on 17 July 1998, PCNICC/1999/INF/3), disposes that : “(a) ‘Victims’ means natural persons who have suffered harm as a result of the commission of any crime within the jurisdiction of the Court; (b) Victims may include organizations or institutions that have sustained direct harm to any of their property which is dedicated to religion, education, art or science or charitable purposes, and to their historic monuments, hospitals and other places and objects for humanitarian purposes.” “[O]rganizations or institutions” can be construed to include indigenous peoples' collectivities.

³⁰) Rombouts and Vandeginste, *supra* note 4, p. 90.

³¹) E. A. Fattah, ‘Victimology: Past, Present and Future’, 33:1 *Criminology* (2000) pp. 17–46; Elias, *supra* note 1, p. 9 *et seq.*, <www.aic.gov.au/publications/proceedings/27/elias.pdf>, visited on 5 July 2006.

³²) L. Lamborn, ‘The United Nations Declaration on Victims: Incorporating Abuse of Power’, 19 *Rutgers L. J.*, Vol. (1987–1988) pp. 59–95; Rombouts and Vandeginste, *supra* note 4, pp. 91–92.

³³) Elias, *supra* note 1, p. 9 *et seq.*; Rombouts and Vandeginste, *supra* note 4, pp. 89–92.

social and cultural; and collective rights; given the shifting reaffirmation of interdependence and interrelatedness of all human rights.³⁴

With regards to international processes specifically devoted to victims' rights, the UN Victims' Rights Declaration, while drawing a distinction between victims of crimes and those of abuse of power, does not specifically provide for substantive differential treatment of either category of victims.³⁵ In principle, individual or collective victims of crime or abuse of power should all be entitled to the rights provided therein.³⁶ The main difference remains the fact that the declaration, while being more detailed and specific on entitlements of victims of crime, laconically urges states to incorporate into their national legislation norms prohibiting abuse of power and providing redress for victims.³⁷

Likewise in cases of criminal victimization, abuse of power should take the form of harmful acts or omissions against persons, "including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights."³⁸ Rather than being limited to victims of conventional crimes, the UN Victims' Rights Declaration clearly encompass individual or collective victims of such atrocities as genocide, tribal warfare, ethnic strife and other fratricidal conflicts, mass rapes, trafficking in women and children, kidnappings and expulsions, 'ethnic cleansing', torture, arbitrary detention and killings; victimized immigrants. . . .³⁹ Arguably, 'persons' in the definition should not be constructed in a strictly legalistic manner which denies any collective dimension to the concept beyond individuals' group membership.⁴⁰

The differentiation between both types of victimization in the declaration instructs as to the complementary nature of both sources of victimization mainly

³⁴ Anaya, *supra* note 7, pp. 49–53.

³⁵ Paragraph 19 of the UN victims' rights declaration provides for similar remedies for victims of abuse of power as those in preceding paragraphs regarding victims of crime.

³⁶ Rombouts and Vandeginste, *supra* note 4, pp. 99 *et seq.*

³⁷ Para. 19 of the UN Victims' Rights Declaration.

³⁸ Paras. 1 and 18 of the UN Victims' Rights Declaration.

³⁹ United Nations Office for Drug Control and Crime Prevention (ODCCP), 'Guide for Policy Makers on the Implementation of the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power' (Centre for International Crime Prevention, 1999) pp. 33–35, <www.uncjin.org/Standards/policy.pdf>, accessed on 25 July 2006.

⁴⁰ Rombouts and Vandeginste, *supra* note 4, p. 94. While the Bassiouni principles adopt an individual-centric definition of the victim which reads: "[a] person is 'a victim' where, as a result of acts or omissions that constitute a violation of international human rights or humanitarian law norms, that person, individually or collectively, suffered harm, including physical or mental injury, emotional suffering, economic loss, or impairment of that person's fundamental legal rights. A 'victim' may also be a dependant or a member of the immediate family or household of the direct victim as well as a person who, in intervening to assist a victim or prevent the occurrence of further violations, has suffered physical, mental, or economic harm." They paradoxically urge states to provide that "[i]n addition to individual access to justice, adequate provisions should also be made to allow groups of victims to present collective claims for reparation and to receive reparation collectively."

in assessing applicable laws and standards for either type of victims. Hence, victimization results not only from violation or non-enforcement of national criminal laws but also from non-compliance with “internationally recognized norms relating to human rights.”⁴¹ From the general nature underpinning the latter reference to human rights and insistence on the interdependence and interrelatedness of human rights in recent international (human rights) documents and instruments,⁴² it can be deduced that the developing norms protecting indigenous peoples’ rights—in addition to general individual human rights protection—figure among the yardsticks to be used in assessing ‘abuse of power’.⁴³ Thus, acts leading to victimization of indigenous peoples without being proscribed by national laws can still be scrutinized under the latter concept of abuse of power.

Illustratively, adherence by many states’ legal systems to individual property rights collides with communal land tenure of most indigenous groups which remains overwhelmingly constitutionally unprotected.⁴⁴ Consequently, indigenous peoples are frequently arbitrarily expelled—either at the hands of government officials or private actors—from lands on which their ancestors have been living or eons.⁴⁵ Among the adverse consequences resulting from “such interferences as invasions, evictions, displacement and the denial by force of a right to return to lands, mining activities and tourism”,⁴⁶ is the progressive shrinking of the primary resources upon which survival of many hunter-gatherers or pastoralist indigenous groups rests.⁴⁷

⁴¹ Lamborn, *supra* note 32, pp. 67–75.

⁴² Vienna Declaration and Programme of Action, UN. DOC. A/CONF.157/23, 12 July 1993, para. 5; Report of the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance, UN. Doc A/CONF.189/12, Durban 31 August–8 September 2001, para. 25 of the preamble.

⁴³ On the recent development of human rights and status of collective rights, contrast the strong case for indigenous peoples’ collective rights in Anaya, *supra* note 7, p. 53 *et seq.*; with early opposition to “collective human rights” in J. Donnelly, ‘Third Generation Rights’, in C. Brölmann, R. Lefebvre and M. Zieck, *Peoples and Minorities in International Law* (Martinus Nijhoff Publishers, 1993), p. 134. The listing of sources of international norms to be taken into consideration (which appears not to be limitative) does not mention any specific instrument for protection of indigenous groups (see ODCCP, Guide for Policy Makers, *supra* note 39, pp. 33–34).

⁴⁴ To the exception of some few encouraging recent and ongoing developments among others in the Americas, Australia, New Zealand (J. Castellino, ‘The Right “Right” to Land, International Law & Indigenous Peoples’, in J. Castellino and N. Walsh, *International Law and Indigenous Peoples* (Martinus Nijhoff Publishers, 2005) p. 89 *et seq.*; Anaya, *supra* note 7, pp. 141–148). In the African context, South Africa offers the best example of a recent shift towards judicial recognition of indigenous peoples’ right to communal land tenure along the lines mentioned above and as illustrated by *Alexcor Limited & Another v. The Richtersveld Community & Others* 2003 (12) BCLR 1301 (CC). For more details see K. Lehmann, ‘Aboriginal Title, Indigenous Rights and the Right to Cultural’, 20 SAJHR (2004) pp. 86–118; H. Mostert and P. Fitzpatrick, ‘Law Against Law: Indigenous Rights and the *Richtersveld* Cases’, at <www2.warwick.ac.uk/fac/soc/law/elj/lgd/2004_2/mostertfitzpatrick/>, last visited on 3 November 2006.

⁴⁵ Thornberry, *supra* note 14, pp. 214–224.

⁴⁶ *Ibid.*, p. 214.

⁴⁷ See ACHPR Report, *supra* note 20, pp. 21–22.

Hence, international standard-setting documents are explicit in considering indigenous peoples as victims. This recent proposition, grounding on the assumption that victims rights are human rights,⁴⁸ cover individual as well as collective aspects of victimization, some by specifically mentioning indigenous peoples as falling under the latter category.⁴⁹ The *Study Concerning The Right To Restitution, Compensation and Rehabilitation for Victims of Gross Violations of Human Rights and Fundamental Freedoms*, by van Boven in discussing “individuals and collectivities as victims”, rightly remarked that the “coincidence of individual and collective aspects is particularly manifest with regard to the rights of indigenous peoples.”⁵⁰ Furthermore, the United Nations Office for Drug Control and Crime Prevention’s *Guide for Policy Makers on the Implementation of the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power* specifically mentions reparative measures in favour of aboriginal peoples as falling within the purview of the declaration.⁵¹

4. Correlation and Complementarity between Human Rights and Victimology in Protecting Indigenous Peoples Rights

Taking into consideration the above highlighted definitional and conceptualization challenges of indigenous peoples’ rights; and following the ongoing dynamics aimed at furthering their rights in international, regional and national *fora*, theorization over their quality as collective victims in victimological terms is far from being an easy task.⁵² The still limited normative development and, consequently, scope of protection of indigenous peoples is rooted in states’ imposed legal barriers to recognition of their collective rights and standing, and the persistent predominance of the highly individualistic rights modal as inherited from enlightenment ideals.⁵³ While an integrated victimological and indigenous peoples’ (human)

⁴⁸) ECOSOC, UN Doc. E/CN.4/2003/63; UN Doc. E/CN.4/2004/57; UN Doc. E/CN.4/2005/59. These international standard-setting documents depart from the Bassiouni and van Boven principles by covering not only “Gross Violations of Human Rights and Fundamental Freedoms” but more generally “victims of violations of international Human Rights and Humanitarian Law” in general.

⁴⁹) *Ibid.*

⁵⁰) Study Concerning the Right to Restitution, Compensation and Rehabilitation for Victims of Gross Violations of Human Rights and Fundamental Freedoms; Final Report Submitted by Mr. Theo van Boven, Special Rapporteur, Sub-Commission on Prevention of Discrimination and Protection of Minorities, 45th Sess., Agenda Item 4, at 16, U.N. Doc. E/CN.4/Sub.2/1993/8 (1993), para. 14; *see also* paras. 17 and 30.

⁵¹) ODDCP, Guide for Policy Makers, *supra* note 39, p. 34, n. 60.

⁵²) Besides the above mentioned ILO Convention 169, the United Nations declaration on the rights of indigenous peoples, UN. Doc. A/HRC/1/L.3, 23 June 2006 under negotiation since the proclamation of the first indigenous peoples decade was only adopted by the Human Rights Council and is still to be adopted by the UN General Assembly.

⁵³) Kymlicka, *Politics in the Vernacular*, *supra* note 28, pp. 203–220.

rights approach present some advantages, it needs to overcome some challenge by proving: 1) the necessity of protecting the ‘collective’ in addition to the ‘individual’ against victimization; 2) the added value of victimology to existing international (human rights) law processes protecting indigenous peoples’ collective rights and; 3) how can practical ‘operationalization’ and enforcement steps be undertaken.

4.1. Individual versus Collective Victimization

The present analysis builds on the premise that “most victims of the twentieth century’s horrors . . . were victimized for the very reason that they belonged to distinct groups.”⁵⁴ For indigenous peoples, this victimization is dated back to the history of conquest or colonization of their territories, and the process of state formation.⁵⁵ The evolving norms protecting groups’ distinctive identity in multicultural societies are precisely aimed at curbing this type of victimization.⁵⁶ In those cases involving differential group identity claims, be they clans; tribes; ethnic groups; national, religious or linguistic minorities as well as indigenous peoples; the protection of the individual members of the group under equalitarian human rights norms does not provide for sufficiently needed security, and safeguard the identity of the group as a whole.⁵⁷ Even if international and national *fora* are still struggling to strike a right balance between individual and collective entitlements for either members or non-members of minorities or indigenous groups,⁵⁸ the protection of the ‘collective’ remains the ultimate goal sought under these processes.⁵⁹ If it is an undeniable fact that groups are made up of individual members perceived as the beneficiaries of legal protection, some rights or prerogatives can only be enjoyed, to use ICCPR language, “in community with other members of their group.”⁶⁰

The incidental nature of the protection offered to groups in a system centred on individuals remains the main criticism levied against the formulation of

⁵⁴) Niezen, *supra* note 7, p. 119.

⁵⁵) *Ibid.*, Thornberry, *supra* note 14.

⁵⁶) See Tully, *supra* note 28; Kymlicka, *Politics in the Vernacular*, *supra* note 28; Kymlicka and Norman, *Citizenship in Diverse Societies*, *supra* note 28.

⁵⁷) Kymlicka, *Politics in the Vernacular*, *supra* note 28, p. 70.

⁵⁸) In this respect, the case law of the Human Rights Committee is instructing in landmark cases such as *Lovelace v. Canada*, Communication No. 24/1977, *Report of the Human Rights Committee*, U.N. GOAR, 36th Sess., Supp. No 40, at 166, UN. Doc., A/36/40, Annex 18 (1977), 30 July 1981; *Kitok v. Sweden*, Communication No. 197/1985, *Report of the Human Rights Committee*, U.N. GOAR, 43rd Sess., Supp. No 40, at 207, UN. Doc., A/43/40, Annex 7 (G) (1988), 27 July 1988; *Länsman et al. v. Finland*, Communication No 511/1992, *Human Rights Committee*, UN. Doc. CCPR/C/52/D/511/1992, 26 October 1994; see also M. Scheinin, ‘Indigenous Peoples’ Rights Under the International Covenant on Civil and Political Rights’, in Castellino and Walsh, *supra* note 44, pp. 3–15.

⁵⁹) Anaya, *supra* note 7, p. 134 *et seq.*

⁶⁰) Article 27 of the ICCPR; see also the case law of the Human Rights Committee as commented in Scheinin, *supra* note 58, pp. 3–15.

Article 27 of the ICCPR and its interpretation through the practice of the Human Rights Committee (HRC), whereby groups do not even enjoy a legal standing.⁶¹ The paradox of the few existing international processes protecting collective rights is precisely that they either provide for rights which cannot fully be enforced under existing institutional arrangement or for ‘individual-centric’ procedural arrangements even where the essence or *raison d’être* of the norm is to protect the collective identity of group members and consequently the group itself.⁶² As rightly pointed out by J. S. Anaya, “[t]he conceptualization and articulation of such rights collides with the individual/state perceptual dichotomy that has lingered in dominant conceptions of human society and persisted in the shaping of international standards.”⁶³ Interpretations by the Human Rights Committee of Articles 1 and 27 of the ICCPR display the persistent uneasiness of the system to explicitly and simply acknowledge collective rights it ends up offering a kind of a protection *par ricochet*.⁶⁴ Kymlicka offers a better picture of the unsettled legal debates on minorities or indigenous peoples’ claims when he considers traditional understanding of self-determination in Article 1 of both ICCPR and ICESCR and minority protection in Article 27 of the ICCPR too strong or too weak respectively.⁶⁵

4.2. Victimological Input in Protecting Indigenous Peoples’ Collective Rights

Given the precariousness of the evolving but still hesitant legal framework protecting indigenous peoples’ collective rights, the development of victims’ rights by victimology offers an extra impetus to foster the needed comprehensive protection of victimized indigenous groups. In the absence of a legally binding international instrument protecting indigenous peoples’ rights, save for the under-ratified ILO Convention 169, norms providing for victims’ rights might present an alternative to legal and judicial sidelining of indigenous peoples as collectives.

Presented in many countries where they live as the most disadvantaged, dispossessed, marginalized but also victimized segments of the national population,⁶⁶

⁶¹ *Chief Bernard Ominayak of the Lubicon Lake Band v. Canada*, communication No. 167/1984, *Report of the Human Rights Committee*, U.N. GOAR, 45th Sess., Supp. No 40, Vol. 2, at 1, UN. Doc., A/45/40, Annex 9 (A) (1990), 26 March 1990, para. 32.1 whereby the Human Rights Committee held that the right to self-determination under Article 1 of the ICC cannot be claimed by groups through the individual complaint procedure instituted in Optional Protocol 1 to the ICCPR. *See also* Human Rights Committee, General Comment No. 23 adopted under Article 40, para. 4 of the International Covenant on Civil and Political Rights, UN. Doc. CCPR/C/21/Rev.1/Add.5 (1994), para. 3.1 whereby the Committee held that: “Self-determination is not a right cognizable under the Optional Protocol.”

⁶² *Ibid.*

⁶³ Anaya, *supra* note 7, p. 59.

⁶⁴ Scheinin, *supra* note 58, pp. 3–15.

⁶⁵ Kymlicka, *Politics in the Vernacular*, *supra* note 28, p. 123.

⁶⁶ Thornberry, *supra* note 14, pp. 18–20; K. S. Coates, *A Global History of Indigenous Peoples Struggle and Survival* (Palgrave Macmillan, New York, 2004).

indigenous peoples can rightly claim their status as societal victims. Their present situation is not merely conditioned by historical, political and socio-economic factors but also by their constant victimization at the hand of, or condoned by states with jurisdiction over them, through lack of legal protection or non-enforcement of existing laws.⁶⁷ Attribution of shared responsibility by indigenous groups for their societal victimization through such chauvinistic portraits as the “backward indigenous”⁶⁸ reflects not more than a “structural/cultural proneness” theoretical modal in analysis of causes of victimization;⁶⁹ which shouldn’t be construed so as to hinder indigenous peoples’ entitlements as collective victims. This interpretation derives from the definition of victims in the declaration which, as a reminder, encompasses persons sustaining harm due to violations of national criminal laws or internationally recognized human rights. Even if, likewise in indigenous peoples’ evolving norms, victims’ rights have not yet sufficiently translated into hard law, their codification in instruments like the ICC statute and the Victims’ Rights Declaration represent encouraging steps which hopefully are precursors of more general provisions and comprehensive measures in favour of individual or collective victims of crime or abuse of power.⁷⁰

Hence, matching the existing normative-theoretical conceptualizations of indigenous peoples’ entitlements with practice, namely by taking positive steps towards implementation of their proclaimed rights constitutes one major challenge within the current legal framework. Lack of specific national legal protection and non-incorporation of international norms in the internal legal order in many countries, as well as the inaccessibility of international mechanisms and procedures for the majority of indigenous groups hardly connected to the outside

⁶⁷ IWGIA, *The Indigenous World Reports, 2002–2003 and 2005, 2006* <www.iwgia.org/sw162.asp>, visited on 18 July 2006 provides continuously updated accounts of forms of violations of indigenous groups’ rights in various countries, most of which amount to victimization; *see also* for early work on the topic Burger, *supra* note 15. *See also* ECOSOC, UN Doc. E/CN.4/2002/97, ECOSOC, Human Rights and Indigenous Issues: Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People, Rodolfo Stavenhagen, Submitted in Accordance with Commission Resolution 2001/65, UN Doc. E/CN.4/2003/90, 21 January 2003 (with add.1–3).

⁶⁸ G. C. Marks, ‘Indigenous Peoples in International Law: The Significance of Francisco de Vitoria and Bartolomé de Las Casas’, in S. J. Anaya (ed.), *International Law and Indigenous Peoples* (Ashgate Publishing Limited and Dartmouth Publishing Company, 2003) p. 13; ACHPR Report, *supra* note 20, p. 27.

⁶⁹ E. A. Fattah, ‘Victimology Today: Recent Theoretical and Applied Developments’, *112th International Training Course, Visiting Experts’ Papers*, Resource Material Series No 56, pp. 65–66 at <www.unafei.or.jp/english/pdf/PDF_rms/no56/56-06.pdf>, visited on 35 July 2006; *see also* R. F. Meier and T. D. Miethe, ‘Understanding Theories of Criminal Victimization’, 17 *Crime & Justice* (1993) pp. 461–464.

⁷⁰ *See* Rule 85 of the ICC statute (*supra*, note 20) extending the definition of victims to include, not only persons but also “organizations or institutions that have sustained direct harm to any of their property which is dedicated to religion, education, art or science or charitable purposes, and to their historic monuments, hospitals and other places and objects for humanitarian purposes”, (Rule 85 (b)).

world, despite their improving networking skills;⁷¹ limit the impact of the current legal protection of most indigenous peoples.⁷² Recourse to victimology in advocating redress and empowerment of indigenous collectivities presents a complementary and practical avenue likely to reinforce indigenous peoples' human rights protection processes.

4.3. 'Operationalization' and Enforcement Challenges

In mainstream victimological terms, redress for indigenous peoples is subjected to the measurement of their victimization.⁷³ As previously mentioned, victimological debates have been so far dominated by scientific approaches, focusing on individual victims of crime and, to a lesser extent, of abuse of power.⁷⁴ With the development of the discipline, this predominant approach has often used crime victims' surveys as a source of measurement of victimization.⁷⁵ Victimization is thereby analyzed, grounding on individual human beings as subjects. Even where studies are carried out on groups, the techniques used are focused on individual members of the groups.⁷⁶ The result is a situation whereby the group is reduced to a sum of individual members, without an identity of its own. As theoretical as the differentiation might appear, individualization of victimization fails to capture certain dimensions pertaining to a group's social cohesion claimed to be the core ingredient of indigenous distinctive identity.⁷⁷

Most reflective of this approach is the more policy oriented comparative study conducted in some countries on criminal participation or victimization of indigenous peoples as opposed to non-indigenous individuals.⁷⁸ The practical benefits stemming from this limited insight into the *problématique* of criminality or victimization of indigenous peoples are less likely to deliver sustainable

⁷¹ Niezen, *supra* note 7, pp. 1–28.

⁷² The status and limits of the protection of indigenous peoples mainly through the developing international norms are better pictured among others by Anaya, *supra* note 7 and Thornberry, *supra* note 14.

⁷³ E. A. Fattah, 'Victimology: Past, Present and Future', pp. 27–32; *see also* Meier and Miethe, *supra* note 69, p. 464 *et seq.*

⁷⁴ The recent publication: E. Vetere and D. Pedro (eds.), *Victims of Crime and Abuse of Power: Festschrift in Honour of Irene Melup*, Bangkok, 11th UN Congress on Crime Prevention and Criminal Justice, April 2005, displays the predominance of the individual in victimization studies.

⁷⁵ H. Kury (ed.), *International Comparison of Crime and Victimization: The ICVS* (De sitter Publications, 2001).

⁷⁶ *See in this respect* L. Capobianco and M. Shaw, 'Crime Prevention and Indigenous Communities: Current International Strategies and Programmes', *Report, International Centre for the Prevention of Crime*, July 2003, at <www.crime-prevention-intl.org/publications/pub_1_1.pdf>, visited on 19 July 2006.

⁷⁷ On the differentiation of individual and collective rights in indigenous claims *see* A. Buchanan, 'The Role of Collective Rights in the Theory of Indigenous Peoples' Rights', 3 *Transnat'l L. & Contemp. Probs* (1993) p. 93 *et seq.*

⁷⁸ Capobianco and Shaw, *supra* note 76.

solutions if not analyzed and tackled comprehensively, taking into account the interplay of numerous factors conditioning their current political marginality and socio-economic conditions.⁷⁹

In the specific case of indigenous groups, additional to generally applicable patterns of personal victimization, collective victimization transpires from various material acts constitutive of violations of their legitimate rights, most of which are generally deemed to be subsumed in their claim for self-determination.⁸⁰ Applied to indigenous peoples, this right, whose theoretical confines are still much debatable in international law, embodies crosscutting civil, political, economic, social and cultural dimensions.⁸¹ Violations of indigenous peoples' rights by governments, corporations or private actors have generally taken the form of environmental damages on their lands; forcible expulsions/relocation—generally without compensation—of entire groups for purposes of establishing reserves, parks, mining or “development” projects, political marginalization and exclusion in decision making processes in matters affecting them as well as imposition of legal and institutional structures with which indigenous peoples remain unacquainted.⁸² Thus, not only concepts such as abuse of power remain unexploited, but also criminal victimization of groups not amenable to individualization can serve as a starting point in seeking redress for victimized indigenous peoples.

The measurability of collective forms of victimization resulting from the above mentioned violation remains challenging; and yet victimology should not close the door to this dimension of their plight as any redress measures are less likely to be successful without taking it into consideration. Thus, either victimologists need to be inventive in putting forward other measurement techniques for collective victimization or they should unconventionally depart from established techniques, drawing inspiration from existing but limited cases—involving in most instances reparative measures—testifying to the

⁷⁹ J. van Dijk and M. Shaw, ‘The International Crime (Victim) Survey: Impact and Future Policy Implications’, in H. Kury (ed.), *International Comparison of Crime and Victimization* Vol. 2 (De sitter Publications, 2001) p. 11. The multidimensional nature of indigenous claims and the need for adapted responses is reflected in international documents such as the Vienna Declaration, UN. Doc. A/CONF.157/23, paras. 20, 28–32; Report of the World Conference against Racism, UN. Doc. A/CONF.189/12, paras. 39–46.

⁸⁰ C. Oguamanam, *supra* note 6, pp. 361–362. On an extensive discussion of Indigenous Peoples' claimed rights see B. Kingsbury, ‘Reconciling Five Competing Conceptual Structures of Indigenous Peoples' Claims in International and Comparative Law’, in P. Alston (ed.), *Peoples' Rights* (Oxford University Press, 2001) pp. 69–110.

⁸¹ P. Alston (ed.), *Peoples' Rights* (Oxford University Press, 2001) pp. 7–67, 87–100; Anaya, *supra* note 7, pp. 97–128.

⁸² R. K. Hitchcock, ‘International Human Rights Law, the Environment, and Indigenous Peoples’, 5 *Colo. J. Int'l Envtl. L. & Pol'y* (1994) pp. 1–22, 12–13.

acknowledgement by some countries' political and legal systems of collective forms of victimization and redress.⁸³

As previously mentioned, the development of indigenous peoples' collective rights is not accompanied by correlated enforcement mechanisms providing for forms of collective legal standing.⁸⁴ The jurisprudence of the HRC and other treaty bodies as well as jurisdictional provisions and case law of most international and regional human rights mechanisms, do not offer collective forms of complaints whereby groups can institute legal proceedings.⁸⁵ Lack of legal standing before most national, regional and international adjudicative institutions even where relevant legal instruments provide for substantive group rights display a limitation in existing human rights mechanisms which can be reinforced under victims rights notions as conceptualized in victimology. The latter discipline needs however to take the lead in advocating redress for both individual and collective forms of victimization as reflected in the Victims' Rights Declaration.

5. *Victimization of African Groups Claiming Indigenous Identity*

Various discourses on existence and specific entitlements of indigenous peoples in Africa remain widely contested in political and legal academic literature. In the light of the numerous identity rooted claims throughout the continent seen as a catalyst to the numerous conflicts and civil wars, constitutional protection of indigenous claims remain subject to differing national contexts. If countries like post-apartheid South Africa have unequivocally recognised a distinct category of aboriginal peoples with similar entitlements to communal land rights as in Canada and Australia (in spite of persistent contentions as to who qualifies as indigenous),⁸⁶

⁸³ United Nations Office for Drug Control and Crime Prevention (ODCCP), 'Handbook on Justice for Victims: On the Use and Application of the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power' (Centre for International Crime Prevention, 1999) p. 46, <www.uncjin.org/Standards/9857854.pdf>, visited on 31 July 2006; D. Boyle, 'The Rights of Victims: Participation, Representation, Protection, Reparation', 4 *Journal of International Criminal Justice* (2006) pp. 307–313; T. van Boven, 'Human Rights and Rights of Peoples', 6 *EJIL* (1995) p. 15.

⁸⁴ Notes 58–62.

⁸⁵ H. Keteley, 'Exclusion by Definition: Access to International Tribunals for the Enforcement of the Collective Rights of Indigenous Peoples', 8 *International Journal of Minority and Group Rights* (2001) pp. 331–368. One of the exceptions is the ACHPR which provides for *actio popularis*.

⁸⁶ Lehmann, *supra* note 43, pp. 87–91. The author discusses throughout the article the *Richtersveld* cases before the South African Land Claims Court, the Supreme Court of Appeal and the Constitutional Court resulting, in the later case, in an unequivocal recognition of aboriginal title and rights without elucidating the contentious issue as to who is entitled to those rights in South Africa, beyond the specific case of the claimants.

other countries remain unreceptive to a concept perceived as divisive by nature and inapplicable in postcolonial Africa.⁸⁷

Rejection of indigenous claims from some groups composing national populations of African countries is linked to persistent historical uncertainties over anteriority on specific territories in the light of the frequent migratory movements over the centuries; and the prevailing terminological confusion in literature whereby the same or overlapping meaning is attributed to a wide range of institutions labelled indigenous, customary/traditional, chiefdoms, clans, tribes or ethnicities, existent in many countries throughout the continent.⁸⁸ The differentiation becomes even more blurred in the African context with regards to other notions such as protection of traditional/indigenous knowledge whereby participation into the evolving international processes dedicated to indigenous peoples is not a precondition for legal protection.⁸⁹ In the latter case, local groups not claiming 'indigeneity' but organized under customary/traditional units can claim the protection.⁹⁰ In the absence of internationally accepted determination criteria of indigenesness, the latter remains a challenging concept to accommodate on a continent harbouring over 600 ethnic groups, ranging from one group to 250 groups per country.⁹¹

Acceptance or rejection of indigenous claims of specific groups stems from an interaction between national constitutionalism and, regional dynamics and international processes. The general picture of indigenesness in the African context reflects a situation whereby recognition of indigenous claims of some groups from the continent have widely been endorsed internationally, and recently by the regional human rights system, while remaining ambiguous, if not contentious, in most national political and legal settings.⁹²

⁸⁷ S. Saugestad, 'Contested Images: "First Peoples" or "Marginalized Minorities" in Africa?', in A. Barnard and J. Kenrick (eds.), *Africa's Indigenous Peoples: First Peoples or Marginalized Minorities* (Centre of African Studies, University of Edinburgh, 2001) pp. 299–322; ECOSOC, UN Doc. E/CN.4/2002/97, paras. 33 and 95–96; ACHPR Report, *supra* note 20, pp. 45–50.

⁸⁸ As illustrated in the following publication: O. Vaughan (ed.), *Tradition and Politics: Indigenous Political Structures in Africa* (Africa World Press, Trenton/Asmara, 2005); J. Klabbers and R. Lefebber, 'Africa: Lost Between Self-Determination and *Uti Possidetis*', in C. Brölmann *et al.* (eds.), *Peoples and Minorities*, *supra* note 43, pp. 37–76.

⁸⁹ P. Drahos, 'Towards an International Framework for the Protection of Traditional Group Knowledge and Practice', UNCTAD-Commonwealth Secretariat Workshop on Elements of National *Sui Generis* Systems for the Preservation, Protection and Promotion of Traditional Knowledge, Innovations and Practices and Options for an International Framework, Geneva, 4–6 February 2004, at <http://cgkd.anu.edu.au/menus/PDFs/Drahos_tkframework.pdf>, visited on 03 August 2006.

⁹⁰ *Ibid.*

⁹¹ United Nations Development Programme (UNDP), *Socio-Economic Dominance of Ethnic and Racial Groups—The African Experience*, Human Development Report Office, Occasional Paper by Sam Moyo, UNDP. 2004/8, p. 4.

⁹² ACHPR Report, *supra* note 20, pp. 45–50; Barnard and Kenrick (eds.), *supra* note 87.

The present analysis does not seek to dwell on historical, legal and anthropological theorizations over indigenouness in Africa. Nor will it expand on inclusiveness or exclusiveness of African Groups into the proposed international definitions or determination criteria of indigenous peoples.⁹³ The discussion adopts a pragmatic approach on the question, building on dynamics which, over the last two decades, have seen the appropriation of the indigenous banner by numerous groups throughout the continent seeking international support in their quest for protection of differential identity through active participation in national, regional and international processes and institutions dedicated thereon.⁹⁴ Even the most sceptical opponents of the applicability of indigenouness to Africa acknowledge the need to special protection of the collective identity of claimant groups.⁹⁵ While the terminology and forms of protection widely vary from one country to another, many states with groups claiming indigenous identity are increasingly taking political and/or legal steps aimed at alleviating their current disadvantaged societal position, notwithstanding the above referred persistent resistance to or avoidance of the concept.⁹⁶

Likewise in other parts of the globe, the marginal and dispossessed condition of most groups claiming indigenous identity in Africa results from an interplay of various factors. On a continent where generalized poverty and survivor

⁹³ See *supra* notes 12, 13 and 14 on different international institutions' approaches to indigenouness.

⁹⁴ The most commonly cited examples of current groups identifying with indigenous movement comprise hunter-gatherer groups such as: 1) the Pygmies of the African Great Lakes (East and Central Africa) divided in different groups including *Batwa* (Burundi, Democratic Republic of Congo, Rwanda and Uganda), *Bambuti* (Democratic Republic of Congo), *Hadzabe* and *Ogiek* (respectively in Tanzania and Kenya), *Baka* (Central African Republic and Gabon), *Yaka* and *Babendjelle* (North-West Congo Basin), as well as *Baka* and *Bagyeli* (Cameroon); 2) the *san* of Southern Africa/commonly referred to as Bushmen (mainly in Botswana, Namibia and, to a lesser extent, South Africa, Zimbabwe, Angola, and Zambia). Examples of pastoralists include but are not limited to: 1) in Eastern, Southern and horn of Africa: the *Pokot* of Kenya and Uganda, the *Barabaig* of Tanzania, the *Maasai* of Kenya and Tanzania, the *Samburu*, *Turkana*, *Rendille*, *Orma* and *Borana* of Kenya and Ethiopia, the *Himba*, the *Karamojong* of Uganda, the numerous isolated pastoralist communities in Sudan, Somalia and Ethiopia (*Somalis*, *Afars*, *Kereyu/Oromo*, *Nuer* . . .); 2) in Western, Central and Northern Africa: the *Mbororo* (part of the *Fulanis/Peuls*) in, among others, Niger, Burkina Faso, Nigeria, Senegal, Mali, Benin, Cameroon, Chad and Central African Republic, the *Ogoni* in Nigeria and the *Imazighen* or *Amazigh* (also known as *Berbers* and including the *Tuareg*) mainly found in Morocco, Algeria, Mali, Niger, with smaller pockets in Mauritania, Burkina Faso, Libya, Tunisia and Egypt. For further details on the various African groups claiming indigenous status see ACHPR Report, *supra* note 20, pp. 14–19; IWGIA, The indigenous World Reports 1999–2000, 2000–2001, 2001–2002, 2002–2003, 2004, 2005 and 2006, at <www.iwgia.org/sw162.asp>, last visited on 2 August 2006.

⁹⁵ This is the case of M. A. Martínez, 'Study on Treaties, Agreements and other Constructive Arrangements between States and Indigenous Populations', Final Report by the Special Rapporteur, E/CN.4/Sub.2/1999/20, 22 June 1999, para. 90 which advocated other forms of protection such as minority rights.

⁹⁶ ACHPR Report, *supra* note 20, pp. 47–50. Most countries prefer using in their legislations on special protection neutral formulations like 'marginalized groups' or 'disadvantaged groups' perceived as including, but are not limited to, indigenous peoples.

challenges are not characteristic of sole indigenous peoples, the distinctive feature of the latter lies in their constant victimization by the state, private individuals, corporations or other groups. Over the years, different forms of predatory pressures were, and continue to be, exerted on hunter-gatherers and pastoralist groups still attached to their perceived medieval means of livelihood, taking the form of misappropriation of their lands, leading towards the progressive shrinking of the natural resources upon which their survival rests.⁹⁷ Political exclusion, societal marginalization and non-adherence to or lack of familiarity with market economy as well as limited contact with the outside world, laterally threaten with extinction some African groups identifying themselves with global indigenism.

Different forms of victimization of African indigenous peoples are highlighted in the ACHPR report:

“The establishment of protected areas and national parks has impoverished indigenous pastoralist and hunter-gatherer communities, made them vulnerable and unable to cope with environmental uncertainty and, in many cases, even displaced them. Large-scale extraction of natural resources such as logging, mining, dam construction, oil drilling and pipeline construction have had very negative impacts on the livelihoods of indigenous pastoralist and hunter-gatherer communities in Africa. So has the widespread expansion of areas under crop production. They have all resulted in loss of access to fundamental natural resources that are critical for the survival of both pastoral and hunter-gatherer communities such as grazing areas, permanent water sources and forest products.”⁹⁸

The mistreatment of San people by the Botswana Government—to take one among other similar examples—is revealing of collective victimization of a group claiming indigenism. As illustrated in the same report:

“In Botswana, around 1,500 San people have been evicted from the *Central Kalahari Game Reserve* during the last 10 years. The case, which is now pending in court, bears witness to the refusal of the government of Botswana to recognize that the inhabitants of the area have ancestral rights to the territory. Instead, they have been ‘encouraged’ to leave, through the State’s cessation of the delivery of basic and essential services to those who refuse to move to two settlements outside the Reserve. The move is being ‘encouraged’ in order for the State to provide ‘development’ in the forms of schools, clinics, etc. Alternative forms of development, which could be based upon or utilize the indigenous knowledge systems of the San, within the Reserve, appear to be unknown or unacceptable to the government of Botswana.”⁹⁹

Many other nomadic, pastoralist or hunter-gatherers groups face a similar fate in various countries throughout the continent. It is not surprising therefore that, in

⁹⁷) On this see Thornberry, *supra* note 14, pp. 12–32; Burger, *supra* note 15, pp. 5–62.

⁹⁸) ACHPR Report, *supra* note 20, p. 20.

⁹⁹) *Ibid.*, pp. 23–24; see also N. Olmsted, ‘Indigenous Rights in Botswana: Development, Democracy and Dispossession’, 3 *Wash. U. Global Stud. L. Rev.* (2004) pp. 799–866.

the mist of contested applicability of the indigenous peoples' concept to Africa, the regional human rights system adopted a clear stand in favour of recognition of indigenouness in Africa. The Commission's report further endorses the position according to which legal protection of African indigenous peoples falls within the ambit of peoples' rights provisions in the African Charter.¹⁰⁰ This interpretation adheres to a non-static but rather progressive and actualised construction of 'peoples' in the African Charter, in spite of the perceived anti-colonialist contextual formulation of the relevant norms,¹⁰¹ to encompass the complex reality of the identity question within most post-colonial African countries.¹⁰²

Against this background, one should keep in mind the fact that in post-Martinez Cobo conceptualization of indigenouness whereby determination criteria put more emphasis on situational and self-identification dimensions rather than on autochthony and colonization historical context,¹⁰³ indigenous rights represents the only internationally recognized comprehensive legal protection accommodating collective rights. Even if recourse thereto by some groups—among others from Africa—sounds at odds with the semantic meaning and historical reality of a narrow construction of 'indigenouness',¹⁰⁴ it offers the sole supranational legal framework upon which non-dominant groups lean in supporting their collective identity claims, absent, or in additional to, any other domestic redress mechanisms.¹⁰⁵ Despite persistent terminological intricacies, inadequacies and confusions over indigenism, the protection of societal collectives other than states is far from being an alien concept in many African countries where traditional chiefdoms or kingdoms are legally recognized entities alongside other administrative units.¹⁰⁶ The opportunistic nature of resort to

¹⁰⁰ Articles 19–24 of the African Charter on Human and Peoples' Rights (African Charter), adopted on 27 June 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), entered into force on 21 October 1986; P. Thornberry, *supra* note 14, pp. 255–264.

¹⁰¹ African Commission on Human and People's Rights (ACHPR), *The Social and Economic Rights Action Center for Economic and Social Rights v. Nigeria*, Comm. No. 155/96 (2001) para. 56.

¹⁰² *Ibid.*, para. 58. See also R. Murray and S. Wheatley, 'Groups and the African Charter on Human and Peoples' Rights, 25 *Human Rights Quarterly* (2003) pp. 213–236.

¹⁰³ E.-I. A. Daes, E/CN.4/Sub.2/AC.4/1996/2, *supra* note 13.

¹⁰⁴ As it was clearly expressed in M. A. Martínez, *Study on Treaties, Agreements and other Constructive Arrangements between States and Indigenous Populations*, Final Report by the Special Rapporteur, E/CN.4/Sub.2/1999/20, 22 June 1999, para. 89; where the author, a UN appointed Special Rapporteur, rejects the idea of 'indigenouness' as an applicable legal concept in Africa, arguing for alternative categories.

¹⁰⁵ P. Thornberry, 'Indigenous Peoples in International Law: Definitions, Claim, Process, in A. Bernard and J. Kenrick (eds.), *Africa's Indigenous Peoples: 'First Peoples' or 'Marginalized Minorities'?*, (University of Edinburgh, Centre of African Studies, 2001) pp. 91–94.

¹⁰⁶ For some relevant literature thereon, see O. Vaughan (ed.), *Tradition and Politics: Indigenous Political Structures in Africa* (Africa World Press, Trenton/Asmara, 2005); O. O. C. Okafor, 'After Martyrdom: International Law, Sub-State Groups, and the Construction of Legitimate Statehood in Africa', 41 *Harv. Int'l L. J.* (2000) pp. 503–528.

‘indigenouness’ by some destitute African groups—which overwhelmingly are those historically deprived from the above-mentioned traditional self-rule privileges in those countries where they subsist—in advocating their collective rights can be justified on this very ground of lack of legal protection of group rights in mainstream individual-centric legal systems inherited by most post-colonial African countries from former colonial masters and institutionalized, at times blindly, without being tailored to local realities; thereby culminating into a disruption of preexisting societal patterns.¹⁰⁷ The situational victimized position of claimant groups under evolving victimological notions legitimizes the need for applying the otherwise commonly shared ‘indigenous’ attribute to only those groups from the continent, perceived as in need of special legal protection.

The unexploited ‘collective’ dimension in victimological instruments and theorizations is of paramount significance in advocating the rights of indigenous peoples considered—outside situations of armed conflicts—as the most vulnerable members of national populations in countries where they live.¹⁰⁸ Moreover, recourse to victimological notions in asserting claimant indigenous groups’ rights in Africa would have the beneficial effect of concretizing the lead taken by the continent, against the then prevailing skepticism,¹⁰⁹ in enshrining not only civil, political, economic, social and cultural rights but also group rights in one single instrument, namely the African Charter, whose normative reaches in the latter area and general protective mandate remain however to be tested.¹¹⁰ Provisions over criminal victimization or through abuse of power in the UN victims’ rights declaration constitute some of the yardsticks which can be resorted to in extending ‘peoples’ rights’ provisions in the African Charter to cover claimant African indigenous peoples. In a post-cold war era in which the previous sacrosanct sovereignty and centrality of the state in international law and relations is progressively

¹⁰⁷ On this see Thornberry, *supra* note 14, pp. 244–247.

¹⁰⁸ Burger, *supra* note 15, pp. 176; R. Eversole, ‘Overview-Patterns of Indigenous Disadvantage Worldwide’, in R. Eversole *et al.* (eds.), *Indigenous Peoples & Poverty: An International Perspective*, (International Studies in Poverty Research, London/New York, Zed Books, 2005) pp. 29–37.

¹⁰⁹ For the innovative aspects of the African Charter see J. Swanson, ‘The Emergence of New Rights in the African Charter’, 12 *N.Y.L. Sch. J. Int’l & Comp. L.* (1991) pp. 307–333. For an analysis of relatedness of rights in the African human rights system and the summing up of critics thereon, see J. C. Nwobike, ‘The African Commission on Human and Peoples’ Rights and the Demystification of Second and Third Generation Rights under the African Charter: Social and Economic Rights Action Center (SERAC) and the Center for Economic and Social Rights (CESR) v. Nigeria’, 1 *Afr. J. Legal Stud.* (2005) pp. 129–146.

¹¹⁰ Past limits on the implementation of the provisions of the African Charter are summed up by R. Murray, ‘The African Charter on Human and People’s Rights 1987–2000: An Overview of Its Progress and Problems’, 1 *Afr. Hum. Rts. L.J.* (2001) pp. 1–17. For other details on the African Charter and groups rights see C. Morel, ‘Defending Human Rights in Africa: The case of Minority and Indigenous Rights’, 1:1 *Essex Human Rights Review* (2004) pp. 54–65.

shaken by post-modern and globalization ideals, the exclusion of claimant indigenous peoples in legal systems is more and more untenable in the view of the growing insistence on the various dimensions of security for all human beings.¹¹¹ Grounding on these positive dynamics, effective and inclusive protective measures should entail provisions for normative and procedural guarantees of indigenous peoples' individual and collective rights in national, regional and international *fora*.¹¹²

On the African scene, the entry into force of the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights offers the long awaited binding enforcement tool whereby, among others, the protection of groups claiming indigeneity under the Charter will most likely be clarified as well as their collective legal standing before the Court. The latter should not be problematic since jurisdictional provisions of the charter and the practice of the Commission allow for *action popularis*.¹¹³

6. Conclusion

The destitute condition of indigenous peoples throughout the world and particularly indigenous claimants in Africa requires a convergence of national, regional and international efforts aimed at enhancing their protection and survival. National legal and political systems, regional human rights mechanisms and international *fora* are progressively opening up due to pressures calling for accommodation of indigenous peoples' dissonant claims for protection of their

¹¹¹) On the evolving concept of human security see S. N MacFarlane and Y. F. Khong, *Human Security and the UN*, United Nations Intellectual History Project Series (Indiana University Press, Bloomington and Indianapolis, 2006), Commission on Human Security, *Human Security Now*, Final Report (New York, 2003), at <www.humansecurity-chs.org/finalreport/English/FinalReport.pdf>, last visited on 7 November 2006, which specifically mentions indigenous peoples as in need of special protection (pp. 26 and 134).

¹¹²) On an overview of procedural limitations for indigenous groups, see H. Keteley, *supra* note 85. On positive dynamics, see among others S. J. Anaya, *supra* note 7 and R. Niezen, *supra* note 7.

¹¹³) ACHPR, *The Social and Economic Rights Action Center for Economic and Social Rights v. Nigeria*, *supra* note 101, para. 49. In the same decision the Commission held that: "collective rights, environmental rights, and economic and social rights are essential elements of human rights in Africa. The African Commission will apply any of the diverse rights contained in the African Charter. It welcomes this opportunity to make clear that there is no right in the African Charter that cannot be made effective." As to the *problématique* of the application of "peoples' rights" in the Charter to specific groups forming part of national population, the African Commission, while remaining cautious on factual grounds, gave an indication as to the possibility of responding positively to the question in *Malawi African Association and Others v. Mauritania*, African Commission on Human and Peoples' Rights, Comm. Nos. 54/91, 61/91, 98/93, 164/97 à 196/97 and 210/98 (2000), paras. 140–142 and *Legal Resources Foundation v. Zambia*, African Commission on Human and Peoples' Rights, Comm. No. 211/98 (2001), para. 73.

differential identity in contexts of trends towards national homogenization and globalization dynamics. In the light of the still limited existing legal framework protecting indigenous peoples' rights at national, regional and international *fora* not matched with enforcement mechanisms for their collective rights claims, the evolving advocacy for victims' rights provides a complementary source of protection. Indigenous peoples as collective victims of crime—where national criminal laws are existent—or abuse of power, to be determined under international human rights standards, should benefit from collective forms of redress when collectively victimized.

Their current status as the most destitute members of society in countries where they live derives from pressures exerted upon them throughout the history of state formation and resulting in their dispossession. In the African context, most groups claiming indigenous identity are marginalized and resented by members of other groups, and in some instance by the states, opening room for personal and collective physical victimization. They are also individually or collectively victims of property crimes due to their past and continuing dispossession of the already meagre resources upon which their survival rests. Despite the numerous dimensions coming into play in understanding victimization, their destitute condition presents the worst type of 'victimhood' in comparison with non-indigenous victims of crime or abuse of power. But since the criminal nature of violations of their rights depends on national criminal legal systems, the concept of abuse of power in the UN Victims' Rights Declaration provides an additional ground of protection of their collective rights whereby national legislations are deficient.

Thus, victimology has a role to play in fostering indigenous peoples' legal protection of their collective identity. Their reality should not be sidelined by practical considerations aiming at designing a discipline responding to a given number of scientific requirements. The concepts of collective victimization and collective redress understood in all their dimensions challenge the existing individual-centric victimological approaches and techniques. They represent a reality which can hardly be ignored by the discipline without being in contradiction with its stated goal of advocating victims' rights. 'Operationalization' of collective victimization and redress formula might prove to be difficult tasks under existing victimological patterns and human rights law but the evolving international acknowledgement of group rights should be accompanied by legal enforcement mechanisms and victims' participation rights, in their individual but also collective standing.