

# United Nations Permanent Forum on Indigenous Issues

## Tenth Session 2011

### Discussion point 7 half-day on the right to water and Peoples Indigenous

May 24, 2011

*Prepared by Aicha Cheikh Sala (Assoc Tidawt) and Aboubakar Albachir (Assoc Tunfa), members of IPACC*

Madam Chair, we are pleased that the 10<sup>th</sup> session of the Permanent Forum, has inserted in its programme a half-day on "The Right to Water and Indigenous Peoples". We wish to express our gratitude to the Permanent Forum for its sincere efforts and its pioneering role in promoting the visibility of indigenous issues within the international community.

Madam Chair, members of the Permanent Forum, we want to start the discussion from the work of the 108<sup>th</sup> plenary session of the General Assembly on July 28, 2010 (GA/10967) which "recognizes" the right to drinking water as a fundamental right by 122 votes and 41 abstentions.

The 35 delegations that explained their votes, indicate that there are still conflicting views on whether or not the right of access to water is universally appreciated.

#### **Introduction**

*The water law is he alone or he follows other rights?*

Our national governments face a difficulty in legislating access and rights in relation to water resources. Many of government have national water commissions established to guide legislation related to accessing water at the ground level, but not considering the security of subsurface aquifers. The human right to water deserves to be clarified taking into account the difference between surface level rights and the more complex issue of subterranean water quality and conservation.

The fundamental feature of the Tuareg and Fulani-Bororo herders is that of mobile peoples who manage arid territories through livestock and human rotation depending on the fluctuating levels and quality of water.

For indigenous peoples of West Africa, Tuareg and Fulani-Bororo pastoralists, the water issues holds a very central role in our livelihoods, our relationship with our territories, and in sustaining biodiversity overall in arid and sub-humid territories of the Sahel and the Sahara. Contrary to appearances, nomadic transhumance is random. Our migration corridors and patters are the result of decisions based on parameters related to the availability of palatable herbaceous or shrubby vegetation (pasturage), surface or pit water (both quality and quantity of water), health issues (e.g. the presence or absence of dangerous toxic pollution in the aquifers and outbreaks of water-borne diseases), social cohesion and conflict (proximity to related settlements or allies, and tensions with sedentary farming communities).

The situation among indigenous peoples in the Sahara in the water is unacceptable.

Although the right to drinking water is a fundamental right, the nomadic pastoralists living in harsh conditions in our desert regions lack access to clean water or water quality is poor, with its poor quality are the source of most of the diseases suffered by indigenous and are the main causes of infant mortality remains very high and a significant loss of livestock. Water is essential to the survival and development Saharan and Sahelian indigenous peoples. Fresh water is in limited quantity on our lands; its quality and quantity are now threatened by water needs mining and other extractive industries, including industrial agriculture. Foreign mining companies are known for their lack of enthusiasm in relation to protecting the natural environment and quality of life in territories where the legal system is inefficient or not present.

Extractive industries approach is simple: Exploit the fossil deposits at the lowest cost and only take into account the needs of indigenous people and the environment if threatened with legal action.

Water management is governed by different legal practices between where convergence but also contradictions may appear. We retain two types of rights: traditional customary law which shapes our daily lives and also our responsibilities, and "modern" law linked with our colonial heritage and the power of the national state.

### **1. Customary rights and obligations**

Traditionally, indigenous pastoralists have rights over a portion of space that we propose to translate as "local attachment" or customary mobile tenure. The availability of drinking is related to the nature of the water point. Individual private ownership of a well may exist but is relatively rare (e.g. alienation cannot be made without the consent of the group/ clan). Moreover, the exercise of these rights does not involve exclusivity: others travelling through the familial territory may drink and graze within acceptable limits by the host community.

Another feature is the diversity of situations in terms of property rights. Politically powerful and wealthy groups are better able than others to limit flows from the outside. It should also be noted that the practice of law works differently depending on the age groups in the area. Thus the customary mobile land tenure is much more sensitive for indigenous nomads such as the Tuareg, Tubu and Fulani-Bororo known for their extreme mobility.

A question arises, whether nomadic pastoralism is able to generate sufficient human development. The answers depends on one's criteria. The legal system, rooted in colonialism, associates development with agricultural land tenure, discriminating actively against indigenous tenorial systems. Indigenous customary systems are layers, with most advanced expression of rights of access and usage being linked to the length of (mobile) occupation (in order of arrival) but also the permanence (the maintenance on the site) and investment work (drilling of wells or sumps, resource protection). This traditional law is confronted with modern practices of water management.

### **2. State-based rights**

The 'modern' legal system and access to water, water governance and conservation is very complex. On the one hand, there are official documents, dating from different periods, often poorly publicized and poorly understood. The rural communities being basically illiterate, struggle to understand the confused messages and prefer to rely on oral interpretation, and defer to the more consistent process in traditional customary law.

The post-colonial assertion that the land belongs to the State, combined with the spread of high-velocity drilling of wells has contributed substantially to the disintegration of the old customary rights, including facilitating the entry of livestock coming into formerly managed areas from other regions causing rapid degradation.

State policy is favours free movement and full access in what is in an environmental context which requires careful management and carrying capacity limitations. The post-colonial legal framework actively contributes to promoting poverty and environmental degradation, the base of which is poor governance of water resources. This touches on the difficulty of effective leadership of pastoral resources in consultation with user groups.

The random nature of rainfall and water access in these areas precludes any system of rights that would be exclusive and contrary to mobility.

### **3. Conclusion**

We have highlighted that water is central to the livelihoods, health and identify of indigenous peoples of arid and subhumid regions of Africa. There is a clear tension between customary use systems, which control access to scarce resources in a rights based, culturally embedded system, and the national legislative framework which favours open access and no mechanism for managing scarcity of water and natural resources.

The difficulty of legislating from the water at least 3 characteristics:

- The nature of water places it outside the rule of law
- Water is fluid, subterranean and scarce, often reliant on erratic rainfall;
- Water is understood in a ratio of property and power.

In pastoral areas, indigenous peoples are faced with many complex legal systems they do not control. They are also forced to cope with major extractive industry players whose activities disrupt their way of life and organizational system. Legal frameworks are not synchronised with ecosystem capacity.

The traditional system tends to disappear to make way for a confused back in the pastoral code which is the amalgamation of land rights, private property and public rights of third parties, the right to use, etc. In Niger, the right to water would be managed by the Land Commission. This principle inherited from the colonial legislation (Napoleonic and Roman) compounded by interference by Western extractive industries and political interference.

We recommend:

- That an inventory be done on African legislation related to water access in relation to customary usage and management practices of water, notably in arid and semi-arid lands;
- We recommend that the Permanent Forum works with the African Commission on Human and Peoples' Rights and the African Ministerial Conference on the Environment to promote national awareness of indigenous water governance and management practices as part of the national and regional body of customary law;
- That water wells and grazing lands need to be available according to customary of nomadic herders in accordance with the pact nomad;
- We urgently call for greater attention and monitoring of the impact of foreign mining and petroleum countries which have been polluting important underground water aquifers, threatening the livelihoods and health of indigenous peoples and livestock;
- We call on African governments to involve indigenous peoples, local people and particularly our traditional leaders in the drafting of pastoral codes;
- We encourage African states and UN agencies, notably UNDP, FAO and OCHA to ensure that there is greater subregional integration of legal and rights frameworks related to water management and governance and access to pasturage. Pastoral codes of West African countries should be rights-based and in line with the UN Declaration on the Rights of Indigenous Peoples.

Associations TUNFA and TIDAWT, International  
Touareg