

**THE RIGHTS OF PASTORALIST PEOPLES.
A FRAMEWORK FOR THEIR RECOGNITION IN
INTERNATIONAL LAW**

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Abstract: Pastoralists are one of the most poverty stricken and underdeveloped existing human groups in the world. Until now, having remained practically invisible in the eyes of international law, it is desirable to open a debate concerning the recognition of their rights. The ideal situation would be to create a specific category of rights dedicated expressly to these pastoralist peoples. Therefore, one can surmise that there are two laws that constitute its essential content: the law protecting their way of life and their access rights to the land

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Summary: I. INTRODUCTION; II. THE PROTECTION OF PASTORALIST PEOPLES IN EXISTING INTERNATIONAL LAW; III. THE FUNDAMENTAL RIGHTS OF PASTORALIST COMMUNITIES; III.1.The protection of a way of life; III.2. The rights to land of the pastoralist communities; IV. CONCLUSIONS.

I. INTRODUCTION

Pastoralists are one of the most poverty stricken and underdeveloped existing human groups in the world. They live off of their livestock and practice itinerate transhumance characterized by constant mobility in search of pastures. Normally, since they are members of traditional societies, that transhumance conditions their social and economic organization. Although they go about their lives engaged in an activity that has its roots in antiquity, more and more these days, for diverse reasons, their way of life, one already beset with considerable hardship, is seriously threatened.

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They are present all over the world; however, they are found in greatest numbers in Central Asia and, above all, in Africa. In the entire world, it is estimated that there are forty million nomadic pastoralists, of which around twenty-five million are to be found on the African continent. Here as well there are some two hundred forty million agro-pastoralists, that is to say, individuals who engage in both areas of production. As they suffer from the greatest consequences of poverty, it is necessary for the institution of law to respond to this situation to preserve and to improve their living conditions². Fortunately, pastoralists all over the world are organizing themselves to take actions to improve their lives³.

The Human Rights Council has already started to discuss a declaration on the rights of peasants. The purpose of this declaration is also to cover to other people working in rural areas. In this way pastoralist people are being included. There is interest to grant legal protection for this collective. However, Human Rights Council has so far been addressed to agricultural workers. The work of the Human Rights Council has not focused a great deal of attention of pastoralist needs⁴.

We estimate there should be recognition of the pastoralist rights. Precisely, the objective of this research is to determinate the foundation of these rights and proposing, *de lege ferenda*, more consistent rules, particularly in order to obtain a United Nations Declarations specifically for the pastoralist rights. In this article, we will try to trace out the principal points of this task.

² The Food and Agriculture Organization of the UN (FAO) and its partners have launched (27 apr. 2015) an online knowledge hub for pastoralists, which aims to hosts a knowledge repository, contacts to pastoral networks, and discussion forums for the networks and partnering institutions. It is a database that classifies and provides access to literature on pastoralism, <http://www.fao.org/pastoralist-knowledge-hub/en/> (last visited Jun 10, 2016)

³ This website offers information on the existing pastoralist regional and sub-regional networks.

⁴ <http://www.ohchr.org/EN/HRBodies/HRC/RuralAreas/Pages/FirstSession.aspx>, <http://www.ohchr.org/EN/HRBodies/HRC/RuralAreas/Pages/2ndSession.aspx> (last visited 10 Jun, 2010) *A/HRC/AC/8/6, Nations Human Council Advisory Committee, Final study of the Human Rights Council Advisory Committee on the advancement of the rights of peasants and other people working in rural areas, prepared by the drafting group on the right to food of the Advisory Committee. A/HRC/RES/21/19 Resolution adopted by the Human Rights Council, 21/19. Promotion and protection of the human rights of peasants and other people working in rural areas.* The third session of open-ended intergovernmental working group of United Nations declaration on rights of peasants and other people working in rural areas will take place from 17-05-2016 to 20-05-2016.

II. THE PROTECTION OF PASTORALIST PEOPLES IN EXISTING INTERNATIONAL LAW

Until now, having remained practically invisible in the eyes of international law, it is desirable to open a debate concerning the recognition of their rights. Therefore, there is sufficient basis to support the needs of this group of humans in the international law in force (*lex lata*).

The Advisory Opinion on Western Sahara of the International Court of Justice underlines clearly the existence of a common Saharan law concerning the use of water-holes, grazing lands and agricultural lands. The right of pasture was enjoyed in common by these tribes⁵. In sum, it is a regional consuetudinary law protecting pastoralist peoples.

In the same way, the case concerning the frontier dispute between Burkina Faso and Mali cites treaties providing that rights of use of the nationals of the two States pertaining to farm-land pasturage preserved in accordance with regional customs⁶.

And more recently, the International Court of Justice in the Frontier dispute (Burkina Faso/Niger), sentence of April 13th 2013, has made an express reference to these peoples. The Court expresses its wish that each party, in exercising its authority over the portion of the territory under its sovereignty, should have due regard to the needs of the population concerned, in particular these of the nomadic or semi-nomadic populations, and to the necessity to overcome difficulties that may arise for them because of the frontier⁷.

Such references are welcome but are limited and not specific enough. The precariousness and the great degree of poverty in pastoralist communities should motivate, ineludibly constituting a necessity, international law to act and to offer effective protection. However, this supportive protection could be found in the existing legal order.

We can make an effort to seek the application of existing law as they relate to the case of pastoralists, which, as we will see shortly, can produce good results. Still, concurrently, we consider that it would be opportune and desirable to create rights of its own specifically for this collective. Certainly, this creation can be beneficial in that it gives them greater recognition and it enhances their position with greater effectiveness.

⁵ *Western Sahara, Advisory Opinion, ICJ Reports, 1975. See paragraph 87 and 136.*

⁶ *Frontier dispute judgment ICJ Reports 1986, paragraph 116.*

⁷ *Frontier Dispute (Burkina Faso/Niger), International Court of Justice, 16 April 2013, Judgment, para. 112, p. 48.* “112. Having determined the course of the frontier between the two countries (see sketch-map No. 4), as the Parties requested of it, the Court expresses its wish that each Party, in exercising its authority over the portion of the territory under its sovereignty, should have due regard to the needs of the populations concerned, in particular those of the nomadic or semi-nomadic populations, and to the necessity to overcome difficulties that may arise for them because of the frontier...”

By so doing, this new branch would not begin from scratch, at once a great part of that which would be the contents of this law would already be recognised by the international law in force. The labour fundamentally would consist of codification and clarification.

In this sense, the first body of legal rules that can cover and have applicability for the pastoralist communities is that one relative to the international law for indigenous peoples. To a large degree, the communities that practice pastoralist belong to a differentiated tribal or ethnic group that traditionally has practiced this activity for a considerable period of time. Normally, they constitute a differentiated social group and, in numerous occasions, in a state of exclusion or marginalization.

Indeed, the definitions that are given to indigenous and tribal peoples for Africa usually include these communities. In particular, the Task Force on this matter created, well over a decade ago, by the African Commission on Human Rights and Peoples' Right mention expressly that on the continent this category of peoples is made up by different groups of hunter-gatherers, former hunter-gatherers and certain pastoralist groups, essentially⁸.

International law has been slowly consolidating a body of regulations to protect indigenous peoples and it has expanded considerably in the last few decades. The General Assembly of the United Nations approved, on September 13th 2007, a Universal Declaration on these rights, which includes a complete protective policy framework. The International Labour Organization also adopted in 1989 Agreement 169 on indigenous and tribal peoples. There is also recourse on the part of numerous States in their internal legal orders, recognising and regulating these rights.

This regulatory body attempts, in essence, to respect the way of life, the worldview and the individual culture of each of these peoples and to protect rights that are so necessary to this end, such as their lands and access to their natural resources. The aforementioned task force constituted by the African Commission also makes manifest these ideas and points out expressly that the principal characteristic of said indigenous peoples is the need for their particular way of life to survive, which depend on their access rights to their traditional home range and their natural resources. This is, evidently, the essential core of this right⁹.

⁸*African Commission on Human and People's Rights, Indigenous peoples in Africa: the forgotten peoples? The African Commission's work on indigenous peoples in Africa, Denmark (2006) IWGIA, at 16. See also Morir Sing Oei, Manual on the promotion and protection of the rights of indigenous populations/communities through the African Human Rights system, Denmark, IWGIA,*

⁹*Ididem*

That also would be said for pastoralist peoples. These points constitute their fundamental preoccupation and they also would be the essential core of the rights which they have been insisting on defending.

Consequently, international law on this matter could provide much more to pastoralist communities. Supposing that, the reality is that, in the specific case of Africa and to the contrary in other continents, such as the Americas, this right has not found sufficient acceptance, owing to numerous hindrances and reticence on the part of the continent's States. Their internal systems of law in addition have barely welcomed and admitted its injunctions.

On the other hand, and despite the anterior reference to the aforementioned task force into whose sphere of responsibility the pastoralist fall, a concrete and complete listing of the peoples who fall into said category is missing. There is vagueness and it is illustrative that this task force in one of its most noteworthy publications describes them as the forgotten peoples. This is the very same one that points out that the indigenous peoples are not only and exclusively of the three previously mentioned categories (hunter-gatherers, former hunter-gatherers and pastoralists) and it takes pains to spell out that not all these groups are from these communities, rather just some of them, which is the expression that has been used¹⁰.

As so, there is room to think that not all the pastoralist communities fall necessarily into the definition of indigenous or tribal people. It is not a condition of *sine qua non* to be simultaneously pastoral and indigenous or tribal.

This also leads us to understand that it is preferable for there to be a set category of rights for pastoralist peoples and that they do not end up diluted within the general category of indigenous and tribal peoples. It is the best manner to attend to the specificity and singularity itself of pastoralist communities.

In addition, by so doing one can overcome the inconvenience of the scarce consolidation that the law still possesses on the rights of the indigenous and tribal peoples on the African continent. Certainly, it is very curious to observe how the African Commission on Human and People's Rights in the only case regarding pastoralists that it has tackled, which was the matter concerning the *Endorois* community in Kenya¹¹, did not make use of these rules. In this case, the legal regulations that were considered unfulfilled are various precepts of the African Charter of Banjul for human and the peoples' rights.

¹⁰¹⁰ Report of the African Commission's working group of experts on indigenous populations/communities (adopted by the African Commission on Human and People's Rights at the twenty-eight session, 2003).

¹¹ 276/2003 Centre for minority rights development (Kenya) and minority rights group international on behalf of Endorois welfare council v. Kenya.

So we find, therefore, another field, that of human rights, that can serve as legal support to bolster protection and the validity of the pastoralist peoples' rights.

Concretely, the African Commission estimated that in this matter the articles 1, 8, 14, 17, 21 and 22 were not fulfilled. Those articles refer to various rights, such as property, culture, religious practice, access to natural resources and development. They are human rights recognised in the aforementioned African charter and that also are reflected in the regulations and texts of international law in general.

The Commission made the effort to apply the law paying attention to the singularities of the pastoralists. Thus, express mention of the protection of the pastoral way of life is made, as a derivation of the second and third paragraphs of article 17, which recognises the right of the culture. Moreover, the violation of property rights due to the loss of their ancestral lands is recognised. In short, these observations are the essential core of the rights that must deserve protection for these communities.

This labour of application demands that one possesses necessarily a collective perspective. Before us are rights that are required for a collective and, certainly, the consideration that one is dealing with only individual rights is insufficient. Is it possible, therefore, to surmise that the rights of pastoralist communities are by nature collective? It is true that still today there is some doctrine in international law that denies or that shows itself reticent in recognising and admitting rights of this nature¹²; however, this is an already sterile debate, given that the existence of these rights in international legal order as of today is undeniable. There are many suppositions and a category of its own of rights for pastoralist peoples would have to have this collective nature.

Such as this is, it is logical to argue that the pastoralist communities be considered as a people thus to obtain the protection of this system of rights. This is a strong argument, difficult to refute and that has already been vindicated, for example, as in the case almost a decade ago by the professor of the University of Makerere, Samuel Tindifa¹³. Implicitly, the aforementioned *Endocroi case* also recognises this possibility. In all matters, that which is ideal is that which serves, as we have been pointing out all along, to defend a specific category of rights of the pastoralist communities.

On the other hand, the consideration of these as collective rights has implicit practical consequences. In these rights one can give a representation in the name of all the members of the group or collective without it being necessary to count on the collaboration

¹² See particularly Donnelly, S., *Third generation rights, in Peoples and minorities in international law*, The Hague, ed. Martinus Nijhoff, 1993, pp. 133-134. Prof. Donnelly indicates that "all internationally recognized human rights regulate the relations between individuals and society with special emphasis on what the State must and must do for against or with respects to individuals".

¹³ *Pastoralism in the Horn of Africa. Report of a workshop on social and economic marginalization, 8-10 December 1998, Nairobi. Kenia, 5.*

or participation of each of the said members. That is useful before legal or administrative proceedings to assert these rights. In practice in many countries one can observe that there are limitations in this sense, allowing only for the defence of each right or individual interest, and limiting collective actions. On account of that, this should be recognised and should remain well established for pastoralists.

This is the case, for example, of Tanzania¹⁴, where a study has shown the restrictions that its tribunals have placed on some members or representatives when they wished to litigate in the name of the community or on the outcomes of litigation having greater effect beyond that of the litigants themselves. There are many legal antecedents (*Mulbadaw case*, *Yake Gwaku case*, etc.) in which obstacles are placed before communities when they have desired to appear as plaintiffs before the tribunals to demand rights that have a collective scope.

To allow, therefore, collective representation is key. Consequently, the necessary means to facilitate the representation and the exercise of these rights should be established beforehand for the pastoralist communities in the internal legal order, moving beyond a focus on just individuals, which limits the efficacy of these rights.

On the other hand, it is necessary to keep up efforts to search of juridical rules in force in international legal order that defend the existence of pastoralists' rights and by so doing we may find that we have come upon the right to development. It is most difficult to deny that this has been recognised as part of general international law, which is now twenty-five years old, since its adoption by the General Assembly of the United Nations in their declaration of recognising this right¹⁵, but is it applicable in the case of pastoralist communities?

An affirmative example can be seen in that of the African Commission itself, in the so called *Endorois Case*, also expressly mentions and cites specifically the third article of this declaration, which stipulates the obligation of the States to create the adequate conditions so that the achievement of this right is possible.

This right also admits the possibility of having as a recipient a collective or group. It is true that there is a very interesting doctrinal debate regarding whether or not the right to development is an individual right or/and a collective one¹⁶ and some conclusions to this

¹⁴*Experiences in the defence of pastoralist resource rights in Tanzania: lessons and prospects, part. A, dr. Sengondo E. Mvungi, April 2007, Study on options for pastoralists to secure their livelihoods, report submitted to Cords, pg. 14. Courts in Tanzania have failed the pastoralists. They have remained timorous and unable to creatively constitute law to champion their rights as marginalised people leading marginalised livelihoods at. 31.*

¹⁵*A/RES/41/128 4 December 1986 97th plenary meeting 41/128. Declaration on the Right to Development.*

¹⁶ See Abi-Saab, G, The legal formulation of a right to development (subjects and content), *The Right to development in the international level*, The Hague, ed. Sitjhoff, 1980, p. 163; Gros Espiell, H., *The right of*

regard can be clear. Development is centred on the individual and it is made manifest in the manner it favours multiple individual rights (food, education, housing, health, etc.), but it requires, due to its very given nature, that it be fulfilled by a group of people. Professor Phillip Alston of New York University states it well upon indicating that this right, with a predominately individualistic orientation, is a part of an indivisible aggregate with an essentially collective orientation. It is fulfilled in relation to a group¹⁷

And the pastoralist peoples very well can consider themselves technically as a group recipient of this right. It is an argument in favour of the recognition of the category of pastoralist communities' rights.

Within the walls of the United Nations itself work is under way in order to delve deeper into this right and to establish indicators that clarify better the contents of this right¹⁸. Up to the present, no reference or mention of pastoralist peoples has been made in this endeavour. It would be desirable, naturally, for that to happen. However, implicitly and via the application of legal reasoning, we believe that it can be affirmed that the right to develop protects them and entails obligations for the States that they inhabit.

In particular, we consider that over their heads should hang the obligation of improving their living conditions through precautionary planning or developmental programs, which deal with their necessities and particular problems, aimed specifically at them. Moreover, we also can surmise that this must be part of the essential contents of the pastoralist communities' rights, thereby surmounting a past, as we will see, characterised by scant legal attention on the part of their governments.

In addition, this forms the basis of one the most commonly made lawsuits against the States by pastoralist groups, who in some occasions have filed its claims as formally written documents. A current example of this occurrence can be found in the case of the Fulani pastoralists of Nigeria, who, in a letter addressed to their government, demand not only access to pastures but also the right to development for their twelve million members as a means of overcoming their traditional exclusion from society, their illiteracy and their

development as a human right, Texas International Law Journal, 1981, 16, p.200 and Bedjaoui, M., The right to development, International Law: achievements and prospects, The Hague, Martinus Nijhoff, 1991, p. 1179. Prof. Gros Espiell indicates that "only if the right to development is simultaneously considered as a collective and individual right does the idea of development acquire its meaning".

¹⁷Alston, Phillip: "The right to development at the international level", *The right to development in the international level, Workshop The Hague 16-18 October 1977, ed. United Nations University and the Hague Academy of International law, 1980, ed. Sithjoff, 108.*

¹⁸Right to Development. Report of the high-level task force on the implement of the right to development on its sixth session, Geneva 14-22 January 2010. Addendum. Right to development criteria and operational sub-criteria, A/HRC/15/WG.2/TF/2/Add. 2, 8 March 2010, United Nations, General Assembly. Completion of the conclusion and recommendations of the open-ended working group on the right to development (1998-2012), A/HRC/WG.2/14/CRP.1, 6 December 2012.

recurring conflicts with the agriculturalists who have made them loss in the last decade more than three and a half million heads of cattle¹⁹

Likewise, one must keep in mind that the application of the right to development for the pastoralist peoples must follow one of the most important entitlements of this right, as is the principle of participation for the pastoralist communities. This principle acts as part of the essential content of the right to development and it necessarily must be taken into account by the public authorities charged with its application in specific programs for them and transversally in all those that may affect them.

This is a requisite than cannot be obviated, and a good indication of that are the texts and international documents that have begun to accept it. A very illustrative example in this sense is article 10 of the United Nations Convention of June 17th 1994 on combatting desertification²⁰. Expressly, this article calls upon the pastoralists and their representative organizations to have effective participation in the planning, approval, implementation and revision of the national programs of action against desertification. This is a most noteworthy example, fundamentally being a treaty of obligatory scope.

Without a doubt, here the principle of participation is enjoying a positive reception. Likewise it is fitting to succinctly state that also in said plans against desertification the right to development of these pastoralist communities should be well reflected. It is very much tied to their way of life and they face the effects of desertification continually. We already indicated that it is one of the principle causes of the increasing conflicts between agriculturalists and pastoralists.

Finally, we can find even more current international rules in favour of the rights of the pastoralist communities. Thus, some have put forward the argument that they also protect the international legal precepts of the protection of minorities. As it has been done by, for example, David Martín, Public Diplomacy Officer for the United Nations High Commission on Human Rights²¹.

Certainly, international law slowly has been developing protection for this legal basis, which materialized in the form of a declaration of rights passed by the Assembly General of the United Nations²² and, above all, by the article 27 of the International

¹⁹ *Missionary international service news agency, 12-09-2012.*

²⁰ *Ask, Vesmeloy: UNCCD and food security for pastoralists within a human rights context, DCG Report n° 43, February 2006, Drylands Coordination Group-Fian, Oslo, Norway.*

²¹ *David Martín Castro, The protection of the rights of pastoralist peoples in the United Nations system, [http://data.uicn.org/wisp/documents_english/pastoralist%20rights%20eng%20\(3\).doc](http://data.uicn.org/wisp/documents_english/pastoralist%20rights%20eng%20(3).doc). (last visited May 16, 2015).*

²² *A/RES/47/135, 92nd plenary meeting, 18 December 1992, Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities*

Covenant on Civil and Political Rights, which protects the exercise of one's culture in the seat of one's community.

It may be, in a large number of suppositions, these communities may fall into this category of national minorities, although it need not necessarily be the case and all of them may fall into this category. Therefore, the singular and proper recognition of a singular and proper law for the pastoralist communities would be ideal, as we have been defending in this article.

We can conclude, therefore, that there is enough legal basis to affirm the existence of rights for the pastoralist communities, as has been made clear in the previous paragraphs. This protection rests securely on the international law in force. The challenge has to be to the effectiveness of the application of the precepts, which can contribute considerably to its recognition and diffusion of a specific category of rights for pastoralist peoples. To advocate for these very same rights does not imply a creation *ex novo* of law. It already exists. The matter at hand is to recapitulate and to put in order diffused laws in the concrete application for a collective, thereby achieving greater coherence, concision and greater force.

III. THE FUNDAMENTAL RIGHTS OF PASTORALIST PEOPLES

This current work, as has been indicated, attempts to contribute to the creation of a body of law for pastoralist peoples. For this work, an essential first step is to establish the rules or fundamental rights, the ones that must function as pillars to bear the weight of the subsequent policy framework in this area. In this sense, we believe that there are two fundamental laws, each with its own opportune particularities, which respond to this requisite: a way of life which is entitled to protection and the recognition of the right to land. We shall hereafter trace out the fundamental features of each of them.

III.1. The protection of a way of life

It is clear that this protection has an essential character. Certainly, no other law or rule would make sense for this collective if complete respect for it and application of it do not take root firmly. Moreover, an effective recognition of this protection is necessary, given that, as recent history has demonstrated, this way of life has been called into question. Generally, it has been considered unviable, anachronistic and very undesirable. What is more, it has been scarcely supported.

As is widely known, after decolonization and after the birth of new States, an initiative for policy that sought to make nomadic communities sedentary was fomented considerably. This result was seen as a desirable political objective for national

development and state construction, even if that had an impact on the way of life and the mobility of said populations²³.

One may even say that these policies even had international encouragement and support. Thus one can see, for example, in a very illustrative manner, in Recommendation 104 of June 5th 1957 of the International Labour Organization on the protection and integration of indigenous populations and tribal and semi-tribal populations in independent countries. Concretely, in its third point it laid out expressly that so long as the objectives of a settlement policy for semi-nomads were not met, the areas in which these groups could freely pasture their livestock should be determined. As such, implicitly, acceptance is garnered.

Moreover, this negative posture towards pastoralism has persisted in time. We shall provide some examples also illustrative in nature, such as the important workshop that took place in December 1998 in Nairobi on economic and social marginalization, which was the very same workshop that drew as an incisive conclusion that the African States did not consider pastoralism to be a viable way of life²⁴. Again, more recently, in 2008, an Oxfam investigation continued to make manifest that national policies are inappropriate to come to grips with the issue of pastoralism²⁵. That would become quite apparent in countries like Kenya, Uganda or Tanzania.

Now is the time when it seems that this state of affairs finally is starting to change and to stir an interest in revitalizing the pastoral world, highlighting the positive contributions of this system of production and the need to empower these pastoral communities.

In this endeavour, it is necessary to underscore the impetus that the World Initiative for Sustainable Pastoralism (WISP) is providing. WISP operates under the auspices of the United Nations Development Programme (UNDP) and the World Nature Organization (WNO), and that, in just a few years, has managed to create a global network of which more than two hundred organizations from this sector around the world are members.

²³David Grossman, *rural process-pattern relationships: nomadization, sedentarization, and settlement fixation*, Portsmouth, Greenwood Press, 1992. Victor Ayarza, *Pastoralism and the State in Africa: marginalization or incorporation?*, *Nomadic Peoples*, vol. 38, (1996) 11-36. Y. Sanon, *Politiques publiques et développements de l'élevage au Burkina Faso: politique de sédentarisation et évolution de l'organisation sociale et productive des fulbé burkinabé*, *Thèse Doctorale*, 2003, Université Paris-Nanterre. More recently, it is interesting to see J. Gilbert, *Nomadic Peoples and Human rights*, London, Routledge, 2014

²⁴*Pastoralism in the horn of Africa. Report of a workshop on social and economic marginalization, 8-10 December 1998, Nairobi, Kenya.*

²⁵Kirkbride, M., Grahn, R.: *Survival of the fittest. Pastoralism and climate change in east Africa*, *Oxfam briefing paper 116*, Oxfam International, 2008, at 17, 19, 34: "Put an end to inappropriate development policies aimed at pastoralists, include encouraging settling communities through inappropriate bore-hole drilling and the assignment of fixed grazing lands to pastoralist communities".

WISP also is advocating for a change in the policies that spurn them in order for there to be a positive consideration of their contribution to environmental sustainability²⁶.

Today it emerges a process of claiming their main interest. For example, the Hustai declaration from Central Asian pastoralist call society for a better recognition of pastoralist (27th July 2015). Their networks are present in the global decision making fora (on food sovereignty, environmental issues, etc). These fora are usually centred on concrete themes that affect pastoralist, but broad discussions on pastoralism as a whole are much scarcer²⁷

In addition, in a similar vein, one must highlight the work of the African Union, which adopted in January 2012, in its eighteenth session, the document entitled Policy Framework for Pastoralism in Africa²⁸. This amounts to a strong impetus for the protection of pastoralism on the continent. Its objectives, according to what is set out in its reference documents, are to ensure and to protect the lives, the ways of life and laws; make a commitment with its development; and to reinforce its contribution to the economies. What is more, the very same document is going to be expanded and developed in the coming years²⁹.

Scientifically, also it is becoming increasingly evident that the pastoral productive system provides positive contributions, compelling the traditional negative perceptions to be dispelled. Indeed, the transhumance has been a system historically well suited to a difficult natural environment and that has made optimum usage of scarce natural resources, providing a way of life for a significant number of people. In fact one is already clearly able to observe that the process itself of sedentarization and the abandonment of pastoralism is the direct cause of severe land degradation which is occurring in numerous semi-arid zones.

Now, therefore, should be the moment of action on the part of the law, which, by its own nature, must be the suitable and appropriate instrument to offer effective and real protection of the pastoral way of life, complementing other political or scientific measures.

The fact of the matter is that the aforementioned African Union Political Framework explicitly recognises the rights of pastoralists. It makes mention of their existence although

²⁶*World Initiative for Sustainable Pastoralism, Enabling sustainable dryland management through mobile pastoral custodianship: world initiative on sustainable pastoralism (wisp), terminal evaluation final report Prepared by: Oliver Chapeyama, September 2011*

²⁷ <http://www.fao.org/pastoralist-knowledge-hub/pastoralist-networks/thematic-working-groups/en/> (last visited, Jun 10, 2016).

²⁸*Policy Framework for pastoralism in Africa,: Securing, Protecting and Improving the Lives, Livelihoods and Rights of Pastoralist Communities, African Union, Department of Rural Economy and Agriculture October 2010, Addis Ababa, Ethiopia.*

²⁹*The stakeholder's validation workshop on institutional arrangements and resource mobilization strategies for the Policy Framework on Pastoralism was held in Addis Ababa, Ethiopia on 21-22 August 2012.*

it is vague and it is limited to a mere general reference³⁰. There is an absence in the Framework of any construction well elaborated by its framers, thus making it mandatory to engage in a wider analysis of the contents, scope and the effects of these rights. In addition, there is no mention what so ever to this right to their way of life, which is clearly evident.

That is essential and the construction of the rights of the pastoralist peoples must be presided over by this principle of respect for their way of life. The very same notion, in addition, has been recognised in an express fashion by the African Commission for Human Rights in the also aforementioned Endoroi Case, and we can also consider it to be implicit in respecting a culture that makes sacred in various international human rights instruments and in other rules in international law, such as those relative to minorities, indigenous peoples or the right to development. From all these regulations one can deduce their existence.

Nevertheless, the ideal situation would be for this principle to receive recognition *ex profeso* and the same be realized within the framework of the singular category of the rights of the pastoralist peoples, which is what we have defended all along. By so doing, we believe that this right would end up being reinforced.

Likewise, once this law has been well established, the argument of having to maintain the politics of sedentarization to promote the development of the nation or of the country no longer makes sense. That has been fallen back upon profusely. Now the right to development must be also an argument in favour of the protection of this way of pastoral life and it must give priority to this group of humans. This right is based on the human person, as the third article of the Declaration of the United Nations on this right expounds, and, as a consequence thereof the necessities of this wide group of persons must prevail over the supposed national interests or those of the State.

The right to development must serve to maintain this environment of pastoral life. It must be kept in mind that, for this long-term survival to be viable, it will be necessary that the people of these communities improve their living conditions and that they totally have satisfactory access to health care and education. Precisely, these last three components are the succinct reference which the aforementioned African Union Policy Framework makes with regard to that which must be pastoralists' rights³¹

³⁰4.1.1 Recognize the rights of pastoralists: The framework explicitly recognizes the *rights* of pastoralists, and the need to provide security, services, infrastructure and economic opportunities in pastoral areas which are comparable to non-pastoral areas. This principle is articulated as a response to the high levels of conflict in pastoral areas, and the low levels of basic services, of which health and education are particular concerns. It further recognizes that under the broad challenges of health and education, are a set of specific barriers of service access for women and girls. The principle relates directly to international human rights conventions and laws, including the right of people to protection from violence, the right to pursue a livelihood of their choice, and the right to education and health. (*Policy Framework, supra.note 20*).

³¹ *Id.*

Without the enjoyment of these rights and the experience of a dignified life, in general the right to development, there can be no future for the survival of this way of pastoral life, which, due to its very essence, will require adaptation.

Finally, it is necessary to underscore that one of the essential components of the pastoral way of life is the most important, that being mobility³². This element is part and parcel of the very nature of this way of pastoral life³³.

As a matter of fact, currently, the limitations to which this mobility finds itself subjected are the gravest threat which the survival of pastoralism faces. More and more these days more obstacles are literally rising up, such as fences for agricultural operations, for the expansion of crop land, for industrial extraction and processing, etc. Therefore, it is necessary to take measures to step in and preserve open spaces for the sake of mobility.

And, on account of it, we can understand what necessarily makes up part of this first right of pastoralist peoples, which in consequence must wholeheartedly receive maximum juridical protection. To that end, that which would be most effective would be for internal rights to foresee the need for measures proactively to grant this protection. There are some cases in which express protection is given at the highest level. The case of Mauritania, with its foresight in concrete instances such as its Pastoral Statutes, is worth highlighting.

Without a doubt, here as well it would be interesting to search for rulings and arguments in the international legal order to support this mobility. In this task some benefits may be reaped. Thus, it is interesting to recall that there are rules in international law that protect and guarantee the right to freedom of movement and the right to adequate housing. This is the case in the first paragraph of Article 12 of the International Pact on Civil and Political Rights³⁴ or Article 13 of the Universal Declaration on Human Rights³⁵. These also must favour and assist the pastoralist communities, as well as serve as a base upon which to lay the foundations for the utility of a rule of protection

³²Swallow, Brent: *The role of mobility within the risk management strategies of pastoralists and agro-pastoralists*, Gatekeeper Series n° SA47; Niamir-Fuller, M.: *Managing mobility in African rangelands: the legitimization of transhumance*, in *Property Rights, Risk and livestock development in Africa*, International Food Policy Research Institute, Brent Swallow, Nancy McCarthy, Michael Kirk, Peter Hazell, Washington (2000) at 102

³³J. Gilbert, *Nomadic Territories: A Human Rights Approach to Nomadic Peoples' Land Rights*, *Human Rights Law Review*, 7:4 (2007), 681-716 ; *Academy in-brief no. 5, Negotiation of a United Nations declaration on the rights of peasants and other people working in rural areas*, Geneva academy of international humanitarian law and human rights, January 2015 at 70-73. This research cites some international declarations advocating for mobile rights to pastoralist peoples.

³⁴"Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence..."

³⁵"Everyone has the right to freedom of movement and residence within the borders of each State".

Nevertheless, if it must be kept in mind that in terms of its scope of application in each separate case it would act as a means of support to guarantee the right to the freedom of movement within the interior of the territory of each State. What would not be covered would be the transit or the movement of livestock through various countries. The transhumance traditionally, by its very nature, has been a transnational phenomenon, which entails crossing various frontiers, which must remain preserved. A rule to that regard must be recognised. The past reference to the aforementioned International Court of Justice in its attention to the needs of nomadic and semi-nomadic peoples in the case of the demarcation of frontiers between Niger and Burkina Faso appears to move in this direction and we believe that it also can be an argument in favour of international recognition of pastoral mobility.

As a final point, we believe that, globally speaking, precision is a necessity. Pastoral mobility must not be understood as an absolute right, always applicable in each and every instance and under any given circumstance. The law must modulate its intervention and also establish some requisites and establish some exceptions based on the greater public good. This is the case, for example, of establishing routes, calendars, documentation for the effective control of people and livestock, etc. Naturally, none of these measures can have as a side effect the gutting or amelioration of the essential content of this mobility, which must always be preserved.

III.2. The rights to the land of the pastoralist peoples

As we have already indicated, the other essential component that must necessarily be part of this body of law for the pastoralist peoples is the recognition and the protection of the access, use and exploitation of the land. That is essential, in as much as these rights to the land are a necessary condition for their activity as producers and the social development itself of these peoples. It is logical for them to have as their most elemental assertion the capacity to access pastureland and to have freedom of transit and of movement to facilitate their means of existence. We can even understand that having these rights well guaranteed is also a necessary condition for the perpetuity of the way of life of these communities³⁶.

³⁶Dafinger A. , Pelican, M., *Land rights and the politics of integration: pastoralists strategies in a comparative view*, Max Planck Institute for Social Anthropology, Working Paper n° 48, Halle; Traore, *problems in pastoral land management related to tenure: policies versus basic practice, managing land tenure and resource access in west Africa*, ed. Gret and Lled, *proceedings of a workshop held Goree, Senegal.*; Salzman, P.C., "Afterword: reflection on the pastoral land crisis", *NOMADIC PEOPLES*, vol 34/35 (1994) at 159-163.; Mc Carthy, N. Swallow, Brent, Kirk, Michael, Hazell, Peter: *Property rights, risks and livestock development in Africa*, IFRI, 2000. Flintan, Fiona: *The political economy of land reform in pastoral areas: lessons from Africa, implications for Ethiopia*, paper presented at the international conference on the future of pastoralism, 21-23 march 2011, University of Sussex.; Bertrand Bonnet Dominique Hérault, *gouvernance du foncier pastoral et changement climatique au Sahel*, *Land Tenure Journal, Fao*, 2, (2011), at.

In practice, the precariousness of this recognition can be observed. These communities lack formal ownership in the majority of cases. There is insecurity on whether or not they are entitled to legal formal ownership, which is patently clear, above all, in the less habitual uses, such as migrations or seasonal movements that are very vulnerable legally speaking. In addition, the increasing conflicts between pastoralists and agriculturalists usually are in essence conflicts over the rights over the use of the land and over its content, scope and limitations³⁷

It is true that the scant protection of land ownership rights is a problem of a general nature, not only for these peoples. All the rural communities usually are vulnerable in this aspect. That is increasing nowadays due to the growing tendency to the hoarding of land, large scale investments and privatization³⁸. These phenomena are, without a doubt, real threats to said rights.

This being so, it is easy to explain that on an international scale there is an increase in the number of initiatives and demands to establish these rights and to obtain greater protection. It is even getting to the point in which there is a defence of the establishment of a human right to land³⁹, which would truly enhance, without a doubt, its legal protection, although it still is in an embryonic stage of development, and as proposed *de lege ferenda* it would have to travel a long road. Although, and in spite of that, on May 11th 2012, the Committee on Global Food Security in its 38th special session adopted the Voluntary Guidelines on the Responsible Management of Land, Fisheries and Forests.

These guidelines do not constitute a legally binding text. They are by character voluntary, although their influence is considerable as it functions as a guide and as orientation for the States and it encapsulates and makes manifest in writing rules and principles generally accepted in these areas that pay heed, as we have seen, to a great international demand.

It was logical to think that this text might have included in its regulations the specificities of the pastoralist communities relatively speaking to the aforementioned possession of land⁴⁰. A complete assimilation with other communities is difficult, above all

157 ss. *Pastoralism Forum Ethiopia, International Institute of Rural Reconstruction, The Development Fund, Pastoralism and land: Land tenure, administration and us in Pastoral areas of Ethiopia, Addis Ababa, 2010. IUCN (2011). The land we graze: A synthesis of case studies about how pastoralists' organizations defend their land rights. IUCN ESARO office, Nairobi, Kenya.*

³⁷ *Id.*

³⁸ *Land tenure and international investments in agriculture A report by the high level panel of experts on food security and nutrition, July 2011, HLPE report 2, Committee on World Food Security, Rome 2011, 10.*

³⁹ De Schutter, Olivier, *The emerging human right to land*, International community law review, vol. 12, (2010) 303-334

⁴⁰ On the contrary, reference to pastoralist is made to Voluntary Guidelines to support the progressive realization of he right to adequate food in the context of national food security (Guideline 8.1).

with those which engage in agriculture, where the possession of land is more direct and deals with very concrete spaces, bring with it the exclusion of user or owners. Normally, this possibility only can fit in the postulations of semi-pastoralists, where there is less mobility and pastoralism is centred on specific and demarcated land.

Nevertheless, that has not occurred. There is no special specific treatment for the land ownership rights of the pastoralist communities. In fact, there is not even any mention at all to them in the entire text of the guidelines. This information void must be filled. A fortiori, the right to land references in the draft of the Declaration on the rights of peasants and other people working in rural areas (art 4) only refers to peasants⁴¹. Therefore, it is necessary to engage in the task of analysing the application of the foreseen regimen of the guidelines in the concrete case of the pastoralists. Naturally, this regimen also should be useful for them and there must be an effort made to interpret it and apply it to their particular needs and situations.

And, as a point of departure, one must keep in mind the variety of situations that can be encountered in this pastoralist possession of land. It is a complex question that offers multiple possibilities, with considerable fine details, and that cannot be simply reduced to a few general ideas. Naturally, in this labour one also should be preoccupied with the task of elucidating which is the formula that best protects these peoples.

And in this sense, one may think perfectly well that the ideal situation is for the lands that are for pastoral be constituted as part of the public domain and they will be, therefore, protected by the State, guarantor of said use. In the African States in which this sector possesses a more significant presence, this solution is well received. This is the case of Niger, whose Rural Code grants this legal condition to the lands with the aforementioned usage.

The regulation of the Rural Code, in addition to this recognition, establishes measures of protection, like the express prohibition of any given concession on these lands and the preparation of a national inventory in which this data is gathered and arranged. The Code also concerns itself with both the inclusion in the condition of public domain the ways and transhumance corridors that the livestock usually uses, and, in addition, it grants the condition of public water sources to those watercourses that may be found along these lands and ways.

This protective regulation is ideal and, without a doubt, at an international level, is useful as a bulwark against the encroachments of the privatization of state-held lands and lands that are public domain. It works to protect its use by the pastoralist communities and,

⁴¹A/HRC/WG.15/1/2, 23 June 2013, *Declaration on the rights of peasants and other people working in rural areas Human Rights Council First session 15–19 July 2013 Open-ended intergovernmental working group on the rights of peasants and other people working in rural areas.*

by extension, their way of life and their survival. Currently, it has become something imperative, given the expansion of these processes of privatization in numerous countries⁴².

We can give an example to this regard, as is the case of Senegal, whose recent start to the process of the legal reform of the law governing land ownership (*loi foncier*) has already been perceived as a very liberal and almost reckless push towards privatizations and concessions⁴³. There also have been documented cases of instances of forced removals⁴⁴, the loss of access and the dispossession of pastoralist communities a consequence of concessions, building projects and the sale of land to increase the size of agricultural operations or other such actions. Examples of this have recently been in the public eye in the Ethiopian region of Afar⁴⁵. These communities are witnesses to how their ways of life are limited and, ironically, this occurs in a country whose Constitution the Article 40 expressly protects and recognises the right to free access to pastureland and to the right to not be removed from ones very own land.

The debility and scant formality of the title deeds covering usage by the communities provokes these situations. This debility is generalized and it usually also is present when the lands are collective or communal property⁴⁶.

This form of ownership, termed ‘the commons’ is very extended on an international level, above all in the rural areas of developing countries. It is estimated that more than two billion people live on them and one could think well that a large percentage of the global number of pastoralists is included in that figure.

⁴² <http://www.landcoalition.org/en/resources/commercial-pressures-land-worldwide> (last visited, Jun 10, 2016).

⁴³ See *Commission nationale sur la réforme foncière: le Congad veut un dialogue inclusif*, *Le Soleil Online*, Friday, 8 February 2013.

⁴⁴ See on karayu pastoralist of Gambella region, Ethiopia (A/HRC/4/9/Add.3, 28 February 2007, Implementation of general assembly resolution 60/251 of 15 March 2006 entitled “human rights council, Report of the independent expert on minority issues, Gay McDougall Addendum mission to Ethiopia”, 28 November-12 December 2006.

⁴⁵ Bekele, Hundie, Martina Padmanabhan, *the transformation of the afar commons in Ethiopia. State coercion, diversification and property rights, change amongst pastoralist*, *Capri working paper n° 87, June 2008*, <http://www.ifpri.org/publication/transformation-afar-commons-ethiopia>. (last visited, Jun 10, 2016)

⁴⁶ Baland, J.M., Platteau, J.P.: *Division of the commons: a partial assessment of the new institutional economics of land rights*, *American Journal of Agricultural Economy* (1998); Ensminger, J. Rutter, A.: *The political economy of changing property rights: dismantling a pastoral commons*, *American Ethnologist*, vol. 18, (1991) at 683; Lawry, Steven, *Tenure policy toward common property natural resources in sub-Saharan Africa*, *Natural Resources*, (1990) 403. Lane C. R.: *Custodians of the commons: pastoral land tenure in east and west Africa, 1998*; Beyene. Fekadu: *Korfi, Benedikt, Unmaking the commons: collective action, property rights and resource appropriation among (agro-) pastoralists in Eastern Ethiopia*, *Capri working paper n° 88, June 2008* <http://www.ifpri.org/sites/default/files/publications/CAPRiWP88.pdf>. ; Tidiane, Ngaido, *Can pastoral institutions perform without access options?* in MC Carthy, n. swallow, Brent, Kirk, Michael, Hazell, Peter: *property rights, risks and livestock development in Africa*, IFRI, 2000, at 299.

All in all, one must recognise that it is not a form of ownership that has been highly regarded and kept in mind by politics and economic analyse in general. From investigations linked to the World Bank, it has been considered not very efficient at all⁴⁷. The usage of the famous expression ‘the tragedy of the commons’ also is very widespread when referring to these lands, and that, in essence, communicates the idea that this modality of land ownership brings with it overexploitation and that it is largely unviable. Common property, that of a communal disposition, when free, generalized, irresponsible and predatory access, without any worries concerning its maintenance as a common possession, is permitted simply devolves into a sort of no-man’s land. In a famous article published in the journal *Science*, Garret Hardin used precisely the example of pastoralists and their use of grasslands⁴⁸.

Now then, this analysis is an abstract exposition. In practice it has been demonstrated on numerous occasions that that is not the case. More precisely, the pastoralists can consider themselves to be the best guardians of the commons⁴⁹. They constitute the human group most preoccupied with its perpetuity and utilization. In addition, more and more it is becoming quite clear that in some zones, like the Sahel, their usage is what keeps large tracts of land from being lost to the effects of desertification. Very much to the contrary to that which it might appear, they contribute positively to environmental sustainability.

At any rate, one must begin with the idea that this modality of land ownership is protected by the alluded to Guidelines adopted by the FAO. The protection of the traditional systems of land ownership, in which one must include pastoralism, is cited on multiple occasions in the body of the text⁵⁰. Now what is impossible to find in them is a complete and detailed regulation of the commons and their specificities.

To the contrary of what it may seem to be superficially, this regulation offers considerable legal complexity and richness, that cannot simply be reduced to a few general ideas. Communal property can be so diverse that it is advisable to examine each concrete instance. Normally, it is governed by consuetudinary rules that also will vary from one place to another.

Including, the very demarcation of those who constitute the community deed holder of the lands needs to be studied in each concrete instance. In some cases this community

⁴⁷Platteau, J.-P., The evolutionary theory of land rights as applied to sub-Saharan Africa, a critical assessment. *Development and Change* 27 (1) (1996), 29-86.

⁴⁸Garret Hardin, *The tragedy of commons*, *Science*, new series, vol. 162, (1968) at 1243.

⁴⁹Charles lane (editor), *custodians of the commons: pastoral land tenure in Africa*, New York, Routledge, 1998.

⁵⁰ See Guideline 9. *Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security*

can be well defined and have very clear contours. In other cases, the beneficiaries can be diverse groups, from diverse provenance.

In the first case, common property is a possession that can be assimilated into the private property of a group, which is what Brownley stated⁵¹. The land and pastures belong exclusively to a community, which can even exclude third parties from making use of them.

Specific to the case of pastoralists, this type of property can be seen in various guises, like in the lands that constitute the core of the communities' homeland. They usually are points of departure and places sacred in nature. In the case of agro-pastoralists it can be seen with even greater clarity. These communities (which are growing in number) have very limited mobility and, on account of that, the boundaries of their communal lands can be ascertained without any difficulty.

All in all, in spite of that, is it common to find in practice permits given by the communities themselves for those individuals who come from other communities to pass through their lands and to practice pastoralism. These communities also usually reciprocally do the same with other communities. A system operates on the basis of a sort of reciprocal agreements for the transfer of pastureland. There is no doubt that this is a strategy based on interest in increasing the quantity of available land.

Similarly, it would be necessary to pay attention to the manner in which each community distributes and regulates the modalities and conditions of use. Consuetudinary rules, which will come in a considerable variety, will also constitute this internal regulation. These will be practically unique in each community and they will tackle issues such as the role of traditional chiefs, the clans, the successions, the granting of territory, etc. The exercise thereof shows considerable richness.

On the other hand, we have already commented that in some cases it is more difficult to determine which community is the exclusive and sole owner of a particular tract of land. It is typical to find instances in which there is sufficient enough land and multiple users of that space overlap each other, utilizing with different levels of intensity and at

⁵¹Daniel W. Bromley, *Resource degradation in the African commons: accounting for institutional decay* environment and development economics 13: 539–563, 2008 Bromley, D.W., D. Feeny, M.A. Mckean, P. Peters, j. Gilles, R. Oakerson, c.f. Runge and J. Thomson (eds), *Making the commons work: theory, practice, and policy*, san Francisco: ics press.(1992). More recently, see Jon Abbink, Kelly Askew, Dereje Feyissa Dori, Elliot Fratkin, Echi Christina Gabbert, John Galaty, Shauna LaTosky, Jean Lydall, Hussein A. Mahmoud, John Markakis, Günther Schlee, Ivo Strecker, David Turton, *Lands of the Future: transforming pastoral lands and livelihoods in eastern Africa*, max Planck Institute for Social Antropology, working paper, n°154, 2014. USAID issue brief, *Pastoral land rights and resource governance overview and recommendations for managing conflicts and strengthening pastoralists' rights* [http://www.usaidlandtenure.net/sites/default/files/USAID Land Tenure Pastoral Land Rights and Resource Governance Brief 0.pdf](http://www.usaidlandtenure.net/sites/default/files/USAID_Land_Tenure_Pastoral_Land_Rights_and_Resource_Governance_Brief_0.pdf) (last visited, Jun 10, 2016).

different times. That occurs, above all, in situations where there is vast pastureland, when there are users who use the communities en-route when grazing over large distances y, most typically, along the routes of seasonal transhumance.

In these cases, there can appear concurrently different users with different access entitlements to the land. Legally, this lends itself to creating mosaic-like scenarios. Thus the possible existence of a hierarchy of rights is discussed; there are some who invoke a priority of use in function of diverse criteria (seniority etc.). In practice the existence of secondary and tertiary users can be observed. These different uses and users normally are present in situations characterized by their flexibility, their informality and an absence of boundaries.

Undoubtedly, it is interesting to see that within the same territory various different rights can be asserted. Nevertheless, that which cannot be lost sight of is the precarious nature of these informal arrangements. Property rights that may have crystallized over the course of time possess considerable fragility in the face of evidence and allegations. Moreover, that fact has been borne out in the practice of law and national legal systems. In the case studied in Tanzania, for example, restrictions have been made manifest in the practice of recognizing the rights of pastoralist communities⁵².

Given this reality, it is clear that an important challenge must be to eliminate the precariousness and guarantee the rights of pastoralist communities in this area. In this sense we believe that it is important for these communities' consuetudinary property rights to be presented and duly noted in deed registries. This mechanism appears in the alluded to FAO's Guidelines, granting unto them considerable importance as a protective device for those rights⁵³.

These registries will have to be designed so that they permit this possibility of inscribing both a multiple possibility of rights and some hypothetical cases, as well. Concurrently, they ought to set in motion initiatives to provide training as well as making inventories of these rights. Along those lines, an interesting project already was proposed back in 1984 to empower the pastoralist communities in the registration of defensible community rights relating to pastureland and water points⁵⁴.

Tightly linked to these questions, we encounter two rights whose protection emerges as essential for the long-term survival and the development of pastoralist communities. This is the case with access to sources of water or water points and the right of way for livestock. We could characterize these two as subsidiary tenure rights,

⁵² See supra note 3.

⁵³ See Guideline 17. *Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security*

⁵⁴ Swallow, supra note at 4.

following the terminology of the FAO's guidelines, which seem rather brief and shallow⁵⁵. And, without a doubt, they would be rights worthy of protection and guarantee.

Regarding the first one, its relevance for the pastoral way of life is indisputable. Access to water is, logically, an essential element in making it possible to move livestock, especially in the long distances associated with transhumance. Without this access guaranty, the long-term survival of the pastoral way of life would be subjected to considerable risks.

More and more, the risks are greater, given that, in this instance, one can detect that at an international level a tendency to privatize sources of waters. That is especially worrying in some African countries⁵⁶. In many instances, in addition, conflicts, which can turn violent, arise between users, communities, and sometimes between agriculturalist and pastoralists over the access and use of the aforementioned water points. It is a struggle over an essential resource.

Keeping in mind these characteristics, it would be important to propose that the sources of water and water points in communal lands or where livestock must necessarily pass through might be treated as a public service, which makes both its privatization and its denegation as a basic service impossible. That would be a necessary derivation to protect diverse human rights and the pastoralists' rights themselves. It is possible to find already some examples of regulation in this sense, like the water code in Mali.

The second subsidiary right proposed, the right of way or transit through lands belonging to others, also is essential for transhumance and access to other pastureland. Similarly, in practice one can detect increasingly the presence of obstacles and difficulties for this right of way. In some occasions it is derived from an extension of agriculture, for example, increasing the size of fields or the placement of fences, etc. In consequence, it makes it necessary to reinforce these rights, formalizing them and giving them protection mechanisms.

In our view, there must be an adequate deed extended over time. Its maintenance must be closely watched over in the future. It is certain as well that the exercise of this right could be modulated, establishing usage conditions, for example, through the establishment of concrete transit routes or periods of time when transit would be permitted. This can be a good mechanism for finding a balance between all the present communities' interests, particularly between agriculturists and pastoralists.

⁵⁵See Guideline 7.1. *Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security*.

⁵⁶Cotula, Lorenzo, *Law and water rights in the Sahel, LSD working paper 25, Tenure challenges for improving access to water for agriculture*. Gomez, A., *Access to water, pastoral resource management and pastoralist livelihoods, LSD working paper 26*

Likewise, it cannot be forgotten that this right of way can be created between various countries. The transhumance usually possesses an inherently international character. On account of that, the right of way also should be the responsibility of the States concerned with its facilitation, establishing the opportune means to accomplish it. ECOWAS, under whose auspices a regulation of these ways of transit was written in 1998 (Decision A/DEC. 5/10/98), has been a pioneer in this sense. In the aforementioned reference to the International Court of Justice in the matter of the frontier dispute between Niger and Burkina Faso reinforces this necessity to protect the right of way⁵⁷

The formal recognition of these two rights and an effective protection are, in sum, essential for pastoralist peoples. It is interesting to see that that has always been the case. The studies on consuetudinary right in issues of African land, like those undertaken by Professor Jean-Pierre Magnant, make it abundantly clear that both traditionally have been admitted, including in croplands, without agriculturists being able to forestall or hinder them⁵⁸.

We have already said on various occasions that one of the most serious current problems that arise between pastoralist and agriculturalist communities are conflicts⁵⁹. These conflicts, which currently are increasing in number, are taking on a violent nature. Therefore, efforts must be redoubled to provide a legal response to them, finding a balance for the communities immersed in any such conflict. It is true that, although in the past it was not the case, that in the last few decades the politics practiced have favoured agriculturalists noticeably. Generally, it is felt that agriculturalists have gained greater security in their claims, meanwhile pastoralists, uprooted and bereft of deeds, have lost security. Efforts must be made to establish equity.

At all times, one must keep in mind that the question is complex and it merits a thorough monographic analysis. There are many questions and details that can enter into the overarching issue. Sometimes, for example, fences, irrigation projects and increases in cropland leave no room for pastoralists. Sometimes agriculturalists complain about the destruction of their crops due to the passage and presence of livestock. Now, what is more,

⁵⁷ Supra note 1.

⁵⁸ Jean-pierre Magnant, *Les normes foncieres traditionnelles en Afrique noire, la terre, l'eau et le droit en Afrique, a Madagascar et a l'ile Maurice*, sous la direction de François et Gerard Lonac, Bruylant, Paris, (1978) 76.

⁵⁹ Basset, Thomas, *The political ecology of peasant-herder conflicts in the northern Ivory Coast*, *Annals of the association of American geographers* (1988) vol. 78., 453-472. Hussein K, et al., *Increasing violent conflict between herders and farmers in Africa: claims and evidence*, *development policy review*, vol. 17 (1999) 397-418. Breusers, M. et al., *Conflict or symbiosis? Disentangling farmer-herdsman relations: the mossi and fulbe central plateau*, *journal of modern african studies*, vol. 36 (1998) 357. Abba Gana, Shettima, Usman, A. Tar, *Farmer-pastoralist conflict in West Africa: exploring the causes and consequences*, *information, society and justice* (2008) vol. 12, 163.184. Cousins, B., *Conflict management for multiple resource users in pastoralist and agro-pastoralist contexts*, *proceedings of the 3rd international technical consultation on pastoral development*, may 20-22, New York.

in some countries changes in traditionally followed transhumance routes are occurring because the grazing areas are exhausted in terms of vegetation. There is a tendency to head towards the south in search of less arid lands with sufficient pastureland. That is a change forced upon them due to the growth in desertification, drought, and, above all, climate change, which is a key threat to pastoralism⁶⁰.

As such, conflicts can only be expected to happen and, in many cases, since they are new areas of transit or passage, they do not possess any deed that legitimizes their use. It is an area, therefore, that as a matter of utmost priority should receive public authorities', international organisms' and jurists' attention to create a legal response and conflict resolution.

The Guidelines of the FAO alluded to previously provide a legal basis for it. In its chapter dedicated to indigenous peoples and other communities with traditional systems of land ownership (where, without a doubt, pastoralist belong) a reference can be found to these situations. Expressly, it indicates that when the land is utilized by more than one community they ought to reinforce or create instruments with the finality of conflict resolution between communities⁶¹. It, consequently, is a call to affect a development in legal rules.

Finally, it is necessary to mention that also in these Guidelines sufficient legal basis can be found to set limits on the States when it comes to restricting and expropriating lands at pastoralists' disposition. As is expressed in this text, the expropriation of land only can take place to satisfy some public interest.

IV. CONCLUSION

In light of that which has been expressed, we can conclude that the international law in force provides a basis for protecting the rights of pastoralist peoples. Some branches of international law such as human rights, indigenous peoples, minority rights or the right to development are protecting these pastoralist peoples.

Naturally, to make these rights more effective and to maximize their impact when applied, the ideal situation would be to create a specific category of rights dedicated

⁶⁰Climate change, drought and pastoralism in the Sahel Discussion note for the World Initiative on Sustainable Pastoralism, prepared by Nick Brooks, November 2006 Available at http://cmsdata.iucn.org/downloads/e_conference_discussion_note_for_the_world_initiative_on_sustainable_pastoralism_.pdf. (last visited, Jun 10, 2016) Pastoralism forum Ethiopia, climate change and pastoralism: the implications on sustainable pastoral development in Ethiopia, proceedings of the 5th national conference on pastoral development in Ethiopia, Addis Ababa, Ethiopia (2010).

⁶¹ See Guideline 9.11. *Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security*.

expressly to these pastoralist peoples. This creation also should entail the elaboration of a roadmap to obtain its international recognition. We propose that that be its first step towards its incorporation into a resolution from the General Assembly of the United Nations. One can estimate it is no appropriate to include pastoralist peoples into a general and residual category of rural workers as does the United Nations process for a declaration of Peasants rights⁶².

Therefore, one can surmise that there are two rights that constitute its essential content: the law protecting their way of life and their access rights to the land. These must act as the legal keystone, acting to support all subsequent legal developments upon which they will be built. Its application moreover is essential for guaranteeing the long-term survival of pastoralist peoples and to face down the threats that are looming over them.

It should be borne in mind, however, that creating international law, particularly human rights rules, has always been a difficult and long-term process. That needs to be follow a step-by-step approach. In the first instance, the adoption of a general resolution from the United Nations General Assembly advocating for pastoralist rights could be an enormous revulsive to its recognition in international arena. From our point of view, we believe that the core content of the declaration must be the rights as outlined above.

It is important also to encourage pastoralist associations and networks all over the world to carry on participating in this common objective. Efforts must be pursued to develop a human rights based agenda. It is to be shared by all stakeholders (pastoralist networks, experts, governments, international organizations, involving civil society)

⁶² A fortiori, there is no reference, even indirect, to pastoralist in the existing draft of the declaration on the rights of peasants and other people working in rural areas (supra note 35)