

# THE COLLECTIVE RIGHT TO INDIGENOUS PROPERTY IN THE JURISPRUDENCE OF REGIONAL HUMAN RIGHTS BODIES

ERIKA DE WET \*

## Introduction

Since the end of the Second World War, there has been a proliferation of international human rights treaties, both within the United Nations system as well as at the regional level. These instruments are aimed at protecting individual rights and are based on the principle of universality.<sup>1</sup> They depart from the premise that the rights they guarantee apply to all individuals everywhere, regardless of factors such as race, ethnicity, gender, language, religion, national or social origin. The rights in these instruments are intended to transcend different cultures and societies and it is accepted that ratifying states are endorsing instruments that concretise universal values for all individuals on their territory. These human rights instruments seem, by their very nature, to be irreconcilable with arguments that the applicability of human rights depends on the cultural context and/or that human rights are attributed to groups rather than individuals.<sup>2</sup>

Yet, the individualist and universalist human rights paradigm has somewhat paradoxically shown itself receptive to claims pertaining to cultural differences and group identity,<sup>3</sup> despite the absence of a clear definition of the term 'culture' in international law.<sup>4</sup> The most prominent

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\* Blur. LL.B, LL.D (University of the Free State), LL.M (Harvard), *Habilitationsschrift* (Zurich); SARChI Professor of International Constitutional Law, Faculty of Law, University of Pretoria (South Africa); Honorary Professor, Faculty of Law, University of Bonn (Germany). The research for this article was undertaken as a fellow at the Käte Hamburger Center for Advanced Study in the Humanities 'Law as Culture', Bonn, Germany.

<sup>1</sup> M Odello 'Indigenous peoples' rights and cultural identity in the Inter-American context' (2012) 16 *International Journal of Human Rights* 25 26.

<sup>2</sup> Odello (note 1 above) 26; MI del Toro Huerta 'The contributions of the jurisprudence of the Inter-American Court of Human Rights to the configuration of collective property rights of indigenous peoples' (2013) (on file with author) 1.

<sup>3</sup> S Sloan 'Accommodation and rectification: A dual approach to indigenous peoples in international law' (2013) 51 *Columbia Journal of Transnational Law* 739 741.

<sup>4</sup> The Southern African Development Community (SADC) Protocol on Culture, Information and Sport (14 August 2001) is the only binding international instrument that contains a definition of culture. Art 1(2) defines culture as 'the totality of a people's way of life, the whole complex of distinctive spiritual,

vehicle within international human rights law for bringing about this new development has been the right to property, given the importance of land for indigenous peoples' way of life.<sup>5</sup> While the right to property is not recognised in either the United Nations International Covenant on Civil and Political Rights (ICCPR)<sup>6</sup> or the United Nations International Covenant on Economic, Social and Cultural Rights (ICESCR),<sup>7</sup> it is recognised in regional instruments for the protection of human rights. This includes article 21 of the American Convention on Human Rights (the American Convention),<sup>8</sup> article 14 of the African Charter of Human and Peoples' Rights (the Africa Charter)<sup>9</sup> and article 1(1) of Protocol 1 of the European Convention of Human Rights (Protocol 1 ECHR).<sup>10</sup>

As all the regional systems for the protection of human rights provide

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material, intellectual and emotional features that characterise a society or a social group, and includes not only arts and letters, but also modes of life, the fundamental rights of the human being, value systems, traditions and beliefs'. See SADC Protocol on Culture, Information and Sport art 1(2), available at [http://www.sadc.int/files/3213/5292/8362/Protocol\\_on\\_Culture\\_Information\\_and\\_Sport2001.pdf](http://www.sadc.int/files/3213/5292/8362/Protocol_on_Culture_Information_and_Sport2001.pdf) (accessed 3 September 2016). For a discussion of the term 'culture' in human rights instruments see Y Donders 'Foundations of collective cultural rights in international human rights law' (2015) 23 *Amsterdam Law School Research Paper No 2015-23* 3, available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2622424](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2622424) (accessed 30 December 2015).

<sup>5</sup> N Bankes 'The protection of the rights of indigenous peoples to territory through the property rights provisions of international regional human rights instruments' (2011) 3 *Yearbook of Polar Law* 57 65.

<sup>6</sup> International Covenant on Civil and Political Rights (ICCPR) 999 *UNTS* 171.

<sup>7</sup> International Covenant on Economic, Social and Cultural Rights (ICESCR) 993 *UNTS* 3.

<sup>8</sup> American Convention on Human Rights (American Convention) 1144 *UNTS* 123. According to art 21:

'1. Everyone has the right to the use and enjoyment of his property. The law may subordinate such use and enjoyment to the interest of society.

2. No one shall be deprived of his property except upon payment of just compensation, for reasons of public utility or social interest, and in the cases and according to the forms established by law.'

See also American Declaration of the Rights and Duties of Man, OAS Res XXX adopted by the Ninth International Conference of American States (1948) reprinted in *Basic Documents Pertaining to Human Rights in the Inter-American System* OEA/Ser.L.V/II.82 doc.6 rev.1 17 (1992). Art 23 states that: 'Every person has a right to own such private property as meets the essential needs of decent living and helps to maintain the dignity of the individual and of the home.'

<sup>9</sup> The African Charter on Human and Peoples' Rights (African Charter) 21 *ILM* 58. According to art 14: 'The right to property shall be guaranteed. It may only be encroached upon in the interest of public need or in the general interest of the community and in accordance with the provisions of appropriate laws.'

<sup>10</sup> According to art 1(1) of the Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms 213 *UNTS* 262.

for individual complaints procedures — which in the case of the regional courts are binding in nature — the regional systems for the protection of human rights have become an attractive avenue for litigation in relation to indigenous property rights. Of the bodies responsible for the monitoring and enforcement of these regional human rights treaties, the Inter-American Commission on Human Rights (Inter-American Commission) and the Inter-American Court of Human Rights (IACHR) in particular, have done ground-breaking work in expanding the scope of the right to property by being sensitive to group identity. They have interpreted this right to include the communal property of indigenous and tribal peoples, recognising that the connection between indigenous peoples and their traditional lands largely defines their identity, both historically and in relation to modern threats to their physical and cultural survival.<sup>11</sup> This is a remarkable development in light of the fact that European settler governments had, until the 20<sup>th</sup> century, utilised international law to displace indigenous peoples in the Americas from their lands.<sup>12</sup>

The Inter-American jurisprudence has strongly influenced the work of the African Commission on Human and Peoples' Rights (the African Commission). However, the jurisprudence of the European Court of Human Rights (the ECHR) and the former European Commission of Human Rights (the European Commission) still recognise the right to property only as an individual right. The subsequent analysis of the right to property in regional human rights jurisprudence starts by briefly introducing the relevant judicial bodies and thereafter elaborates on their treatment of the right to property of indigenous peoples. The analysis distinguishes between the recognition of a collective property right of indigenous peoples as such, their collective right to restitution or compensation in the face of involuntary displacement, as well as the collective right to share in economic benefits resulting from economic exploitation of indigenous property. In so doing, the analysis exposes differences between the approaches of the Inter-American and African judicial bodies on the one hand and those of the European judicial

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'[e]very natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.'

<sup>11</sup> G Pentassuglia 'Towards a jurisprudential articulation of indigenous land rights' (2011) 22 *European Journal of International Law* 165 167.

<sup>12</sup> See extensively J Gilbert *Indigenous Peoples' Land Rights under International Law: From Victims to Actors* (2006) 22ff. See also F Viljoen 'Reflections on the legal protection of indigenous peoples' rights in Africa' in SA Dersso (ed) *Perspectives on the Rights of Minorities and Indigenous Peoples in Africa* (2010) 75.

bodies on the other.<sup>13</sup> In addition, the article draws attention to the fact that the recognition of a collective right to property implies the expansion of international legal personality to certain groups of peoples, notably indigenous peoples. In turn, this raises questions about the meaning of indigeneity and whether the concept is capable of a common understanding that is applicable to all regions.<sup>14</sup>

### **The recognition of a collective right to indigenous property in the jurisprudence of regional human rights bodies**

The evolution of the right to property in regional human rights treaties from an individual right to one in which a collective right to indigenous property is acknowledged, resulted from the fact that the regional judicial bodies can interpret the respective treaty rights progressively and autonomously.<sup>15</sup> As far as the Inter-American system is concerned, both the Inter-American Commission and the IACHR adjudicate violations of human rights.<sup>16</sup> The primary difference between the two bodies is that the IACHR has the authority to render binding judgments on the parties involved and order reparations, while the Commission publishes non-binding (albeit authoritative) recommendations. Moreover, whereas complaints received by the IACHR pertain to the rights guaranteed in the American Convention, the Inter-American Commission can receive complaints based on the rights guaranteed in the American Declaration in relation to those members of the Organization of American States (OAS) that have not yet ratified the American Convention.<sup>17</sup>

<sup>13</sup> The analysis focuses exclusively on the right to property of indigenous peoples in relation to land rights. The debate on the intellectual property rights of indigenous peoples has gained momentum in recent years, but it has not yet formed the object of a dispute before any of the regional judicial bodies in question. For a discussion of the challenges pertaining to the intellectual property rights of indigenous peoples see, inter alia, P Drahos *Intellectual Property, Indigenous People and their Knowledge* (2014) 247.

<sup>14</sup> The African Charter, unlike the American Convention and the ECHR, explicitly guarantees the right to self-determination in art 20(1) of the Charter:

'All peoples shall have the right to existence. They shall have the unquestionable and inalienable right to self-determination. They shall freely determine their political status and shall pursue their economic and social development according to the policy they have freely chosen.'

<sup>15</sup> D Shelton 'The Inter-American human rights law of indigenous peoples' (2013) 35 *University of Hawaii Law Review* 937 968.

<sup>16</sup> E de Wet & A du Plessis 'The meaning of certain substantive obligations distilled from international human rights instruments for constitutional environmental rights in South Africa' (2010) 10 *African Human Rights Law Journal* 345 353.

<sup>17</sup> Although this implies that the Inter-American Commission formally relies on different standards when reviewing human rights complaints against different

Both the Inter-American Commission and the IACHR regard human rights instruments as living instruments that need to be interpreted in accordance with the times.<sup>18</sup> In so doing, these bodies consistently rely on article 29(b) of the American Convention to integrate other international human rights standards into their decisions. This article determines that no provision of the American Convention shall be interpreted as 'restricting the enjoyment or exercise of any right or freedom recognized by virtue of the laws of any State Party or by virtue of another convention to which one of the said States is a party'.<sup>19</sup> For example, when the IACHR interprets the right to property in relation to indigenous peoples, it consistently interprets article 21 of the American Convention in light of the Indigenous and Tribal Peoples Convention (Convention No 169) of the International Labour Organization (ILO).<sup>20</sup> This treaty, which remains the only binding international law instrument specifically applicable to indigenous peoples,<sup>21</sup> recognises the legal personality of indigenous

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OAS member states, on a practical level the standards in the American Declaration and American Convention often overlap and function as one set of standards. See De Wet & Du Plessis (note 16 above) 353.

<sup>18</sup> Shelton (note 15 above) 944–945.

<sup>19</sup> American Convention (note 8 above).

<sup>20</sup> Revised ILO Convention (No 169) concerning Indigenous and Tribal Peoples in Independent Countries (27 June 1989, ILO Official Bulletin vol 72 Series A no 2). See also the United Nations General Assembly Declaration on the Rights of Indigenous Peoples (DRIP), GA Res 61/295 annex UN doc A/Res/61/295 (2 October 2007). The non-binding but influential DRIP calls attention to, inter alia, the right of indigenous peoples to and spiritual ties with ancestral lands (arts 25–30), the right to their cultural heritage and intellectual property (art 31), and the development or use of their territories and other resources (art 32). See G Otis & A Laurent 'Indigenous land claims in Europe: The European Court of Human Rights and the decolonization of property' (2013) 4 *Arctic Review on Law and Politics* 156 159; D Inman 'From the global to the local: The development of indigenous peoples' land rights internationally and in Southeast Asia' (2016) 6 *Asian Journal of International Law* 46 54ff.

<sup>21</sup> See the Council of Europe Framework Convention on the Protection of National Minorities (1 February 1995, ETS 157), available at [https://www.coe.int/t/dghl/monitoring/minorities/1\\_atglance/PDF\\_H\(95\)10\\_FCNM\\_ExplanReport\\_en.pdf](https://www.coe.int/t/dghl/monitoring/minorities/1_atglance/PDF_H(95)10_FCNM_ExplanReport_en.pdf) (accessed 3 September 2016). This is a binding regional treaty, designed to protect the right of national minorities living within the territory of the State Parties. It does not, however, specifically refer to indigenous peoples (even though indigenous peoples and minorities in Europe, to some extent, overlap). See extensively M Barelli 'The interplay between global and regional human rights systems in the construction of the indigenous rights regime' (2010) 32 *Human Rights Quarterly* 951 967ff.

peoples,<sup>22</sup> as well as their spiritual and cultural attachment to their traditional lands<sup>23</sup> including the notion of collective ownership over land which they have traditionally occupied.<sup>24</sup>

In relation to the African Charter, both the African Commission and the African Court on Human and Peoples' Rights adjudicate individual complaints.<sup>25</sup> However, until such time as the African Court becomes more active on issues of substance,<sup>26</sup> the African Commission remains the most important regional monitoring body in relation to the rights guaranteed in the African Charter. Commission decisions are non-binding and the track record of states giving voluntary effect to them remains

<sup>22</sup> According to art 1 of ILO Convention No 169 (note 20 above):  
This Convention applies to:

- (a) tribal peoples in independent countries whose social, cultural and economic conditions distinguish them from other sections of the national community, and whose status is regulated wholly or partially by their own customs or traditions or by special laws or regulations;
- (b) peoples in independent countries who are regarded as indigenous on account of their descent from the populations which inhabited the country, or a geographical region to which the country belongs, at the time of conquest or colonisation or the establishment of present State boundaries and who, irrespective of their legal status, retain some or all of their own social, economic, cultural and political institutions.

Challenges pertaining to this definition in the African context are illuminated below in the section concerning recognising and expanding legal personality.

<sup>23</sup> Art 13(1) of ILO Convention No 169 (note 20 above) determines that:  
'In applying the provisions of this Part of the Convention governments shall respect the special importance for the cultures and spiritual values of the peoples concerned of their relationship with the lands or territories, or both as applicable, which they occupy or otherwise use, and in particular the collective aspects of this relationship.'

<sup>24</sup> Art 14(1) of ILO Convention No 169 (note 20 above) determines that:  
'The rights of ownership and possession of the peoples concerned over the lands which they traditionally occupy shall be recognised. In addition, measures shall be taken in appropriate cases to safeguard the right of the peoples concerned to use lands not exclusively occupied by them, but to which they have traditionally had access for their subsistence and traditional activities. Particular attention shall be paid to the situation of nomadic peoples and shifting cultivators in this respect.'

<sup>25</sup> See text of the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights (6 October 1998 CAB/LEG/66.5), available at <http://en.african-court.org/index.php/basic-documents/12-homepage1/1-welcome-to-the-african-court> (accessed 3 September 2016).

<sup>26</sup> At the time of writing the court had 29 parties (out of 54 African states). It had finalised 23 cases, most of which concerned procedural matters. See the official website of the African Court on Human and Peoples' Rights, available at <http://en.african-court.org/index.php/basic-documents/12-homepage1/1-welcome-to-the-african-court> (accessed 3 September 2016).

mixed. Even so, the decisions and recommendations of the African Commission remain an authoritative source that provides guidance to states in relation to the scope and content of their obligations under the African Charter.<sup>27</sup> As is the case with the Inter-American Commission and IACHR, the African Commission uses other international human rights law instruments (such as ILO Convention No 169) as guidelines for interpretation of the rights in the African Charter. This guidance is facilitated by article 60 of the African Charter, which permits the African Commission to be inspired by and draw on these instruments.<sup>28</sup>

As is well known, the European Convention used to provide for a two-tier enforcement system consisting of the European Commission and ECHR. This dual system was replaced by a single court on 1 November 1998 that consists of a chamber system with the possibility of appeal to the Grand Chamber.<sup>29</sup> In accordance with article 32 of the European Convention, the ECHR is competent to interpret and apply the rights in the European Convention and its protocols. While the European Convention does not contain a clause comparable to article 29(b) of the American Convention or article 60 of the African Charter, the ECHR can take into consideration any relevant rule of international law applicable between the parties when interpreting the European Convention. This possibility is provided for by the general principle of systemic integration as concretised in article 31(3)(c) of the Vienna Convention on the Law of Treaties.

### *A collective right to property through possession of ancestral lands*

In its ground-breaking jurisprudence on the property rights of indigenous peoples, the IACHR has attributed an autonomous meaning to the right to property in article 21 of the American Convention that extends beyond the individualistic understanding that the right has in the domestic laws of the member states.<sup>30</sup> In *Mayagna (Sumo) Awas Tingni Community v Nicaragua*<sup>31</sup> the IACHR for the first time recognised the collective property rights of indigenous peoples.<sup>32</sup> The case concerned

<sup>27</sup> See extensively F Viljoen & L Louw 'State compliance with the recommendations of the African Commission on Human Rights and Peoples' Rights, 1994–2004' (2007) 101 *American Journal of International Law* (2007) 1 1ff.

<sup>28</sup> See African Charter (note 9 above) art 60.

<sup>29</sup> See De Wet & Du Plessis (note 16 above) 352.

<sup>30</sup> Pentassuglia (note 11 above) 170–171; Shelton (note 15 above) 947.

<sup>31</sup> *Mayagna (Sumo) Awas Tingni Community v Nicaragua* (Reparations and Costs) IACtHR Series C No 79 (31 August 2001).

<sup>32</sup> See *Yanomami v Brazil* Case 7615, Inter-Am. Comm. H.R., Res No 12/85, OEA/Ser.L./VII.66, doc. 10 rev. I (5 March 1985), which paved the way for subsequent

Nicaragua's lack of recognition of the right to property of the Awas Tingni community to ancestral lands, as well as its failure to demarcate the lands, despite the fact that the domestic law of Nicaragua acknowledged the collective nature of indigenous property.<sup>33</sup> As a result, the access of the Awas Tingni to their ancestral lands was jeopardised when the government granted a concession to a private company over the territory that was occupied by the community.<sup>34</sup>

The IACHR recalled that its definition of property in article 21 of the American Convention includes

those material things, as well as any right that can form part of a person's heritage; the concept includes all movable and immovable heritage; corporeal and incorporeal elements and whatever other intangible object capable of having value.<sup>35</sup>

Moreover, it stated that article 21 included a right to communal property of indigenous peoples, in accordance with which the ownership of the land is not centred on an individual but in the indigenous community as such.<sup>36</sup> In addition, the IACHR noted that their customary possession of the land per se justified its recognition as indigenous property under article 21 of the American Convention.<sup>37</sup> It linked this collective concept of property and the importance of possession for the purpose of ownership to the close ties of the indigenous people with the land which constitutes the foundation of their culture, their spiritual life, their integrity and their economic survival.<sup>38</sup>

Taking this factor into account, the IACHR held that Nicaragua had violated the right to the use and enjoyment of the property of members of the *Mayagna Awas Tingni* community by failing to delimit and demarcate their communal property. Nicaragua thus was under a positive obligation to adopt measures for the effective delimitation, demarcation and titling

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decisions of the IACHR pertaining to land and resource rights of indigenous peoples. See Shelton (note 15 above) 954, Odello (note 1 above); Huerta (note 2 above) 2.

<sup>33</sup> See *Awas Tingni* (note 31 above) paras 150, 153; Huerta (note 2 above) 7.

<sup>34</sup> Huerta (note 2 above) 6.

<sup>35</sup> *Awas Tingni* (note 31 above) para 144; Huerta (note 2 above) 7.

<sup>36</sup> It supported this position, inter alia, with reference to the laws of Nicaragua, which also recognised the communal property of indigenous peoples. See *Awas Tingni* (note 31 above) paras 150, 153; Huerta (note 2 above) 7.

<sup>37</sup> *Awas Tingni* (note 31 above) para 151.

<sup>38</sup> *Id* para 149. At para 140a, the IACHR underscored that in order for this bond with the territory to exist, it does not require the indigenous community to have inhabited one single place or possessed the same configuration over the centuries. The overall territory of the community is possessed collectively. See also Otis & Laurent (note 20 above) 164–165.



of the communal property.<sup>39</sup> This line of reasoning has since become well established in the jurisprudence of the IACHR and was recently reaffirmed in *Kaliña and Lokono Peoples v Suriname*.<sup>40</sup> Due to the lack of recognition of their right to collective property to their lands, the Kaliña and Lokono peoples did not have a delimited, demarcated and titled territory. Part of the territory claimed by them was owned by third parties, and Suriname had established nature reserves on part of their land and granted a mining concession in one of these reserves.<sup>41</sup> In line with its previous case law, the IACHR concluded that Suriname had violated article 21 of the American Convention by failing to delimit, demarcate and grant title to the territories of the Kaliña and Lokono peoples and that it was under a positive obligation to do so.<sup>42</sup>

This line of reasoning found resonance with the African Commission, which confirmed that article 14 of the African Charter encompasses the collective property of indigenous peoples over their ancestral lands, despite the scepticism of African governments, who regard the control over land and natural resources as the responsibility of the state.<sup>43</sup> In the *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya*,<sup>44</sup> a pastoral community known as the Endorois was evicted from traditional land during the 1970s and 1980s in order to establish a nature reserve. The government also granted a concession for ruby mining to a private company. A question that arose was whether the government had

<sup>39</sup> *Awás Tingni* (note 31 above) paras 152–153; See also IACHR Indigenous and tribal peoples' rights over their ancestral lands and natural resources: Norms and jurisprudence of the Inter-American Human Rights system, OEA/Ser.L/V/II. doc 56/09 (30 December 2009) para 79; GF Teodoro & APNL Garcia 'A step further on traditional peoples human rights: Unveiling the key-factor for the protection of communal property' (2013) 5 *Göttingen Journal of International Law* 155 156; Inman (note 20 above) 63–64; Pentassuglia (note 11 above) 171; Huerta (note 2 above) 7–8.

<sup>40</sup> *The Kaliña and Lokono Peoples v Suriname* (Merits, Reparations and Costs) IACHR Report No 76/07 (25 November 2015) paras 125, 127.

<sup>41</sup> *Kaliña and Lokono* (note 40 above) para 50ff.

<sup>42</sup> *Id* para 142.

<sup>43</sup> Draft Aide-Memoire: United Nations Declaration on the Right of Indigenous People (9 November 2006) para 7, available at <http://www.ipacc.org.za/en/2007/15-aide-memoire/file.html> (accessed 3 September 2016); W van Genugten 'Protection of indigenous peoples on the African continent: Concepts, position seeking, and the interaction of legal systems' (2010) 104 *American Journal of International Law* 29 43.

<sup>44</sup> ACHR *The Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya* Comm 276/2003 (2009).

violated the Endorois' right to property as guaranteed in article 14 of the African Charter.<sup>45</sup>

The Endorois alleged they had been denied access to these ancestral lands since 1978 and had been relocated to land unsuitable for their traditional way of life.<sup>46</sup> Their main prayer was for the restitution of their ancestral land, as well as for securing it by means of demarcation and the issuance of a collective title to the community.<sup>47</sup> By drawing heavily on the jurisprudence of the IACHR, the African Commission, based on the community's ancestral patterns of land use and customs, recognised that the land surrounding Lake Bogoria was traditional Endorois territory.<sup>48</sup> It confirmed that traditional possession of land is the equivalent of full title and must be recognised as such.<sup>49</sup> The African Commission determined that Kenya had failed to recognise full title and to delimit and demarcate the land in consultation with the Endorois and affected neighbours.<sup>50</sup> By denying the Endorois access to the land and the resources necessary for their livestock, the government created a major threat to their way of life.<sup>51</sup>

In contrast to article 21 of the American Convention and article 14 of the African Charter, the right to property in article 1(1) of Protocol 1 of the ECHR does not recognise a collective right to property by indigenous peoples. This right was conceived to protect individual property from arbitrary interference by the state, which implies that

<sup>45</sup> Id paras 71ff and 86ff. Their claim further concerned violations of the right to dispose of wealth and natural resources (art 21), development (art 22), practising religion freely (art 8), and participation in cultural life (art 17). See also Pentassuglia (note 11 above) 187; AA Yusuf 'The progressive development of peoples' rights in the African Charter and in the case law of the African Commission on Human and Peoples' Rights' in F Lenzerini & AF Vrdoljak (eds) *International Law for Common Goods: Normative Perspectives on Human Rights, Culture and Nature* (2014) 55.

<sup>46</sup> Bankes (note 5 above), Yusuf (note 45 above) 55.

<sup>47</sup> *Endorois* (note 44 above) para 192; K Sing' Eoi A & J Sheperd 'In land we trust: The Endorois' communication and the quest for indigenous peoples' rights in Africa' (2010) 16 *Buffalo Human Rights Law Review* 57-67; Bankes (note 5 above) 107.

<sup>48</sup> *Endorois* (note 44 above) par 184.

<sup>49</sup> Id paras 206-207, 209.

<sup>50</sup> Id paras 199, 206, 209; see also Advisory Opinion of the African Commission on Human and Peoples' Rights on the United Nations Declaration on the Rights of Indigenous Peoples, 41st Ordinary Session (16-30 May 2007) paras 32-35, available at [http://www.achpr.org/files/special-mechanisms/indigenous-populations/un\\_advisory\\_opinion\\_idp\\_eng.pdf](http://www.achpr.org/files/special-mechanisms/indigenous-populations/un_advisory_opinion_idp_eng.pdf) (accessed 3 September 2016). See also Pentagssulia (note 11 above) 186-187.

<sup>51</sup> *Endorois* (note 44 above) para 251; Yusuf (note 45 above) 57.

the claimant has to prove the pre-existence of a form of property.<sup>52</sup> The ECHR has acknowledged on several occasions that the right to property in article 1(1) of Protocol 1 of the ECHR has an autonomous meaning.<sup>53</sup> For example, it has determined that possession can constitute a manifestation of property rights even where the respective domestic law did not recognise such possession. An example is *Dogan & others v Turkey*, in which the ECHR recognised that a protected property interest existed where a person's income or economic resources were dependent on possession even where this was not recognised under domestic law.<sup>54</sup> In this instance it concerned economic activities of private individuals in the form of stock-breeding and tree-felling on common village lands such as pasture, grazing and forest lands.<sup>55</sup>

In the *Könkämä* decision, which was decided several years earlier, the European Commission acknowledged that hunting and fishing rights can be regarded as possessions within the meaning of article 1 of Protocol 1, even though it declared the decision inadmissible for lack of exhaustion of domestic remedies.<sup>56</sup> In the case of *From v Sweden*, the European Commission further recognised the special way of life of the Saami and the cultural importance that they attach to reindeer hunting and herding. As a consequence, national legislation that permitted a Saami village access to part of From's land for elk hunting, constituted a proportionate limitation of his right to property in the general interest.<sup>57</sup>

However, the ECHR has not yet expressed itself on whether its autonomous understanding of the right to property in article 1(1) of Protocol 1 of the ECHR encompasses collective property rights of indigenous communities. This may in part be due to the fact that only a few cases in which indigenous property questions were raised, have thus far reached the merits phase.<sup>58</sup> In none of these cases was the ECHR directly confronted with the question of whether article 1(1) of

<sup>52</sup> Otis & Laurent (note 20 above) 274–275.

<sup>53</sup> See, inter alia, *Former King of Greece v Greece* ECtHR App no 25701/94 (23 November 2000) para 60; *Beyeler v Italy* ECtHR App no 33202/96 (5 January 2005); Bankes (note 5 above) 44.

<sup>54</sup> *Dogan & others v Turkey* ECtHR App no 8803/02 (29 June 2004) para 139.

<sup>55</sup> Id para 129; Otis & Laurent (note 20 above) 177; Bankes (note 5 above) 76.

<sup>56</sup> See *Könkämä & 38 other Saami villages v Sweden* Commission Decision App no 27033/95 (25 November 1996). The Saami villages challenged a Swedish regulation that allowed the Swedish authority to authorise hunting and fishing licences to wider parts of society on reindeer grazing lands where the Saami claimed to hold exclusive hunting and fishing rights. See also Otis & Laurent (note 20 above) 171.

<sup>57</sup> *From v Sweden* Commission Decision App no 34776/97 (4 March 1998) 3; Bankes (note 5 above) 89.

<sup>58</sup> Bankes (note 5 above) 772–773; Otis & Laurent (note 20 above) 170.

Protocol 1 of the ECHR imposes an obligation on the state to recognise collective, ancestral title to traditional indigenous lands where domestic laws have not done so.<sup>59</sup> In addition, it relates to the fact that the ECHR has consistently understood article 1(1) of ECHR Protocol 1 as requiring that the person claiming the applicability of this article must, as a matter of domestic law, enjoy some right which may qualify as a property right under the ECHR.<sup>60</sup> In turn this implies that the ECHR can avoid addressing the question of whether article 1(1) imposes an obligation to recognise collective property rights by giving extensive deference to the respective national definitions of property and by refusing to go beyond the determinations of the national courts on this issue.

This practice was particularly evident in *Handölsdalen Sami Village v Sweden*, where the ECHR pointed to domestic law to determine whether the Saami had grazing rights on lands belonging to third parties that would qualify for protection under article 1(1) of Protocol 1 of the ECHR. In this case, five Saami villages brought a complaint against a domestic court decision that prevented them from grazing reindeer on land owned by third parties without a valid contract to that effect between the landowners and the Saami.<sup>61</sup> The Saami argued before the ECHR that their previously existing right under Swedish law to use the land constituted possession in terms of article 1(1) of Protocol 1 of the ECHR and they had been deprived of this right through the Swedish court order.<sup>62</sup>

In a majority decision, the ECHR decided that in order for the notion of possession in article 1(1) of Protocol 1 of the ECHR to be applicable, there at least has to be a legitimate expectation of obtaining the enjoyment of a property right.<sup>63</sup> Swedish law assigned the task of determining whether such a right existed to the Swedish courts and, without the intervention of the courts, no property rights vested in the applicants. Their property interest was in the nature of a claim that could not in this instance be characterised as an existing possession within the meaning of the ECHR case law.<sup>64</sup> While a property interest in the form of a claim can qualify

<sup>59</sup> Otis & Laurent (note 20 above) 169, 177; Bankes (note 5 above) 62.

<sup>60</sup> See, inter alia, *S v the United Kingdom* Commission Decision App no 11716/85 (14 May 1986); see also M Carss-Frisk *The Right to Property: A Guide to the Implementation of Article 1 of Protocol No. 1 to the European Convention on Human Rights* (2003) 18.

<sup>61</sup> *Handölsdalen Sami Village v Sweden* ECtHR App no 39013/04 (17 February 2009), decision of partial admissibility para 46. See also *O.B. v Norway* Commission Decision App no 15997/90 (8 January 1993); Bankes (note 5 above) 79.

<sup>62</sup> *Handölsdalen* (note 61 above) paras 45, 47; Otis & Laurent (note 20 above) 172.

<sup>63</sup> *Handölsdalen* (note 61 above) para 48.

<sup>64</sup> *Id* para 51; Otis & Laurent (note 20 above) 172; Bankes (note 5 above) 67, 80.

as an 'asset' that falls under the protection of article 1(1) of Protocol 1 of the ECHR, such a claim would have to have a sufficient basis in national law, as would be the case, for example, where there is consistent domestic court practice confirming that the claim constitutes an asset.<sup>65</sup> In this instance, the domestic court determined that no such claimed right existed since the Saami did not sufficiently prove its existence. In particular, they did not prove that they had use of the land for a sufficient length of time without objections from the landowners concerned.<sup>66</sup>

While the established ECHR practice of giving deference to national law in determining whether a property interest exists facilitates national policies that limit property interests in the public interest, it can also result in a structural bias towards indigenous peoples in relation to land rights. In this instance it places the entire burden of evidence pertaining to title over land on the Saami in accordance with a domestic legal system designed to reject an indigenous, ancestral tenure system whose distinguishing feature was exactly that it existed without formal demarcation and title.<sup>67</sup> This uncritical approach of the ECHR towards potentially biased domestic laws in matters pertaining to indigenous property rights poses a significant hurdle for the recognition of the use and possession of ancestral lands by indigenous peoples as collective property in terms of article 1(1) of Protocol 1 of the ECHR.<sup>68</sup>

### *The right to restitution of ancestral lands in case of a continued violation*

While the *Awes Tingni* case concerned the infringement of collective property rights of an indigenous group that was in actual possession of their lands, the IACHR has since recognised that the collective right to property continued in situations where indigenous and tribal peoples have lost possession against their will, as a result of which they also had a right to restitution. The IACHR did not make this right dependent on

<sup>65</sup> *Handölsdalen* (note 61 above) para 52.

<sup>66</sup> *Id* para 54.

<sup>67</sup> See the dissenting opinion of Judge Ziemele in the *Handölsdalen* decision (note 61 above) paras 5–6, 10; Bankes (note 5 above) 82; Otis & Laurent (note 20 above) 177.

<sup>68</sup> It is possible that indigenous peoples may have more success if they presented their claims as violations of the right to family life in art 8, as the ECHR is less deferential in its examination of domestic law pertaining to art 8, than is the case with art 1(1) of Protocol 1 of the ECHR. In *Connors v UK* ECHR App no 66746/01 (27 May 2004) paras 83–84, the ECHR determined that art 8 placed positive obligations to protect vulnerable groups (in this instance, gypsies) with different lifestyles than mainstream society. It found art 8 to be of central importance to the individual's identity and self-determination. See also Bankes (note 5 above) 63.

whether this understanding of the right to property was recognised by the respective domestic laws of the state in question. Instead, it relied on the autonomous meaning of the right to property in article 21 of the American Convention as informed by developments in international human rights law.<sup>69</sup>

The first relevant case in this regard was that of *Moiwana Village v Suriname*.<sup>70</sup> The case concerned the descendants of African slaves who were brought to Suriname in order to work on plantations in the seventeenth century.<sup>71</sup> Many of these persons managed to escape to areas in the eastern part of what is currently known as Suriname where they established new and autonomous communities. One of these communities founded the village of Moiwana in the late nineteenth century.<sup>72</sup> An armed conflict erupted after a violent military coup in February 1980. In November 1986 the government carried out a military operation in the village of Moiwana. As the community's property was destroyed during the attack, the survivors had to flee and the village remained abandoned after the attack.<sup>73</sup>

Although the IACHR did not have jurisdiction *ratione temporis* over the events of November 1986, Suriname having only recognised the jurisdiction of the court as of November 1987, the IACHR asserted jurisdiction for so-called continuous violations, as well as those that occurred after the recognition of jurisdiction. Among the continuing violations were those relating to the forced displacement of the victims from their traditional lands, since their return to these lands remained impossible.<sup>74</sup> The court concluded that Suriname violated the right to property of the Moiwana community, as the State did not facilitate their return to their ancestral lands on which they (still) had a special dependence as well as an emotional attachment.<sup>75</sup> The IACHR arrived at this decision despite the fact that Surinamese domestic law recognised neither the Moiwana as a legal entity nor a collective right to property. The IACHR thus attached an interpretation to the right to property in article 21 of the American Convention that required Suriname to recognise the legal personality of the Moiwana.<sup>76</sup> The IACHR further reaffirmed, in the case

<sup>69</sup> Pentassuglia (note 11 above) 173.

<sup>70</sup> *The case of Moiwana Village v Suriname* (Preliminary Objections, Merits, Reparations and Costs) IACHR Series C no 124 (15 June 2005).

<sup>71</sup> Huerta (note 2 above) 8.

<sup>72</sup> *Ibid.*

<sup>73</sup> *Id.* 9.

<sup>74</sup> *Moiwana* (note 70 above) para 128; Huerta (note 2 above) 9.

<sup>75</sup> *Moiwana* (note 70 above) paras 134–135; Huerta (note 2 above) 10.

<sup>76</sup> This line of reasoning was most recently confirmed in *Kaliña and Lokono* (note 40 above) para 114. The IACHR determined that the lack of recognition of the legal

of indigenous communities that have occupied their ancestral lands by means of customary practices, that their possession should be sufficient to establish ownership and to facilitate subsequent registration.<sup>77</sup>

Moreover, by regarding the displacement of the Moiwana as a continuing violation, the IACHR implicitly recognised their right to restitution. This right was subsequently confirmed in the cases of *Yakze Axa Indigenous Community* and *Sawhoyamaxa Indigenous Community*<sup>78</sup> against Paraguay, in which the government, subsequent to the displacement of indigenous communities, transferred their ancestral lands to private parties. This confirmation raised the question of whether a right to restitution of ancestral lands was reconcilable with the property rights of private third parties who have acquired the lands in accordance with domestic law and have been using them productively.<sup>79</sup>

The IACHR confirmed that a right to restitution in principle existed even in situations where there had been lawful dispossession, as long as the indigenous identity of the community maintained their unique relationship with their ancestral lands.<sup>80</sup> However, the right to restitution did not automatically trump the property rights of third parties. In accordance with article 21(2) of the American Convention it would depend on the circumstances of the case in question.<sup>81</sup> Where objective and fundamental reasons prevented the state from facilitating the return of ancestral lands to indigenous communities, it had to provide alternative lands of equal size and quality that had to be chosen in a manner consented to by the indigenous peoples and in accordance with their own means of consultation and decision.<sup>82</sup>

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personality of the Kaliña and Lokono peoples by Suriname, inter alia, resulted in a violation of art 21 of the American Convention (note 8 above).

<sup>77</sup> *Moiwana* (note 70 above) para 131.

<sup>78</sup> *Yakze Axa Indigenous Community v Paraguay* (Merits, Reparations and Costs Judgment) IACtHR Series C no 125 (17 June 2005) and *Sawhoyamaxa Indigenous Community v Paraguay* (Merits, Reparations and Costs) IACHR Series C no 146 (29 March 2006).

<sup>79</sup> *Sawhoyamaxa* (note 78 above) paras 128, 138–139; Huerta (note 2 above) 12.

<sup>80</sup> *Yakze Axa* (note 78 above) paras 127, 136–137; *Sawhoyamaxa* (note 78 above) paras 119–120; Bankes (note 5 above) 97; Shelton (note 15 above); Pentassuglia (note 11 above) 174.

<sup>81</sup> *Yakze Axa* (note 78 above) paras 146–148; *Kaliña and Lokono* (note 40 above) para 155; Pentassuglia (note 11 above) 173.

<sup>82</sup> *Yakze Axa* (note 78 above) 151; *Sawhoyamaxa* (note 78 above) paras 135–137; *Kaliña and Lokono* (note 40 above) para 158. See also *Xakmok Kasek Indigenous Community v Paraguay* (Judgment) IACHR Series C no 214 (24 August 2010) 10 paras 89, 108–110; Shelton (note 15 above) 961. Pentassuglia (note 11 above) 174.

The above line of jurisprudence had a significant influence on the African Commission in the *Endorois* decision. In line with the reasoning of the IACHR, the African Commission concluded that members of indigenous peoples who have unwillingly left their traditional lands or lost possession thereof maintain property rights thereto despite the absence of formal title, unless the lands have been lawfully transferred to third parties in good faith.<sup>83</sup> Since this had indeed happened to the Endorois, they were entitled to restitution of their lands or to obtain other lands of equal extent and quality.<sup>84</sup>

The African Commission in the *Endorois* decision — as with the IACHR in the *Moiwana* and *Sawhoyamaya* decisions — regarded the deprivation of possession of land by indigenous peoples as a continuing breach of their property rights, whereas the ECHR took a different approach. In *Hingitaq, 53 & others v Denmark*, the ECHR regarded the deprivation of possession of indigenous land as an instantaneous act.<sup>85</sup> In that case members of an Inuit tribe in Greenland were displaced in the summer of 1953 and resettled in the vicinity of their native village in the district of Thule, in order to facilitate the building of the Thule airbase. The Inuit claimed that they had been deprived on a continuous basis of their homeland and hunting territories in violation of article 1(1) of Protocol 1 of the ECHR.<sup>86</sup>

The ECHR, however, found that the deprivation of ownership or another right *in rem* constituted instantaneous acts. The relocation of the Inuit, as well as the limitation of their access to hunting and fishing, thus, was a once-off act.<sup>87</sup> As these acts occurred before the ECHR and Protocol 1 of the ECHR entered into force for Denmark, the ECHR did not have temporal jurisdiction and declared the dispute inadmissible.<sup>88</sup> Had the ECHR focused on the consequences produced by the expropriation as opposed to the expropriation itself, as well as the importance of the land for the way of life of the Inuit, its conclusion may have been different and more in line with the autonomous interpretation that the IACHR has given to the right to property.

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<sup>83</sup> *Endorois* (note 44 above) para 209.

<sup>84</sup> *Id.*

<sup>85</sup> *Hingitaq, 53 & others v Denmark* ECHR App no 18584/04 (12 January 2006) 18.

<sup>86</sup> *Id.* 16.

<sup>87</sup> *Id.* 18.

<sup>88</sup> *Id.* 18–19. The ECHR entered into force for Denmark on 3 September 1953 and Protocol 1 of the ECHR on 18 May 1954. See also Otis & Laurent (note 20 above) 170–171; Bankes (note 5 above) paras 57, 74, 84.



*The right to (benefit sharing in) natural resources*

In the cases of *Saramaka People v Suriname*,<sup>89</sup> *Kichwa Indigenous People of Sarayaku v Ecuador*,<sup>90</sup> as well as the *Kaliña and Lokono Peoples v Suriname*<sup>91</sup> the IACHR consolidated its jurisprudence on the collective property of indigenous peoples and expanded the concept of property in article 21 of the American Convention to include natural resources attached to the ancestral land. Again, the justification for expanding the definition of the right to property was linked to the close relationship that the indigenous peoples have with the land.<sup>92</sup> However, the IACHR limited the resources to those necessary for the survival of the indigenous peoples' way of life, for example, in relation to a community that depends on agriculture, hunting and fishing, water resources constitute an essential natural resource.<sup>93</sup>

This recognition of essential resources attached to the land of indigenous peoples as part of their communal property did not take place in the context of land restitution. Instead, it concerned the regulation of permissible restrictions on land already in the possession of an indigenous group, for example as a result of foreign investment or development projects.<sup>94</sup> The IACHR determined that in case of large-scale development projects that could have a major impact on the territory (such as mining concessions), the state had to ensure effective participation by the indigenous community in the decision-making processes leading up to the concessions.<sup>95</sup> In addition, it had to provide for benefit-sharing in the expected profits as a form of equitable compensation for the restrictions

<sup>89</sup> *Case of Pueblo Saramaka v Suriname* (Preliminary Objections, Merits, Reparations and Costs Judgment) IACHR Series C no 172 (27 November 2007); Huerta (note 2 above) 18.

<sup>90</sup> *Kichwa Indigenous People of Sarayaku v Ecuador* (Merits, Reparations and Costs, Judgment) IACHR Series C no 245 (27 June 2012).

<sup>91</sup> *Kaliña and Lokono* (note 40 above).

<sup>92</sup> *Saramaka* (note 89 above) paras 120–122; 143; *Sarayaku* (note 90 above) para 145; Huerta (note 2 above) 18, 20; Shelton (note 15 above) 958.

<sup>93</sup> *Saramaka* (note 89 above) para 126. The IACHR further noted that the extraction of natural resources (including those that are not necessary for the survival of the indigenous group) could affect others, i.e., those resources that are necessary for their physical and cultural survival. See *Sarayaku* (note 90 above) paras 146–147; see also Shelton (note 15 above) 959; Pentassuglia (note 11 above) 175 and JM Pasqualucci 'International indigenous land rights: A critique of the jurisprudence of the Inter-American Court of Human Rights in light of the United Nations Declaration on the Rights of Indigenous Peoples' (2009) 27 *Wisconsin Journal of International Law* 51 97.

<sup>94</sup> Pentassuglia (note 11 above) 175; Teodoro & Garcia (note 39 above) 172.

<sup>95</sup> *Saramaka* (note 89 above) paras 129, 134, *Sarayaku* (note 90 above) para 157.

placed on the use of the land.<sup>96</sup> These principles also applied where the resources which indigenous peoples relied upon were restricted by projects aimed at environmental protection, such as nature reserves.<sup>97</sup>

Effective participation implied an obligation on the state to provide prior environmental impact assessments by an independent and technically competent entity,<sup>98</sup> full disclosure to the indigenous community of all the potentially detrimental health and environmental consequences at an early stage of the project,<sup>99</sup> as well as consultation with the indigenous community in accordance with their customs and traditions including their free consent.<sup>100</sup> These procedural requirements suggest that the right to essential natural resources does not in and of itself exclude concessions for large-scale projects to third parties on the lands of indigenous peoples.<sup>101</sup> Instead, any restriction of the right to communal property should be the result of an even-handed balancing of the interests at stake, with due consideration to the central importance of the relationship with the land for the survival of the indigenous community.<sup>102</sup>

The African Commission replicated the reasoning of the IACHR pertaining to effective participation in the *Endorois* decision, in order to protect their special relationship with the land and in turn their survival as distinct people.<sup>103</sup> It confirmed that the Kenyan government should have obtained free, prior, and informed consent from the Endorois and should have authorised an independent and technically adequate environmental impact assessment.<sup>104</sup> The Commission further decided

<sup>96</sup> *Saramaka* (note 89 above) 129, 137, *Sarayaku* (note 90 above) para 157; *Pentassuglia* (note 11 above) 175; *Teodoro & Garcia* (note 39 above) 172.

<sup>97</sup> *Kaliña and Lokono* (note 40 above) para 181.

<sup>98</sup> *Saramaka* (note 89 above) para 139, *Sarayaku* (note 90 above) paras 159ff; 143; *Huerta* (note 2 above) 18, 21; *Shelton* (note 15 above) 960.

<sup>99</sup> *Saramaka* (note 89 above) paras 129, 138–139; *Sarayaku* (note 90 above) para 177; *Shelton* (note 15 above) 959, 964.

<sup>100</sup> *Saramaka* (note 89 above) paras 133–137; *Sarayaku* (note 90 above) paras 299–300. See also *Mary and Carrie Dann v United States* Case 11, 140 IACHR Report no 75/02, OEA/Ser.L/V/II.117, doc. 5 rev. 1 paras 157, 165 (27 December 2002); *Shelton* (note 15 above) 956, 966. See also *Maya Toledo Indigenous Community of the Toledo District v Belize* Case 12.053, Inter-American Commission on Human Rights, Report no 40/40, OEA/Ser.L/VII.122 doc. 5, rev 1.1, n. 123 (2004), para 142; *Inman* (note 20 above) 66.

<sup>101</sup> *Pentassuglia* (note 11 above) 175.

<sup>102</sup> *Saramaka* (note 89 above) paras 127–129.

<sup>103</sup> *Endorois* (note 44 above) para 127; S Wiessner 'The cultural rights of indigenous peoples: Achievements and continuing challenges' (2011) 22 *European Journal of International Law* 121–133.

<sup>104</sup> *Endorois* (note 44 above) paras 226–228 with extensive references to *Saramaka* (note 89 above); *Yusuf* (note 45 above) 57; *Inman* (note 20 above) 68.

that the Endorois had a right to reasonable benefit-sharing or other adequate compensation in the profits resulting from development of their land.<sup>105</sup> The African Commission went further than the IACHR in one respect: it regarded all natural resources contained within their traditional lands to vest in the indigenous people.<sup>106</sup> This difference relates to the fact that the right of a people to dispose of its wealth and resources is explicitly guaranteed in article 21(1) of the African Charter. This right implies, once it has been determined that land belongs to a particular indigenous community, that community is entitled to all the resources within the land. Their right to dispose of these resources, however, can be limited in the general interest and with the community's effective participation.<sup>107</sup>

### *Recognising and expanding legal personality*

In recognising (and expanding) the international legal personality of indigenous peoples, the IACHR and African Commission have been strongly influenced by ILO Convention No 169. Article 1 of this Convention, which remains the only instrument in international law that contains a definition of indigenous peoples,<sup>108</sup> determines as follows:

This Convention applies to:

- (a) tribal peoples in independent countries whose social, cultural and economic conditions distinguish them from other sections of the national community, and whose status is regulated wholly or partially by their own customs or traditions or by special laws or regulations;
- (b) peoples in independent countries who are regarded as indigenous on account of their descent from the populations which inhabited the country, or a geographical region to which the country belongs, at the time of conquest or colonisation or the establishment of present State boundaries and who, irrespective of their legal status, retain some or all of their own social, economic, cultural and political institutions.

<sup>105</sup> *Endorois* (note 44 above) paras 227–228.

<sup>106</sup> *Id* para 67; see also *Social and Economic Rights Action Centre (SERAC) & another v Nigeria* (2001) AHRLR 60 (ACHPR 2001) paras 55, 70, 56–58; G Pentassuglia 'Indigenous groups and the developing jurisprudence of the African Commission on Human and Peoples' Rights: Some reflections' (2010) 3 *UCL Human Rights Review* 150–159.

<sup>107</sup> *Endorois* (note 44 above) para 267; Pentassuglia (note 106 above) 159–160.

<sup>108</sup> The DRIP (note 20 above) does not include a definition of indigenous peoples as their representative disagreed on whether such a definition should be included. See Barelli (note 21 above) 958.

While this definition constitutes an important point of reference for judicial bodies such as the IACHR and the African Commission in determining whether a particular group constitutes an indigenous people, its preoccupation with precolonial societies raises questions. The definition is a reflection of the fact that the indigenous rights movement commenced as a reaction against large-scale displacement and dispossession of original inhabitants by settler societies in the Americas and Australia through colonial conquest and occupation.<sup>109</sup> When these displaced groups started to seek legal recognition of their plight, their claims centred on the fact that they – as first inhabitants – were uprooted by people who came later. As a result, the term ‘indigenous’ remains strongly associated with original inhabitants who have been displaced by settler societies.<sup>110</sup> This association raises the question of whether the criterion of ‘having been there first’ is a *sine qua non* for recognition as ‘indigenous’. The question gains particular relevance in a region such as Africa, where many, if not most, states are made up of various ethnicities, all predating the colonial era and all therefore qualifying as ‘indigenous’.<sup>111</sup>

The IACHR was confronted with this question when it had to determine whether tribal peoples who arrived during the colonial period had legal personality under international law.<sup>112</sup> In the *Moiwana* and *Saramaka* cases, the IACHR extended the scope of the communal rights recognised by article 21 of the American Convention to tribal communities such as the Maroons, despite the fact that they were taken to the area in colonial times.<sup>113</sup> Thus they were not indigenous in the sense that they had inhabited a particular area since precolonial times. However, the IACHR acknowledged, like tribal peoples, these communities displayed close ties to the land and this relationship was a central element of their cultural identity.<sup>114</sup> They also had social, cultural and economic traditions different from those of other sections of the society, as well as their own

<sup>109</sup> Viljoen (note 12 above) 75–76.

<sup>110</sup> *Id* 75.

<sup>111</sup> *Report of the African Commission on Human and People's Rights Working Group of Experts on Indigenous Populations/Communities* UN doc E/CN.4/Sub.2/AC.5/2005/WP.3 (22 April 2005) 88, 92–93; Advisory Opinion (note 50 above) para 13; *Endorois* (note 44 above) para 154; Van Genugten (note 43 above) 38; Pentassuglia (note 11 above) 185; K Bojosi & GM Wachira ‘Protecting indigenous peoples in Africa: An analysis of the approach of the African Commission on Human and Peoples’ Rights’ (2006) 6 *African Human Rights Law Journal* 382 395; see also Viljoen (note 12 above) 76.

<sup>112</sup> Teodoro & Garcia (note 39 above) 181.

<sup>113</sup> *Id* 172; *Saramaka* (note 89 above) 79.

<sup>114</sup> *Moiwana* (note 70 above) para 132ff. *Saramaka* (note 89 above) para 79; Teodoro & Garcia (note 39 above) 172; Shelton (note 15 above) 958.

forms of organisation and self-government based on customary rules and traditions.<sup>115</sup>

In the *Saramaka* decision the IACHR explicitly recognised that the right to self-determination applies to indigenous peoples,<sup>116</sup> as a result of which they have the right to pursue their social, economic and cultural development and may freely dispose of their natural wealth and resources so as not to be deprived of their means of subsistence.<sup>117</sup> Both the Inter-American Commission and the IACHR further confirmed that such indigenous status includes those indigenous groups whose ethnic composition, economic practices or linguistic traditions have undergone certain changes over time. Indigenous groups are dynamic and adjustments in lifestyle can be necessary to survive as a group within a changing social reality. The decisive factor was that their identity remained dependent over time on their relationship to their ancestral territory and their communal right to property.<sup>118</sup>

The African Commission for its part relied on references to peoples' rights in the African Charter as a point of departure for determining if and to what extent indigenous groups constitute a 'people'. Even though the African Charter itself does not specify explicitly the subject or beneficiary of peoples' rights, the African Commission thus far has identified five different interpretations of the term 'peoples'.<sup>119</sup> The first concerns peoples subject to colonial or alien domination, which also constitutes the classic notion of peoples' rights.<sup>120</sup> Another possibility is that 'peoples' refers to the people of a state as a whole.<sup>121</sup> A third interpretation of the term, as employed in the African Charter, signifies

<sup>115</sup> *Saramaka* (note 89 above) para 80ff; Teodoro & Garcia (note 39 above) 172.

<sup>116</sup> *Saramaka* (note 89 above) paras 134, 137; Huerta (note 2 above) 137. Suriname is a party to the ICCPR and the ICESCR, although not to ILO Convention No 169 (note 20 above).

<sup>117</sup> *Saramaka* (note 89 above) paras 93–94. The IACHR's position was informed by the CESCR in UNCESCR *Consideration of Reports submitted by States Parties under Articles 16 and 17 of the Covenant, Concluding Observations on Russian Federation (Thirty-first session)* UN doc E/C.12/1/Add.94 (12 December 2003) para 11. See also Shelton (note 15 above) 951.

<sup>118</sup> *Xakmok Kasek* (note 82 above) paras 35, 43, 85–88, 91; Shelton (note 15 above) 961–962. See also *Garifuna Community of 'Triunfo de la Cru' and its members v Honduras* (Merits) IACHR case 12.548 Report no 76/01 (7 November 2012) paras 62–64, 67, 190; Teodoro & Garcia (note 39 above) 179–182.

<sup>119</sup> SA Dersso 'The jurisprudence of the African Commission on Human and Peoples' Rights with respect to peoples' rights' (2006) 6 *African Human Rights Law Journal* 358–360.

<sup>120</sup> *SERAC* (note 106 above); Dersso (note 119 above) 360–361.

<sup>121</sup> For example, art 23(2)(b) of the African Charter (note 9 above) determines that for the strengthening of peace, solidarity and friendly relations, States Parties have to ensure that their territories shall not be used as a basis for subversive or

the people of Africa in general.<sup>122</sup> In addition, the term ‘peoples’ can be seen as synonymous with the state itself, which interpretation serves to boost sovereign rights.<sup>123</sup> Finally, and most relevant to the purposes of this analysis, the African Commission regarded the term ‘peoples’ as a reference to the distinct communities within the state. In this sense the subjects of peoples’ rights are the different groups or inhabitants of a particular territory within the state who, on account of historical, traditional, racial, ethnic, cultural, linguistic, ideological, geographical or economic identities and affinities, have come to form a separate identity.<sup>124</sup> These peoples can be heterogeneous<sup>125</sup> and include persons whose ethno-anthropological roots are not African.<sup>126</sup> In line with this reasoning the African Commission acknowledged indigenous peoples as ‘peoples’, notably through its Working Group of Experts on Indigenous Populations/Communities (the Working Group) in 2003 and subsequently in a 2007 Advisory Opinion.<sup>127</sup>

Although it did not define indigenous peoples as such, the African Commission, inspired by ILO Convention No 169, considered criteria for identifying indigenous peoples in Africa.<sup>128</sup> These included their self-identification and recognition by other groups as culturally distinct,<sup>129</sup> as well as an occupation and use of traditional lands to which they have a special relationship and which was of fundamental importance for their collective physical and cultural survival.<sup>130</sup> In addition, the African Commission emphasised that indigenous peoples are characterised

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terrorist activities against the people of other State Parties. See Dersso (note 119 above) 361–362.

<sup>122</sup> Preamble of the African Charter (note 9 above) para 8; Dersso (note 119 above) 352, 362.

<sup>123</sup> Dersso (note 119 above) 362.

<sup>124</sup> Comm 266/03 *Kevin Mgwanga Gunme et al v Cameroon* (27 May 2009), available at <http://caselaw.ihrrda.org> (accessed 3 September 2016) para 171. See *Legal Resources Foundation v Zambia* (2001) AHRLR 84 (ACHPR 2001) para 73; *Endorois* (note 44 above) para 151; see also Comm 279/03-296/05 *Sudan Human Rights Organisation & Centre on Housing Rights and Evictions (COHRE) v Sudan*, Advisory Opinion (note 50 above) para 220.

<sup>125</sup> *Katangese Peoples’ Congress v Zaire* (2000) AHRLR 72 (ACHPR 1995) paras 3, 6. See also Dersso (note 119 above) 362, 363, 366, 372.

<sup>126</sup> *Mgwanga Gunme* (note 124 above) paras 178–179; Yusuf (note 45 above) 51–52, 53.

<sup>127</sup> Working Group (note 111 above); Advisory Opinion (note 50 above).

<sup>128</sup> This characterisation is similar to that of art 1 of the ILO Convention No 169 (note 20 above) despite the fact that it has not yet been ratified by any African State. See also Van Genugten (note 43 above) 37; Bojosi & Wachira (note 111 above) 393; Pentassuglia (note 106 above) 152.

<sup>129</sup> Advisory Opinion (note 50 above) para 12; Working Group (note 111 above) 89, 93.

<sup>130</sup> Working Group (note 111 above) 89; Advisory Opinion (note 50 above) para 12.

by a state of subjugation, marginalisation, dispossession, exclusion, or discrimination resulting from the group's different culture or way of life compared to the dominant national model.<sup>131</sup> It further underscored that, in the African context, 'indigenous' does not necessarily refer to pre-colonial possession of territory by inhabitants, since there is very little difference in relation to the time when the various traditional peoples arrived in the region.<sup>132</sup> It subsequently confirmed these criteria in the *Endorois* decision.<sup>133</sup>

On one hand the African Commission has been praised for its role in providing legal recognition to an inclusive notion of indigenous peoples that takes a functional approach which extends beyond colonial subjugation.<sup>134</sup> At the same time the feasibility of the benchmarks for indigeneity which the African Commission has identified, in reliance on instruments such as the ILO Convention No 169 and the jurisprudence of the IACHR, remains controversial in the African context. First, most Africans still depend on their lands for survival, whether they are pastoralists, agriculturalists, hunters and gatherers, or agro-pastoralists.<sup>135</sup> Second, most groups maintain distinct cultural traditions and continue to have lands they consider to be sacred. As a result, neither ground constitutes a convincing claim for indigeneity.<sup>136</sup>

Moreover, even if one were to add the criterion of marginalisation, this would not necessarily assist in identifying those groups which should qualify as indigenous. The reality is that in many, if not most, African states, a particular ethnic group often enjoys a position of political and socio-economic privilege, while other ethnically and culturally distinct groups live in (relative) poverty.<sup>137</sup> In a situation where numerous ethnically and

<sup>131</sup> Working Group (note 111 above) 88–89; Advisory Opinion (note 50 above) para 12; *Endorois* (note 44 above) para 148; Pentassuglia (note 11 above) 185; Bojosi & Wachira (note 111 above) 391.

<sup>132</sup> Working Group (note 111 above) 88, 92–93; Advisory Opinion (note 50 above) para 13; *Endorois* (note 44 above) para 154; Van Genugten (note 43 above) 38; Pentassuglia (note 11 above) 185; Bojosi & Wachira (note 111 above) 395.

<sup>133</sup> *Endorois* (note 44 above) paras 147, 150, 154; Yusuf (note 45 above) 56.

<sup>134</sup> Barelli (note 21 above) 972. See N Bojosi 'The African Commission Working Group of Experts on the Rights of Indigenous Communities/Populations: Some reflections on its work so far' in S Dersso (ed) *Perspectives on the Rights of Minorities and Indigenous Peoples in Africa* (2010) 95–109ff, who acknowledges that in Africa today the term 'indigenous peoples' has come to have connotations and meanings that are much wider than the question of 'who came first'.

<sup>135</sup> Bojosi (note 134 above) 131; and conceded also by GM Wachira 'Indigenous peoples' rights to land and natural resources' in S Dersso (ed) *Perspectives on the Rights of Minorities and Indigenous Peoples in Africa* (2010) 297–303.

<sup>136</sup> Viljoen (note 12 above) 77; Bojosi (note 134 above) 126.

<sup>137</sup> Viljoen (note 12 above) 77.

culturally distinct groups suffer some form of marginalisation (relative to those groups prioritised by the post-colonial government), one is faced with a 'sliding scale of marginality'.<sup>138</sup> In such a situation it is not the group's marginality combined with a particular lifestyle as such that is decisive for determining whether they should benefit from the protection that indigenous status implies, but rather the severity of the marginalisation — resulting in the threat of extinction.<sup>139</sup> However, the question then is how long indigenous status should continue. If the socio-economic situation of a particular indigenous group were to improve to a level where it was not faced with extinction anymore, would it still qualify as indigenous and on what basis?

In essence, the approach taken by the African Commission is very much contested in Africa.<sup>140</sup> In addition to the conceptual difficulties that 'indigenous peoples' raise in the African context, many African states are concerned that the acknowledgement of different peoples within a state — and attaching certain legal privileges to that classification — undermines nation-building.<sup>141</sup> In all of the instances where the African Community recognised specific communities within the state as a people with the right to self-determination guaranteed in article 20 of the Charter, it emphasised that this right had to be compatible with the territorial integrity and unity of the state in question. The right to self-determination had to be realised within the respective state through forms of political participation that were up to each state to determine.<sup>142</sup> African states, however, remain reluctant to acknowledge indigenous or other groups within their territories as peoples with the right to self-determination out of fear that this can create tensions amongst ethnic groups and instability within sovereign states.<sup>143</sup>

<sup>138</sup> Ibid.

<sup>139</sup> Id 77–78.

<sup>140</sup> See Bojosi (note 134 above) 112, 136–137 who argues that the African Working Group was too strongly influenced by certain interest groups and that its views are not representative within Africa.

<sup>141</sup> Viljoen (note 12) 78; Pentassuglia (note 106 above) 152.

<sup>142</sup> See *Katangese* (note 125) para 6. See also African Commission Report on the Mission of Good Offices to Senegal of the African Commission on Human and Peoples' Rights, Tenth Annual Activity Report (1996-1997) Annex VIII; *Mgwanga Gunme* (note 124 above) paras 189, 190, 191, 194, 197; *Katangese* (note 125 above) para 4; Advisory Opinion (note 50 above) para 27; Draft Aide-Memoire (note 43 above) paras 2.2, 3.1–3.2; Working Group (note 111 above) 88, Bojosi & Wachira (note 111) 395; Yusuf (note 45 above) 52, 54–55; Dersso (note 119 above) 365, 367–368; Pentassuglia (note 106 above) 155; Van Genugten (note 43 above) 36.

<sup>143</sup> This was, inter alia, reflected in a decision of the African Union Assembly of Heads of State and Government in 2006, in which it noted that the vast majority



## Conclusion

The above analysis indicates that human rights treaties aimed at the protection of individual rights have shown themselves capable of accommodating collective rights, notably in relation to the land rights of indigenous peoples. The IACHR, in particular, has shown itself open to recognising that collective title can be acquired through traditional possession, as well as to regarding the consequences of expropriation of indigenous lands as a continued violation, which in turn triggers the right to restitution. In doing so, the IACHR has remained mindful of the legitimate interests of others and has allowed the economic exploitation of indigenous lands by the state or third parties. However, such exploitation remains conditional on whether the informed consent of the indigenous groups was obtained and whether they reasonably participate in the profits of economic exploitation.

Through inter-regional judicial dialogue this line of reasoning has found resonance with the African Commission. Also, judicial bodies in both regions have interpreted the notion of 'indigenous peoples' flexibly. They have given meaning to this term by focusing on the very distinct way of life of the people in question: all cases under discussion concerned groups whose way of life was inextricably linked to the land in question and who faced severe marginalisation and even the risk of extinction as a result of the disruption of their distinct way of life. However, this progressive and functional interpretation of indigenous peoples is not without its problems. Neither the IACHR nor the African Commission has systematically unpacked or defined concepts such as 'peoples' and 'collective land ownership'. This lack has met with criticism, in particular in Africa where the notion of indigeneity still meets considerable resistance and is perceived by many as leading to arbitrary legal protection of some disadvantaged group in society above others and undermining national unity.

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of the peoples of Africa are indigenous to the African continent and expressed reservations with regard to the concept's applicability to the region. See AU Heads of State and Government *Decision on the United Nations Declaration on the Rights of Indigenous Peoples* Assembly/AU/Dec. 141 (VII), 8<sup>th</sup> Sess. (January 2007); Barelli (note 21 above) 958.

Moreover, the more expansive and inclusive the definition becomes the greater the risk will be that competing claims pertaining to land and natural resources will arise between different indigenous groups and/or these groups and other third parties.<sup>144</sup> In turn, this situation will require a complex balancing of interests by governments and courts, the outcome of which may leave some groups with little more than formal recognition of their indigenous status. The progressive awarding of indigenous status to marginal groups therefore is not, in and of itself, a guarantee of any material benefits that will improve their socio-economic status.

A different point of criticism relates to the fact that although claims turning on (the loss of) collective property may address the economic loss that indigenous peoples suffer, it cannot always do justice to the immaterial dimension of the claim. For example, those indigenous communities who accept alternative land leave behind burial grounds and sacred sites which form a central part of the group's identity.<sup>145</sup> Claims to retain some sort of access to these sites should rather be based on the right to self-determination or participation in cultural life, where the treaty in question indeed provides for these rights:<sup>146</sup> at present, claims pertaining to the historical injustices against indigenous groups focus predominantly on economic harms that do not reflect the spiritual and cultural value that traditional lands represent for indigenous groups.<sup>147</sup>

In addition, the question arises whether the informed consent requirement can prevent abusive exploitation of the resources within the lands of indigenous peoples by third parties. It does not seem as if the obligation to inform, consult with and obtain the consent of indigenous groups implies their right to refuse the exploitation of the resources in question – unless it was evident that any exploitation would undermine their very survival. On one hand a categorical right of refusal prevents a careful balancing of the rights of indigenous groups with other legitimate societal interests, on the other, the social and economically vulnerable position of indigenous groups places them at a disadvantage in negotiations with economically powerful private or state-owned companies. In turn, this imbalance requires the state in question to regulate and supervise the information, consultation and participation process in a diligent manner in order to ensure continued even-handed treatment of the various interests at stake. However, it is questionable whether this is possible in situations where the state itself

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<sup>144</sup> Viljoen (note 12 above) 86; Bojosi (note 134 above) 126.

<sup>145</sup> Shelton (note 15 above) 970.

<sup>146</sup> See art 17 (cultural life) and art 20 (self-determination) of the African Charter (note 9 above).

<sup>147</sup> Sloan (note 3 above) 761.

seeks permission to exploit resources within indigenous lands through a state-owned company.

In contrast to the IACHR and the African Commission, the ECHR thus far has not shown itself receptive to a similarly autonomous interpretation of the right to property of indigenous peoples, even though in principle it acknowledges their distinct way of life. This failure in part is due to the manner in which the relevant cases were presented before the ECHR (and previously the European Commission), as well as the fact that the ECHR traditionally has allowed states a significant margin of appreciation in determining whether a property interest existed at all. It is unlikely that this well-established practice will change in a region where indigenous peoples are much fewer in number than in the Americas and mainly are concentrated in the Nordic countries and parts of Russia.<sup>148</sup> In most of the 47 member states of the Council of Europe the issue of the recognition of the collective property of indigenous peoples is not likely to arise. In turn, this situation implies that the development of a common European standard in this regard is unlikely. Added to that, the ECHR is not likely to be keen to generate a whole new genre of cases at a time when its case load has brought the institution to the brink of its capacity and during which member states increasingly call on the ECHR to heed the principle of subsidiarity.

Finally, it is worth mentioning that the recognition of collective property rights of indigenous peoples can be seen as introducing an element of cultural relativism into the interpretation of human rights guarantees. In turn, this recognition raises the question of whether and to what extent cultural relativist arguments apply to other human rights guarantees. A cultural relativist interpretation of property in international human rights instruments has resulted in an expansion of the scope of the protection guaranteed by this right, but there is a risk that acceptance of cultural relativist arguments in other instances could undermine human rights protection in order to sustain traditional cultural practices.<sup>149</sup> Particularly problematic are cultural practices by indigenous and migrant communities that undercut the principle of equality and nondiscrimination.<sup>150</sup>

For example, new migrants in Western societies may attempt to use cultural relativist arguments to obtain recognition for their original way of life, such as the use of the veil, the recognition of polygamy and the practice of female genital mutilation.<sup>151</sup> One could attempt to counter these claims by underscoring that the cultural relativist interpretation of

<sup>148</sup> Barelli (note 21 above) 967.

<sup>149</sup> Shelton (note 15 above) 977.

<sup>150</sup> *Id.* 977; Odello (note 1 above) 25; Sloan (note 3 above) 763.

<sup>151</sup> Odello (note 1 above) 25, 29.

property in relation to indigenous peoples was necessary to ensure their very survival and to address historic injustice relating to their lands. In addition, this cultural relativist approach was exercised in a manner that allows for due consideration of the rights of others. The same cannot be said of those cultural or traditional practices that violate the principal of equal treatment of women or their physical integrity. Seen from this perspective the cultural relativist interpretation of the right to property of indigenous peoples remains an exception necessitated by extreme circumstances; it need not be indicative of a cultural relativist trend in the jurisprudence of regional human rights bodies in general.