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Abstract

Beginning in the 20th century, international law expanded beyond law *between* nations to eventually embrace the concept of human rights. However, until recently, human rights efforts were focused mostly on individuals, their rights and the obligations of the state in question. Indigenous peoples, on the other hand, have always articulated their collective rights and, to their credit, achieved notable success.

While there is no doubt that these achievements should be applauded, what is also of interest, and deserves further study, are the ways in which human rights jurisprudence concerning Indigenous peoples' collective rights intermingle, cross-fertilize, and integrate. This dynamic relationship between the various sources of Indigenous rights law has had a tremendous impact locally, changing how states interact with the Indigenous peoples living within its borders.

The first aim of this article will be to explore the above-mentioned topics in detail with a particular eye on the African human rights systems. Secondly, it will examine how they relate to the *Endorois* case that was recently decided by the African Commission on Human and Peoples' Rights. I conclude with an investigation into what this could mean for Indigenous peoples' rights in the African context.

Keywords

Indigenous peoples, Africa, Endorois, African Commission on Human and Peoples' Rights, African Charter on Human and Peoples' Rights, localizing human rights

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The Cross-Fertilization of Human Rights Norms and Indigenous Peoples in Africa: From Endorois and Beyond

After more than 25 years of negotiations, the *United Nations Declaration on the Rights of Indigenous Peoples* (UNDRIP, 2007) was adopted by the United Nations General Assembly in September 2007. This was a landmark event for the Indigenous rights movement and produced noticeable change in the traditional international legal order because indigenous peoples, as a group, were finally recognized as holders of a catalogue of rights.

One must ask: How did international human rights law evolve in order to recognize the collective rights of Indigenous peoples? Consider if you will, Emerich de Vattel, who in the 18th century defined international law as the “science of rights which exist between nations or states and of the obligations corresponding to these rights” (cited in Anaya, 2004, p. 6). With sovereignty of utmost importance, the rights of individuals remained solely the responsibility of the State. After the emergence of human rights, international law surpassed the above-mentioned confines, and individuals were considered the subjects of international law. Indigenous peoples, however, wanted to move even further beyond the narrowness of the individual–state dichotomy (Anaya, 2004). To unlock the potential beyond the formal human rights system and to expand global human rights norms to include collective rights, Indigenous peoples would have to take advantage of the fact that human rights discourse permits plurality (Viljoen, 2007).

The first point of entry for Indigenous peoples into the international legal arena was through labour, when the International Labour Organization (ILO) addressed the exploitation of Indigenous peoples and their lands by colonial industries (Oguamanam, 2004). The 1957 *ILO Convention No. 107 Concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries* (ILO, 1957) became the first instrument to address the question of Indigenous rights in a comprehensive manner.

However, Convention No. 107 was critiqued (Swepston, 1990; Yupsanis, 2010) for its state-centric leanings and resulted in the drafting of a more up-to-date legal instrument, *ILO (1989) Convention 169 Concerning Indigenous and Tribal Peoples in Independent Countries*, which revised and improved the previous convention. Convention 169 recognized the right of Indigenous and tribal peoples to live and develop as distinct communities (Venne, 1990), elaborated on the provisions for land rights, and elevated participation rights as a key principle. Through participation rights, Indigenous peoples received additional means to exercise control over their own economic, social, and cultural development.

The entry point for Indigenous peoples to raise their concerns at the United Nations came through investigations into racial discrimination, when the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities recommended that a separate study on Indigenous populations be conducted under the auspices of the Special Rapporteur Jose Martinez Cobo (Oguamanam, 2004). The landmark report (Cobo, 1983), as Chidi Oguamanam (2004) explained, “set the stage for entrenchment of the indigenous question on the international agenda” (p. 355).

At the United Nations, “a number of the issues affecting indigenous peoples” began to be “addressed in the context of individual human rights regimes” (Wiessner, 2007, Historical context and legal context section, para. 2). The Human Rights Committee (HRC) in its interpretation of Article 27 of the *International Covenant on Civil and Political Rights* (International Covenant on Civil and Political Rights [ICCPR], 1976), which recognizes the rights of ethnic, religious, or linguistic

minorities “to enjoy their own culture, to profess and practice their own religion, or to use their own language” and that “culture manifests itself in many forms, including a particular way of life associated with the use of land resources, especially in the case of indigenous peoples” (HRC, 1994, para. 2).

Similar to the HRC, the supervisory body of the *International Covenant on Economic, Social and Cultural Rights* (ICESCR, 1976) understood that, in order to fulfill the right to enjoy and maintain one’s culture, Indigenous peoples must be able to participate in any decisions that would affect their collective right to lands and resources (Matiation & Boudreau, 2006; Ward, 2011). Moreover, the goal of the state should be to acquire consent prior to using lands, territories, and resources traditionally used and enjoyed by Indigenous communities (Committee on Economic, Social, and Cultural Rights [CESCR], 2001; CESCR, 2004). As stated in the Committee on Economic, Social and Cultural Committee’s General Comment No. 21 (1997):

Indigenous peoples’ cultural values and rights associated with their ancestral lands and their relationship with nature should be regarded with respect and protected, in order to prevent the degradation of their particular way of life, including their means of subsistence, the loss of their natural resources and, ultimately, their cultural identity. States parties must therefore take measures to recognize and protect the rights of indigenous peoples to own, develop, control and use their communal lands, territories and resources, and, where they have been otherwise inhabited or used without their free and informed consent, take steps to return these lands and territories. (para. 36)

In General Recommendation No. 23, the Committee on the Elimination of Racial Discrimination (CERD, 1997) called upon all states to “ensure that members of indigenous peoples have equal rights in respect of effective participation in public life and that no decisions directly relating to their rights and interests are taken without their informed consent” (para. 3(d)). CERD then referred to informed consent again in the context of the rights of Indigenous peoples to own, develop, control, and use their communal lands, territories, and resources (CERD, 1997).

At the regional level, the Inter-American Court of Human Rights (Inter-American Court) and the Inter-American Commission on Human Rights (Inter-American Commission) have interpreted the *American Declaration of the Rights and Duties of Man* (American Declaration, 1948) and the *American Convention on Human Rights* (Organization of American States, 1969) in ways that have been very beneficial for Indigenous peoples. Similar to the steps taken to get to the UNDRIP, the jurisprudence emanating from the Inter-American human rights system did not occur in a vacuum. The Inter-American Court and Commission engaged in evolutive interpretation, employing decisions from other courts, utilizing authoritative interpretations of human rights norms, while simultaneously understanding that “greater cultural and ideological homogeneity of a region permits agreement on a fuller list of human rights” (Neuman, 2008, p. 106).

The above was in no way an authoritative overview of the evolution of Indigenous peoples’ rights. What it was trying to demonstrate is the variety of ways in which human rights norms concerning Indigenous peoples’ rights intermingle, cross-fertilize, and integrate. This dynamic relationship between the various sources of law has had a tremendous impact regionally and locally, changing how states interact with the Indigenous peoples living within their borders.

One of the aims of this article will be to explore this dynamic relationship, paying particular attention to the African human rights system. The main reason for the focus on Africa is that its human rights

regime has been reluctant at times to utilize external sources relating to Indigenous peoples, and also hesitant to even acknowledge Indigenous peoples' rights, whether philosophically, politically or legally. Recently however, the African Commission on Human and Peoples' Rights appears to be receptive to integrating the concerns of Indigenous peoples, and in the example of the *Endorois* decision one could notice the cross-fertilization of human rights norms. This deserves further study along with an investigation into what this could mean for Indigenous peoples' rights in the African context in the future.

Indigenusness in Africa: A Contested Concept

The concept of Indigenous peoples, and the catalogue of Indigenous peoples' rights that followed, stemmed from numerous grassroots movements that were mainly focused on the Americas and Australasia. In these regions, there was a morally compelling claim made by "first peoples" who were dislocated from their traditional way of life through colonial conquest, mass murder, dispossession, and displacement (Viljoen, 2007). The earlier human rights instruments dealing with Indigenous and tribal peoples, such as the ILO Conventions, reflected the focus on historic continuity with pre-invasion and pre-colonialism. When it came to Africa, however, the acceptance of Indigenous peoples or Indigenous communities became a contentious issue, with the main argument being that all Africans are indigenous to Africa and no particular group can claim Indigenous status (Bojosi & Wachira, 2006).

Another reason why African governments have resisted recognizing Indigenous peoples is the uneasiness about the rights associated with such recognition, namely the right to self-determination. After achieving independence, African states pursued a policy of national unity, where the hegemony of the post-colonial state depended on silencing counter-hegemonic voices and drowning out distinctive cultures and identities (Viljoen, 2007). Questions arose over the strategic and conceptual applicability of the concept in Africa, privileging certain sections of the population and resulting in the undermining of the already fragile nation building that was underway (Viljoen, 2007). Many saw indigenusness as a global interpretation of a Western-originated concept that needed to be refocused if it was to be relevant for the African continent (Viljoen, 2007).

The full extent of Africa's concerns and resistance to Indigenous peoples' rights became even clearer when the text of the UNDRIP reached the General Assembly, where Namibia, with the support of many African states, asked for the vote on the UNDRIP to be deferred in order to allow for more consideration of African concerns (Barume, 2009). As a group, African states and governments (the African Group) published seven of their concerns in a *Draft Aide Memoire* dated November 9, 2006 (African Group, 2006). As stated in this communication, the African Group (2006):

- Wanted a definition of "indigenous" in order to determine who would be the rights holders;
- Objected to the right to self-determination because they were fearful it would cause threats to political stability and territorial integrity;
- Recognized that, by allowing for the right to political, social, and cultural institutions, the UNDRIP contradicted several constitutions that promote unified states;
- Feared that accepting the right to belong to an Indigenous community meant that people could change their nationalities freely, resulting in political instability;

- Believed that the concept of free, prior, and informed consent meant that Indigenous communities could veto national legislation;
- Felt that recognizing the rights of Indigenous peoples to the lands, territories, and natural resources they traditionally owned, occupied, or acquired was unworkable and in breach of states' rights over land and natural resources;
- And, in relation to respecting treaties that have historically been made between Indigenous peoples and states, claimed that only treaties were exclusively a state matter.

While it is beyond the scope of this article to fully elaborate on the lobbying and discussions that took place with the African Group prior to the adoption of UNDRIP in 2007 (Barume, 2009), it is important to note that the concept of Indigenous peoples' rights would only finally find its home in the African human rights system with the establishment of the African Commission on Human and Peoples' Rights Working Group of Experts on Indigenous Populations/Communities (Bojosi & Wachira, 2006). Prior to this working group, the concept of Indigenous peoples was not embraced by the African Commission, as is reflected in the earlier jurisprudence, an issue which will be addressed in more detail in the following section.

By asking the experts to examine the concept of Indigenous peoples in Africa, the African Commission, whether knowingly or not, allowed for an African perspective on indigenes, and one that would be used during human rights litigation at the regional level. Although keenly aware of the controversy surrounding the concept of Indigenous peoples in Africa, in the *Report of the African Commission's Working Group of Experts on Indigenous Populations/Communities* (Report of the African Commission's Working Group, 2005), the Working Group of Experts adopted a more flexible approach to the term indigenous, distancing it from aboriginality and instead focusing on the following characteristics: marginalization, discrimination, and exclusion from developmental processes; occupation and use of a specific territory; voluntary perpetuation of cultural distinctiveness; and, survival of their particular way of life dependent on access and rights to their traditional land and the natural resources thereon (Bojosi & Wachira, 2006).

Following the release of the above-mentioned report, the African Commission, which has a promotional and protective mandate with regards to the human rights enshrined in the African Charter for Human and Peoples' Rights (1982), reaffirmed that Indigenous peoples' rights do exist, are compatible with, and are relevant for, Africa and hence released their *Advisory Opinion on the United Nations Declaration on the Rights of Indigenous Peoples* ("Advisory Opinion," 2007). The "Advisory Opinion" (2007) concluded by saying:

... The African Commission on Human and Peoples' Rights recommends that African States should promote an African common position that will inform the United Nations Declaration on the Rights of Indigenous Peoples with the African perspective so as to consolidate the overall consensus achieved by the international community on the issue. (para. 44)

The African Commission on Human and Peoples' Rights and Indigenous Peoples, Pre-Endorois

Brief Overview of the African Commission on Human and Peoples' Rights

Lying at the core of the African human rights regime is the *African Charter on Human and Peoples' Rights* (African Charter, 1982), which was adopted in 1982 and entered into force in 1986 following ratification by a majority of member states of the Organisation of African Unity (Pentassuglia, 2010). Included in the African Charter is the classic catalogue of civil, political, social, economic, and cultural rights found in other human rights treaties, but the African Charter also enshrines a number of "peoples' rights."¹ At the time of drafting, the concept of peoples' rights was not seen as something new, as the ICCPR and the ICESCR also referred to peoples' rights. However, the inclusion of this concept was meant to reflect African values and traditions and to address the real needs of Africans in their pursuit of development (Viljoen, 2007). Of course, there are numerous ways² to understand the concept of "peoples" in the context of the African Charter, particularly in relation to Indigenous communities. This idea will be explored later on in this section.

As set out in the African Charter, the African Commission on Human and Peoples' Rights (the African Commission) was established with a specific mandate to promote all rights contained within the African Charter and to ensure their protection. The promotional and protective functions of the Commission were achieved through examining states' reports;³ receiving communications from individuals, NGOs, or state parties on alleged violations;⁴ and interpreting the Charter⁵ more generally (Pentassuglia, 2010). The African Commission continues to be the central institution enhancing human rights protection across Africa (Pentassuglia, 2010).

Uniqueness of the African Charter, Reluctance of the African Commission

Apart from the inclusion of the concept of peoples' rights, one of the more unique attributes of the African human rights system is the explicit reference to external sources. The Charter effectively implores the African Commission to use international human rights instruments in order to assist in the interpretation of the norms enumerated therein (Shepherd & Sing'Oei, 2010). As Article 60 of the African Charter (1982) stated:

The Commission shall draw inspiration from international law on human and peoples' rights, particularly from the provisions of various African instruments on Human and Peoples' Rights, the Charter of the United Nations, the Charter of the Organisation of African Unity, the Universal Declaration of Human Rights, other instruments adopted by the United Nations and by African countries in the field of Human and Peoples' Rights, as well as from the provisions of various instruments adopted within the Specialised Agencies of the United Nations of which the Parties to the present Charter are members.

¹ See *African Charter*, 1982, Articles 19-24.

² Frans Viljoen (2007), for example, enumerates three ways to understanding this term:

1. Essentially encompassing everyone.
2. Denoting a distinct minority group.
3. Denoting the inhabitants of a group under alien domination. (pp. 243-244)

³ See *African Charter*, 1982, Article 62.

⁴ See *African Charter*, 1982, Article 47, Article 55.

⁵ See *African Charter*, 1982, Article 45(3).

Likewise, Article 61 stated:

The Commission shall also take into consideration, as subsidiary measures to determine the principles of law, other general or special international conventions, laying down rules expressly recognised by Member States of the Organisation of African Unity, African practices consistent with international norms on Human and Peoples' Rights, customs generally accepted as law, general principles of law recognised by African States as well as legal precedents and doctrine.

Although superfluous at first glance, in the sense that other regional and international human rights systems do not have similar provisions yet still use other sources as interpretive guides, the Commission has at its disposal, by including these provisions, a wide array of possible sources that could provide guidance (Viljoen, 2007). In practice, the Commission appears to view Articles 60 and 61 as working together to include relevant international law principles that relate to the Charter and the issue under consideration (Shepherd & Sing'Oei, 2010). As the Commission itself stated in *Democratic Republic of Congo v Burundi, Rwanda and Uganda* (2003):

The combined effect of Articles 60 and 61 of the African Charter enables the Commission to draw inspiration from international law on human and peoples' rights, the Charter of the United Nations, the Charter of the Organisation of African Unity and also to take into consideration, as subsidiary measures to determine the principles of law, other general or special international conventions, laying down rules recognized by Member States of the Organization of African Unity, general principles recognized by African States as well as legal precedents and doctrine. ("The Merits," para. 5; see also Shepherd & Sing'Oei, 2010, p. 91)

Unfortunately, the African Commission seemed to avoid reference to external sources in its first years, using them only to distinguish the African system from other human rights systems (Neuman, 2011; Viljoen, 2007). According to Frans Viljoen (2007), "this initial neglect may in part have been a deliberate attempt not to alienate states and to establish the Commission as an African institution, but in part also reflected the initial absence of reasoned and well-researched findings" (p. 345).

However, this reluctance to use external sources has changed markedly. Since 2001, the African Commission often refers to United Nations treaties, General Comments, Human Rights Committee jurisprudence, regional human rights instruments and decisions, and even references "soft" law (Viljoen, 2007). As will be explored in the sections below, Articles 60 and 61 have been used for the benefit of Indigenous peoples in Africa and will hopefully be used to develop even more progressive jurisprudence that will further Indigenous rights.

"Peoples' Rights" and the African Commission

As mentioned above, the concept of *peoples* in the Charter is uncertain, and the relationship of this term to Indigenous peoples was mired in even more controversy because of the contested nature of indigeness in Africa. However, prior to the *Endorois* decision, the African Commission had the opportunity to develop a deeper understanding of the term peoples in two cases: *Katangese Peoples' Congress v Zaire* (*Katangese Peoples' Congress v Zaire* [Katangese Secession], 1995) and *The Social and Economic Rights Action Center and the Center for Economic and Social Rights v. Nigeria* (*The Social and Economic Rights Action Center and the Center for Economic and Social Rights v. Nigeria* [Ogoni], 2001).

The *Katangese Secession* (1995) case concerned a claim that Katanga was entitled to independence under Article 20(1) of the Charter and, therefore, the right to secede from Zaire. In deciding whether or not to recognize the right of Katanga to self-determination, the African Commission was asked, albeit implicitly, to present a definition of peoples (Viljoen, 2007). However, the African Commission refrained from elaborating on whether or not the Katangese “consist[ed] of one or more ethnic groups” (Katangese Secession, 1995, para. 3) and they did not feel obliged to do so as the African Commission believed that the Katangese should have exercised a “variant of self-determination that is compatible with the sovereignty and territorial integrity of Zaire” (Katangese Secession, 1995, para. 6). Importantly though, the African Commission appeared to accept that the right of peoples to self-determination could exist if there was concrete evidence of human rights violations or if groups were excluded from participating in government (Viljoen, 2007).

The *Ogoni* case was concerned with the impact of oil development activities on the Ogoni people who live in the areas surrounding the Niger delta, where most of the oil production was taking place (Pentassuglia, 2011). The African Commission found that the Nigerian government, through the Nigerian military and the State oil company, the Nigerian National Petroleum Company, violated, *inter alia*, the Ogoni peoples’ rights found in Article 21 of the Charter, namely the right of the Ogoni people to freely dispose of their wealth and natural resources (Ogoni, 2001; Pentassuglia, 2011).

Interestingly, on a number of occasions, the African Commission construed violations of various rights as a combination of individual and collective rights. For example, the African Commission stated that the levels of pollution and environmental degradation have

Made ... living in the Ogoniland a nightmare. The survival of the Ogonis depended on their land and farms that were destroyed by the direct involvement of the Government. These and similar brutalities not only persecuted individuals in Ogoniland but also the whole of the Ogoni Community as a whole. They affected the life of the Ogoni Society as a whole. (Ogoni, 2001, para. 67)

Similarly, the African Commission concluded that the right to adequate housing as implicitly protected in the African Charter, also encompasses the right to protection against forced evictions, which is a right to be enjoyed by the Ogonis as a collective right (Ogoni, 2001; Pentassuglia, 2011). Using this line of reasoning the African Commission concluded that the Nigerian government also violated the Ogonis individual and collective right to health, to property, to family health, and to a satisfactory environment favourable to development.

Although the approach of the African Commission in the Ogoni case was progressive in relation to its previous decision in the Katangese Secession case, it was still cautious, particularly with regards to using external sources in determining the rights of Indigenous peoples (Pentassuglia, 2011). However, the African Commission would utilize a more expansive approach in the Endorois decision (*The Centre for Minority Rights Development and Minority Rights Group International (on behalf of the Endorois Welfare Council) v Kenya* [Endorois], 2010).

The Endorois Decision

Background

After a 40 year struggle, the African Commission made a historical and landmark ruling that the eviction of the Endorois peoples, in order to create a wildlife reserve, violated their rights as Indigenous peoples to their customary lands to free, prior, and informed consent, to development, to culture, to religion, to health, and to natural resources (Adam, 2011).

The Endorois are a distinct Kalenjin-speaking community and for centuries have been the traditional inhabitants of the Lake Bogoria area within the Rift Valley province in Kenya (Endorois, 2010; Morel, 2004). The community consists of approximately 400 families, or 60,000 people, practicing pastoralism from early days (Endorois, 2010; Morel, 2004). The Endorois' traditional way of life has always consisted of allowing their animals to graze in the lowlands surrounding Lake Bogoria during the rainy season and retreating to the Mochongoi forest for the dry season (Endorois, 2010; Morel, 2004). The green pastures around Lake Bogoria have been vital for the health of their livestock and the lake also remains important for religious and traditional practices of the Endorois community (Endorois, 2010; Morel, 2004).

The Endorois community continued to hold, use, and enjoy this land until 1973 when, without prior consultation or consent, the land was declared a protected area (Endorois, 2010; Morel, 2004). In 1986, the Endorois community was evicted from the fertile lowlands surrounding Lake Bogoria and displaced to semi-arid land, resulting in the death of a number of their animals and their falling into economic hardships previously unknown to them (Endorois, 2010; Morel, 2004). Moreover, access to Lake Bogoria for religious and cultural purposes was restricted and even met with intimidation (Endorois, 2010; Morel, 2004).

In an effort to regain access to their lands, the Endorois community pursued various avenues of recourse through the domestic legal system but ultimately failed (Endorois, 2010; Morel, 2004). The Endorois community first launched their campaign by challenging the land and natural resource regime that was adopted, unchanged, from the British colonial powers (Shepherd & Sing'Oei, 2010). Under the colonial system, land that was occupied by recognized ethnic groups was considered "Native Land Areas" and, although controlled by the Native Lands Trust Board in London, was effectively governed under customary tenure (Shepherd & Sing'Oei, 2010). After independence, the title to the Native Land Areas was transferred to the local authorities where the County Councils were "obliged to hold the land in trust for the use and benefit of the local communities" (Shepherd & Sing'Oei, 2010, p. 61). Unfortunately, this form of land tenure system, in many instances, resulted in collusion between the central government and the local authorities to privatize or nationalize Native Land Areas with complete disregard for the local communities (Shepherd & Sing'Oei, 2010).

As this was the case for the Endorois community, they submitted a complaint to the Kenyan High Court, challenging the legality of the forced evictions and the constitutionality of the denial of access to their grazing lands, and to their cultural and religious sites (Shepherd & Sing'Oei, 2010). The Kenya High Court dismissed the Endorois' claim and stated very clearly that it "could not address the issue of a community's collective right to property" nor did they believe that Kenyan law should afford "any special protection to a peoples' land based on historical occupation and cultural rights" (Endorois, 2010, para. 12).

After exhausting all domestic remedies, the Endorois community, with the assistance of two NGOs, Centre for Minority Rights Development and Minority Rights Group International, filed an individual communication with the African Commission on Human and Peoples' Rights in 2003 claiming that the Republic of Kenya violated their right to practice religion, their right to property, their right to culture, their right to free disposition of natural resources, and their right to development.

Key Legal Arguments and the Importation of International Jurisprudence

As mentioned above, *Endorois* has been hailed as a landmark decision for Indigenous peoples' rights in Africa and adds to the catalogue of progressive jurisprudence dealing with Indigenous peoples' rights to traditional lands, territories, resources, and culture. Since the *Endorois* decision is integral to developing an understanding of the integration, cross-fertilization, and dynamic relationship of human rights law, the following section will be dedicated to an in-depth study of the numerous instances of the "borrowing" from other regional and domestic sources that can be seen in the African Commission's decision.

Determining indigenusness. Prior to discussing the merits of the alleged violations put forward by the complainants, the first substantive aspect the African Commission had to analyze was the Endorois' claim to indigenous identity (Murphy, 2012). From the outset, the African Commission noted that "the terms 'peoples' and 'indigenous community' arouse emotive debates" (Endorois, 2010, para. 148) and that "there is no universal and unambiguous definition of the concept[s]" (para. 147). However, in their first attempt to determine "indigenusness" in the African context, the African Commission took a very unique approach.

First, the African Commission stressed the uniqueness of the Charter, which departs from the narrow formulation of existing human rights instruments and instead includes the three generations of rights: civil and political; economic, social and cultural; and group rights (Endorois, 2010). Using the term *indigenous* is not meant to create a special class of citizens but is linked to the notion of *peoples*. This, in turn, is closely related to collective rights, a concept that, because of the generous provisions in the Charter, can be used to address the historical and present day injustices and inequalities felt by sections of populations with nation-states (Endorois, 2010). By allowing for a section of a population to claim protection when their rights as a collective are being violated, as was done in the *Ogoni* case, the African Commission opened the door for Indigenous peoples to claim similar protection (Report of the African Commission's Working Group, 2005).

Second, since the Charter includes provisions for peoples to retain rights as peoples and peoples are analogous to collectives, and indigenous communities fall within this parameter, the African Commission set out to provide criteria that could be used for identifying Indigenous peoples. For this task, the African Commission referred to its Working Group of Experts on Indigenous Populations/Communities, which highlighted the following criteria and shared characteristics: occupation and use of a specific territory; the voluntary perpetuation of cultural distinctiveness; self-identification as a distinct collectivity; recognition by other groups; an experience of subjugation, marginalization, exclusion, or discrimination; and survival of their particular way of life, which was dependent on access and rights to their traditional land and the natural resources thereon (Endorois, 2010).

Moreover, in applying Articles 60 and 61 of the Charter, the African Commission also took note of the internationally recognized working definition proffered by United Nations Special Rapporteur

Jose Martinez Cobo (Cobo Report, 1986)⁶ and the definition contained within the ILO Convention No. 169 (1991).⁷

Third, in attempting to dispel Kenya's argument that Endorois are not a distinct community but a mere Kalejin-speaking sub-group of the Tugen tribe, the African Commission turned to the concept of self-identification included in the above-mentioned definitions (Endorois, 2010). To do this, the African Commission relied heavily on a case from the Inter-American Court of Human Rights, *Saramaka People v Suriname* (2007). The *Saramaka* case dealt with one of six distinct Maroon groups living in Suriname, an Afro-descendent community whose ancestors were African slaves forcibly taken to Suriname during European colonization in the 17th century (Endorois, 2010). Although not fitting the narrow aboriginal, pre-Colombian concept of an Indigenous community, the *Saramaka* still claimed violations to their collective rights, most notably to property because, over time, the *Saramaka* developed an ancestral link to their land and their way of life depended heavily on the traditional use of their land (Endorois, 2010). In view of the evidence presented, the Inter-American Court considered that the *Saramaka* people made up a tribal community because they were distinct from other sections of the population and they had a special relationship with their

⁶ Cobo Report, 1986, defines "Indigenous peoples" as follows:

Indigenous communities, peoples and nations are those which, having a historical continuity with pre-invasion and pre-colonial societies that developed on their territories, consider themselves distinct from other sectors of the societies now prevailing in those territories or parts of them. They form at present non-dominant sectors of society and are determined to preserve, develop and transmit to future generations their ancestral territories, and their ethnic identity, as the basis of their continued existence as peoples, in accordance with their own cultural patterns, social institutions and legal systems. (Article 2)

This historical continuity may consist of the continuation, for an extended period reaching into the present of one or more of the following factors:

- Occupation of ancestral lands, or at least of part of them;
- Common ancestry with the original occupants of these lands;
- Culture in general, or in specific manifestations (such as religion, living under a tribal system, membership of an indigenous community, dress, means of livelihood, lifestyle, etc.);
- Language (whether used as the only language, as mother-tongue, as the habitual means of communication at home or in the family, or as the main, preferred, habitual, general, or normal language);
- Residence in certain parts of the country, or in certain regions of the world; and
- Other relevant factors.

⁷ ILO Convention No. 169 (1989) offers the following definition in Article 1:

1. 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.

2. Self-identification as indigenous or tribal shall be regarded as a fundamental criterion for determining the groups to which the provisions of this Convention apply.

ancestral land (Endorois, 2010). The Inter-American Court decided this despite some of the members of the Saramaka community not “occupy[ing] the same precise history, territory, or customs of the larger super-class of which they were a part” (Murphy, 2012, p. 177).

Noting the similarities to the claims of the Saramaka people and the Endorois, along with the Endorois' strong linkages between history, traditions, land, and culture, fulfilling much of the criteria of the above-mentioned definitions, the African Commission determined that the Endorois community was an Indigenous community and thus able to benefit from the provisions of the Charter that protect collective rights (Endorois, 2010). In supplementing previous African Commission jurisprudence concerning collective rights, and the African Commission's Working Group of Experts on Indigenous Populations/Communities interpretations, with international soft law sources and comparative jurisprudence from the Inter-American Court, the African Commission adopted an expansive definition of indigeneity, and one that will hopefully have lasting positive consequences (Murphy, 2012).

Article 8: Right to religion. The Endorois community claimed that by expelling them from their land, Kenya violated Article 8 of the Charter, the right to the free practice of religion. In determining if the Endorois' cultural practices constituted a religion under international law, the African Commission looked to its own case law (*Free Legal Assistance Group and Others v. Zaire*, 1993) on the matter but also to the Human Rights Committee. In General Comment 22, where the HRC provides an authoritative interpretation of Article 18⁸ of the ICCPR, the HRC stated: “The terms ‘belief’ and ‘religion’ are to be broadly construed. Article 18 is not limited in its application to traditional religions or to religions and beliefs with institutional characteristics or practices analogous to those of traditional religions” (HRC, 1993, para. 2). Consequently, the African Commission determined that there was a violation of Article 8 of the African Charter.

Article 14: Right to property. Following this, the African Commission examined the Endorois claim that Kenya violated their property rights as stated in Article 14 of the Charter. In determining this claim, the African Commission relied heavily on its own jurisprudence, most notably the Ogoni case, but also jurisprudence from the Inter-American Court and the European Court of Human Rights (European Court). However, prior to delving into the more substantive questions of the alleged violation, the African Commission first attempted to determine what was a property right in accordance with African and international law and whether special measures were required to protect such rights (Endorois, 2010).

The Endorois claimed that property rights had an autonomous meaning under international human rights law, which superseded national legal definitions (Endorois, 2010). The Complainants

⁸ ICCPR (1976) Article 18:

1. Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.

[...]

3. Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.

explained that Indigenous groups had a specific form of land tenure and that domestic legal systems had failed in acknowledging communal property rights, instead relying upon “formal” title (Endorois, 2010). The African Commission appeared to be in agreement as they stated: “... the first step in the protection of traditional African communities is the acknowledgement that the rights, interests and benefits of such communities in their traditional lands constitute ‘property’ under the Charter...” (Endorois, 2010, para. 187)

To support their conclusion, the African Commission referred to *Dogan and others v Turkey* (2004). This case involved villagers who were forcibly evicted after being unable to produce registered titles to the land where they were living. However, the European Court ruled that the villagers, although unable to fulfill formal domestic requirements to prove land ownership, did have rights to property because such rights were born out of possession alone (Murphy, 2012). In *Dogan and others v Turkey*, the possession mentioned previously included houses the villagers constructed themselves on the lands of their ascendants; land of their fathers which they cultivated; and the money earned from stockbreeding and tree-felling, which was used for subsistence (Endorois, 2010).

Following the reference to *Dogan and others v Turkey* (2004), the African Commission also made reference to the landmark case from the Inter-American Court, *Mayagna (Sumo) AwasTingni v Nicaragua* (AwasTingni, 2001). This judgment adopted an evolutionary interpretation of the right to property as defined in Article 21 of the American Convention,⁹ in its meaning autonomous of domestic law, recognizing Indigenous rights to communal property (AwasTingni, 2001). In its decision, the Inter-American Court acknowledged that Indigenous rights to property derived from their traditional use and occupancy patterns and did not depend on State recognition (AwasTingni, 2001). The African Commission echoed these sentiments by citing Articles 26¹⁰ and 27¹¹ of the UNDRIP (2007) and two other Inter-American Court decisions: *Case of the Moiwana Community*

⁹ American Convention (Organization of American States, 1969), Article 21 states:

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.
3. Usury and any other form of exploitation of man by man shall be prohibited by law.

¹⁰ UNDRIP (2007) Article 26:

1. Indigenous peoples have the right to the lands, territories, and resources, which they have traditionally owned, occupied, or otherwise used or acquired.
2. Indigenous peoples have the right to own, use, develop, and control the lands, territories, and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired.
3. States shall give legal recognition and protection to these lands, territories, and resources. Such recognition shall be conducted with due respect to the customs, traditions, and land tenure systems of the Indigenous peoples concerned.

¹¹ UNDRIP (2007) Article 27:

States shall establish and implement, in conjunction with indigenous peoples concerned, a fair, independent, impartial, open and transparent process, giving due recognition to indigenous peoples' laws, traditions, customs and land tenure systems, to recognize and adjudicate the rights of indigenous peoples pertaining to their lands, territories and resources, including those which were traditionally owned or otherwise occupied or used. Indigenous peoples shall have the right to participate in this process.

v Suriname (Moiwana Community, 2005) and *YakyeAxa Indigenous Community v Paraguay* (YakyAxa, 2002).

The African Commission referred again to the *Saramaka* case, where Suriname failed to recognize that the Saramaka people could enjoy and exercise property rights as a community (Endorois, 2010). This failure resulted from the Saramaka people not qualifying as a juridical personality and thus being unable to seek judicial protections against violations of their property rights (Endorois, 2010). Without appropriate land titles, Suriname believed that its duty was to simply grant members of the Saramaka community the privilege to use the land but effective control of the territory was left to the State. Kenya argued along similar lines stating that *de facto* ownership belonged to them in the absence of a land title and thus it was legally permitted to restrict access. The Inter-American Court rejected the argument in *Saramaka*. Similarly, the African Commission believed that the lack of a domestic legal framework designed to recognize communal property rights for the Saramaka in Suriname was analogous to that of the Endorois people in Kenya and Kenya had the duty to establish mechanisms to give effect to such property rights recognized in the Charter and international law (Endorois, 2010).

By denying ownership of land to the Endorois, by expropriating their land and by restricting their access, the African Commission decided that the property rights of the Endorois people had been encroached upon. Although encroachment itself is not a violation of Article 14 of the African Charter, there is a two-pronged test to determine when encroachment can be conducted: in the interest of public need and in accordance with appropriate laws (Endorois, 2010). In determining *public interest*, the African Commission stated that this test had a high threshold because it concerned the encroachment of Indigenous peoples' ancestral lands (Endorois, 2010). To elaborate on this point the African Commission referred to the Special Rapporteur of the United Nations Sub-Commission for the Promotion and Protection of Human Rights, who drafted a report on Indigenous peoples in 2004.

Limitations, if any, on this right of indigenous peoples to their natural resources must flow only from the most urgent and compelling interest of the State [...] Few if any limitations on indigenous resource rights are appropriate, because the indigenous ownership of the resources is associated with the most important and fundamental of human rights: the rights to life, food, and shelter, the right to self-determination, and the right to exist as a people. (Daes, 2004, para. 48)

Limitations on rights, the African Commission explained by referencing *Handyside v United Kingdom* (1976), must be proportionate to the legitimate aim pursued. For this, the African Commission did not believe that unlawfully evicting the Endorois from their ancestral land, destroying their possessions, and denying their property rights, were proportionate to a public need served by the Game Reserve that was set up by Kenya (Endorois, 2010). Moreover, the African Commission noted that the right to property became illusory when they lost access to Lake Bogoria, with Kenya violating the very essence of the right itself (Endorois, 2010).

In relation to the "in accordance with appropriate laws" test, the African Commission regarded consultation to be an important and related requirement. In attempting to expand upon consultation duties, the African Commission turned once again to *Saramaka*, which was a seminal case that helped to qualify the meaning of participatory rights while defining the right to consultation and where applicable the duty to obtain consent (*Saramaka*, 2007). *Saramaka* was the first time the Inter-

American Court held that “indigenous communities had the right to own the natural resources they traditionally used within their territory” (Saramaka, 2007, para. 121).

The *Saramaka* decision was also significant because it clarified whether and to what extent the State could interfere with Indigenous property rights in the exploration and extraction of natural resources located on their territory. Beyond conventional factors, the Inter-American Court was specifically required to take into consideration whether any restriction “amounted to a denial of the concerned communities traditions and customs, in a way that endangered their very survival” (Saramaka, 2007, para. 128). For this, the court established three safeguards to identify whether any restriction would violate an Indigenous populations’ survival. First, the state must ensure the right of Indigenous communities to effective participation in conformity with their customs and tradition regarding development plans. Then, it must guarantee that the Indigenous community shares in the benefits of the development plan. Finally, an environmental assessment must be performed (Saramaka, 2007). Only when those factors are respected can the state legitimately curtail Indigenous peoples’ rights to property. The African Commission concluded that no elements of the three safeguards proposed in *Saramaka* were met and this was tantamount to a violation of Article 14 of the African Charter (Endorois, 2010).

Article 17: Right to culture. Following the discussion on property, the African Commission looked into alleged violations of Article 17, where the Endorois claimed that their group’s cultural rights were denied as a result of their limited access to Lake Bogoria and by the damage caused by Kenya to their pastoralist way of life (Endorois, 2010). In this instance, the African Commission determined that:

Article 17 of the Charter is of a dual dimension in both its individual and collective nature, protecting, on the one hand, individuals’ participation in the cultural life of their community and, on the other hand, obliging the state to promote and protect traditional values recognised by a community. It thus understands culture to mean that complex whole which includes a spiritual and physical association with one’s ancestral land, knowledge, belief, art, law, morals, customs, and any other capabilities and habits acquired by humankind as a member of society - the sum total of the material and spiritual activities and products of a given social group that distinguish it from other similar groups. (Endorois, 2010, para. 241)

In reaching this conclusion, the African Commission drew inspiration from the HRC, as is reflected in their interpretation of Article 27¹² of the ICCPR, which stated:

With regard to the exercise of the cultural rights protected under article 27, the Committee observes that culture manifests itself in many forms, including a particular way of life associated with the use of land resources, especially in the case of indigenous peoples. That right may include such traditional activities as fishing or hunting and the right to live in reserves protected by law. The enjoyment of those rights may require positive legal measures of protection and measures to ensure the effective participation of members of minority communities in decisions which affect them. (HRC, 1994, para. 7)

¹² ICCPR (1976) Article 27:

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

In reading these together, the African Commission noted that not only did Kenya have a high duty to protect the cultural rights of the Endorois people but that a burden is also placed on African States to preserve the cultural heritage essential to group identity (Endorois, 2010). Due to the non-derogable nature of Kenya's responsibility to protect Endorois culture, in planning the game reserve Kenya had the obligation to ensure community access, particularly since access posed no harm to the reserve itself or to Kenya's economic incentive to develop it (Endorois, 2010; Murphy, 2012).

Article 21: Right to resources. In determining if Kenya had violated the Endorois' right to freely dispose of their wealth and natural resources, the African Commission first made reference to earlier jurisprudence, namely *Ogoni*, where they decided that Indigenous communities have a general right to the natural resources contained within their traditional lands (Endorois, 2010).

The African Commission again sought the views from the Inter-American Court through the *Saramaka* decision. In *Saramaka*, the Inter-American Court interpreted the property rights contained within the American Convention to mean that the state is precluded from interfering with the natural resources located on Indigenous land without first consulting with the Indigenous peoples and permitting them to benefit from the results of natural resource development (Murphy, 2012). The African Commission concurred with this interpretation and, as in *Saramaka*, concluded that Kenya could not institute resource development projects within Endorois territory if it affected the natural resources traditionally used by the Indigenous community and which were necessary for the survival of the members of that community (Endorois, 2010).

Article 22: Right to development. In determining if there was a violation of Article 22, the African Commission stressed the connectedness of development with participation. To do this, the African Commission took note of the *United Nations Declaration on the Right to Development* (UNDRD, 1986), which stated that the right to development includes active, free, and meaningful participation in the development process (Endorois, 2010). In *Saramaka*, the Inter-American Court noted that effective participation required the state to consult with said Indigenous community ensuring that development plans within their territory were according to their traditions and customs (Endorois, 2010).

For the African Commission, participation also refers to benefit sharing. Again reference was made to the *Saramaka* decision, where the Inter-American Court stated that benefit sharing is not only vital to the right to development but, by extension, serves as an indicator that states are complying with the communal property of Indigenous peoples (Endorois, 2010).

In addition, in determining the merits of the alleged violation of Article 22 of the Charter, the African Commission also made reference to the concept of "free, prior and informed consent." In exploring this concept, the African Commission took note of the *Mary and Carrie Dann v. United States* (2002) decision at the Inter-American Commission for Human Rights, where the Western Shoshone community was not accurately informed, nor did they give consent, prior to the US pursuing agricultural developments on their land. The African Commission also made note of the observations of the UN Special Rapporteur on the Situations of Human Rights and Fundamental Freedoms of Indigenous Peoples that free, prior, and informed consent is essential for the protection of human rights of Indigenous peoples with regards to major development projects (Endorois, 2010). Moreover, the African Commission referred to the Committee of the Elimination of Racial Discrimination, which observed that:

As to the exploitation of the subsoil resources of the traditional lands of indigenous communities, the Committee observes that merely consulting these communities falls short of meeting the requirements set out in the Committee's General Recommendation 23¹³ on the rights of indigenous peoples. The Committee therefore recommends that the prior informed consent of these communities be sought. (CERD Concluding Observations: Ecuador, 2003, para. 16)

Finally, the African Commission noted that the goal of development should be empowerment and this was not the case for the Endorois community. Similarly, the African Commission highlighted the case of the YakyaAxa community, which was displaced for the purposes of development projects leading to extremely destitute conditions for members of this community (Endorois, 2010).

Concluding Remarks: Going Beyond *Endorois*

The *Endorois* decision was a landmark ruling for Indigenous peoples in Africa and worldwide. As Cynthia Morel, the co-counsel for the Endorois stated:

¹³ Committee on the Elimination of Racial Discrimination (CERD, 1997) General Recommendation No. 23 stated:

1. In the practice of the Committee on the Elimination of Racial Discrimination, in particular in the examination of reports of States parties under article 9 of the International Convention on the Elimination of All Forms of Racial Discrimination, the situation of indigenous peoples has always been a matter of close attention and concern. In this respect, the Committee has consistently affirmed that discrimination against indigenous peoples falls under the scope of the Convention and that all appropriate means must be taken to combat and eliminate such discrimination.

[...]

3. The Committee is conscious of the fact that in many regions of the world indigenous peoples have been, and are still being, discriminated against and deprived of their human rights and fundamental freedoms and in particular that they have lost their land and resources to colonists, commercial companies and State enterprises. Consequently, the preservation of their culture and their historical identity has been and still is jeopardized.

4. The Committee calls in particular upon States parties to:

- (a) Recognize and respect indigenous distinct culture, history, language and way of life as an enrichment of the State's cultural identity and to promote its preservation;
- (b) Ensure that members of indigenous peoples are free and equal in dignity and rights and free from any discrimination, in particular that based on indigenous origin or identity;
- (c) Provide indigenous peoples with conditions allowing for a sustainable economic and social development compatible with their cultural characteristics;
- (d) Ensure that members of indigenous peoples have equal rights in respect of effective participation in public life and that no decisions directly relating to their rights and interests are taken without their informed consent;
- (e) Ensure that indigenous communities can exercise their rights to practise and revitalize their cultural traditions and customs and to preserve and to practise their languages.

5. The Committee especially calls upon States parties to recognize and protect the rights of indigenous peoples to own, develop, control and use their communal lands, territories and resources and, where they have been deprived of their lands and territories traditionally owned or otherwise inhabited or used without their free and informed consent, to take steps to return those lands and territories [...]

The African Commission's ruling makes clear to governments that they must treat indigenous peoples as active stakeholders rather than passive beneficiaries [...] That recognition is a victory for all indigenous peoples across Africa whose existence was largely ignored - both in law and in fact - until today. The ruling spells the beginning of a brighter future. (Human Rights Watch, 2010)

With the *Endorois* decision, the African Commission has also removed all doubts concerning the possibility of Indigenous peoples claiming, collectively, the right to property, natural resources, and development as protected under the African Charter. Although it is too early to draw conclusions on the impact of its jurisprudence, this decision is a major step forward for Indigenous peoples' rights in Africa. Its focus on the collective rights of Indigenous peoples to consultation and participation, and its emphasis on the requirement of free, prior, and informed consent, strengthen the distinctive interests of Indigenous peoples in the development process of their countries. Given the increasing pressures on Indigenous lands and the threat development projects cause to their livelihoods, the recognition of those rights is paramount to the survival of Indigenous peoples. Together with the Inter-American Court, the African Commission has taken a favourable move to defend the interests of Indigenous peoples and to remediate their longstanding exclusion and marginalization from the development process of their States. Locally, however, it remains to be seen whether the work of the African Commission will lead to significant changes but a few positive outcomes can already be noted, while failings from the *Endorois* decision can be highlighted in order to provide recommendations for the future.

Localizing Human Rights

Traditionally, international human rights lawyers have focused on the universality of human rights, promoting a catalogue of rights that represents a shared understanding of all peoples, the prerequisites for a life of dignity. However, for human rights to be truly relevant for all, they need to be situation specific and to be localized (De Feyter, 2006). Localizing human rights requires that the human rights needs must first be formulated at the local level before global human rights norms can be interpreted and elaborated upon, thus creating human rights actions at the global, regional, and local level (De Feyter, 2006). The international human rights regime remains a work in progress that must be contextualized (De Feyter, 2006). In other words, what we are searching for is an *inclusive universality*, which takes place on two fronts: within societies, steps must be taken to make societies more receptive to human rights; and within the international human rights system, flexibility and transformation must be understood as the way in which global human rights norms accommodate specific human rights claims (Brems, 2001).

Post-Endorois we have firsthand evidence of this concept of localizing human rights, and how it worked to address local needs. Pre-Endorois, the idea of property rights in Kenya was narrowly defined, influenced by the classic English common law, inherited through a colonialism definition. The Endorois community challenged this at the local level but was unsuccessful because there were no precedents in domestic law for the recognition of collective or communal property rights, nor were there any precedents in domestic law for the recognition of peoples' land based on historical occupation and cultural rights. In taking into consideration recent developments on Indigenous rights at the global and regional levels, and then providing an interpretation based on an African perspective, the African Commission on Human and Peoples' Rights challenged Kenya's arguments and decided in favour of the Endorois community.

At the local level, this decision not only benefitted the Endorois community, but will also have a long lasting impact in future cases. In the lengthy Kenyan constitutional review process, the perspectives of the African Commission, along with recent comparative and international decisions on Indigenous land rights, were integral in influencing negotiations (Mennen & Morel, 2012). These efforts culminated in the adoption of a new constitution in 2010, which included provisions expressly recognizing community land as equal to public and private land (Mennen & Morel, 2012). The antiquated land trust regime was eliminated and community land is now “vested directly in the communities for the protection of ancestral lands and lands traditionally occupied by hunter-gatherer communities” (Mennen & Morel, 2012, p. 82).

In keeping with the concept of localizing human rights, the ensuing question is: What can be done with the *Endorois* decision? Wilmien Wicomb and Henk Smith (2011) have noted that with the award of title in *Endorois*, the door is now open for customary communities to be seen as *peoples* and for customary land tenure to be seen as *culture*.

With respect to customary communities as peoples, Wicomb and Smith (2011) explain that, based on the African Commission’s own analysis, many customary communities would be able to identify themselves as tribal peoples or Indigenous peoples. For example, the African Commission determined the Endorois’ indigeneity through their seasonal semi-nomadic occupation of areas surrounding Lake Bogoria. However, transhumant nomadism is just one of the characteristics of Indigenous and local customary communities which occupy communal land (Wicomb & Smith, 2011).

Furthermore, the African Commission noted that the term *indigenous* is used to address historical and present-day injustices and the term *peoples* is closely related to collective rights (Endorois, 2010). By marginalizing customary law systems, and because domestic African courts have been unable to protect customary forms of tenure, the protection afforded to the Endorois community could be extended to all customary communities (Wicomb & Smith, 2011).

With respect to customary land tenure as a cultural right, Wicomb and Smith (2011) explained that when communities exercise their tenure rights within a communal system, this is an articulation of their culture or an expression of the culture of the people. In other words, land is central to the culture and cultural survival of customary communities, similar to the argument put forward by the Endorois community before the African Commission. Protecting customary forms of tenure of communities is of utmost importance, especially now in Africa, where the issue of land grabbing is of grave concern (Smis, Cambou & Ngende, 2013). In recognizing communal ownership, one hopes that the bargaining position of customary communities will be strengthened, invoking the state’s duty to consult and the requirement of free, prior, and informed consent (Wicomb & Smith, 2011).

Incorporating the UNDRIP

While *Endorois* has been hailed as a landmark decision for Indigenous peoples in Africa, we must also recognize its failings in order to highlight areas for further progress. The decision appears to refrain from elaborating upon instruments that were specifically designed to promote the rights of Indigenous peoples (Pentassuglia, 2011). Instead, the African Commission opted for jurisprudential dialogue (Pentassuglia, 2011). The UNDRIP and ILO Convention No. 169 are both notably absent from the discussion concerning the merits of the Endorois’ claims. When references to the UNDRIP are used, they appear to reiterate general principles, or perhaps expectations, and remain unused as an interpretive tool (Pentassuglia, 2011).

The idea of using the UNDRIP for the purpose of interpreting the African Charter on Human and Peoples' Rights stems from the unique provision, notably Article 60, that is contained within the Charter (Shepherd & Sing'Oei, 2010). Furthermore, to the general extent that many of the principles contained within the UNDRIP represent nothing more than the codification of norms that have already been accepted by the domestic courts throughout Africa, Article 61 of the Charter could have easily been used to incorporate the UNDRIP into the *Endorois* decision (Shepherd & Sing'Oei, 2010). The African Commission has been willing to use the procedural mechanisms contained within the Charter to reference international instruments, stating:

The African Commission is, therefore, more than willing to accept legal arguments with the support of appropriate and relevant international and regional human rights instruments, principles, norms, and standards taking into account the well recognized principle of universality which was established by the Vienna Declaration of Action of 1993 and which declares that "all human rights are universal, indivisible, interdependent, and interrelated" (*Purohit and Moore v The Gambia*, 2003, Article 48; see also Shepherd & Sing'Oei, 2010, p. 93).

Moreover, consider the above alongside the African Commission's stated position on the UNDRIP:

The African Commission on Human and Peoples' Rights welcomes the adoption of the UN Declaration on the Rights of Indigenous Peoples by the UN General Assembly on the 13th September 2007. This Declaration is a very important document for the promotion and protection of indigenous peoples' rights all over the world, including on the African continent.

The UN Declaration on the Rights of Indigenous Peoples is in line with the position and work of the African Commission on indigenous peoples' rights as expressed in the various reports, resolutions and legal opinion on the subject matter. The African Commission is confident that the Declaration will become a very valuable tool and a point of reference for the African Commission's efforts to ensure the promotion and protection of indigenous peoples' rights on the African continent. (Advisory Opinion of the African Commission Communiqué on UNDRIP, 2007, Communiqué on the UN Declaration on the Rights of Indigenous Peoples section, paras. 1-2)

The UNDRIP provides the minimum standards for the survival, dignity, and well-being for Indigenous peoples worldwide and using this framework for understanding how the rights in the Charter are to be applied to the Indigenous communities in Africa would have been monumental, not only for the African continent but also for the jurisprudential development of the norms embodied in the UNDRIP (Shepherd & Sing'Oei, 2010). An opportunity was missed in the *Endorois* case but hopefully the African Commission will think of ways to incorporate the UNDRIP in the future, particularly since "the usefulness of Article 60 and 61 of the Charter depends on the creative imagination of the [African] Commission" (Nmehielle, 2001, p. 161).

Lessons Learned

Until recently, many African governments have been reluctant to recognize Indigenous peoples as beneficiaries of the numerous rights contained within the *African Charter of Human and Peoples' Rights*. Government officials gave numerous justifications for their position, most notably expressing concerns that the fulfillment of the abovementioned rights for Indigenous peoples as a group could

have a negative impact on the stability and territorial integrity of African States. Furthermore, and perhaps even more troubling, many African officials even questioned the existence of Indigenous peoples within African borders, claiming that all Africans are Indigenous peoples. Fortunately, the engagement of the African Commission on Human and Peoples' Rights, and its Working Group of Experts on Indigenous Populations/Communities, in the development of Indigenous peoples' rights as a specific issue in African human rights law, contributed greatly in detangling the contested concept of Indigenous peoples on the African continent and helped to respond to the objections raised by the African Group of States prior to the adoption of the *United Nations Declaration on the Rights of Indigenous Peoples* (2007).

With its *Report of the African Commission's Working Group of Experts on Indigenous Populations/Communities* (2005) and its *Advisory Opinion on the United Nations Declaration on the Rights of Indigenous Peoples* (2007), the African Commission managed to provide an African perspective on the concept of Indigenous peoples and, perhaps even more significantly, developed more relevant criteria for determining indigenesness. By focusing on elements such as marginalization, exclusion, and self-identification, as opposed to the more controversial criterion to define who are considered Indigenous peoples in Africa, the African Commission and its Working Group of Experts bypassed the controversy of whether or not Indigenous peoples as a group is applicable in the African context. This position has also broadened the scope of application of Indigenous peoples' rights beyond the colonial framework and is likely to have repercussion in other parts of the world where the existence of Indigenous peoples is not fully accepted.

The contribution of the African Commission is not solely limited to offering an African perspective on Indigenous peoples or to convincingly arguing that the manner in which the rights of Indigenous peoples were framed in the UNDRIP did not represent a threat to African States. By developing a novel interpretation of the African Charter in recognizing that Indigenous groups are the rights holders of peoples' rights protected by the African Charter, the African Commission breaks with earlier suggestions that precluded Indigenous peoples from enjoying the same human rights as other peoples. At the heart of the controversy was the denial of the right of Indigenous self-determination. Even though an explicit decision has not yet been pronounced, the African Commission has set aside most uncertainties concerning the application of self-determination to the situation of Indigenous peoples in the *Ogoni* case. While endorsing an interpretation of self-determination that no longer defines the right in term of secession and independent statehood, the African Commission has confirmed that the right can be exercised within state borders, thereby dismissing arguments that would limit Indigenous self-determination on the basis that its exercise represents a threat to the territorial integrity of states.

In its landmark *Endorois* decision, the African Commission has also eliminated any doubts concerning the possibility of Indigenous peoples claiming the collective right to property, natural resources, and development as protected under the African Charter. Although it is too early to draw conclusions on the impact of its jurisprudence, this decision is a major step forward in favour of Indigenous peoples' rights in Africa. By focusing on the collective rights of Indigenous peoples to consultation and participation, and its emphasis on the requirement of free, prior, and informed consent, the *Endorois* decision contributes to highlighting the distinctive interests Indigenous peoples have in the development process of their countries. Given the increasing pressures on Indigenous lands, and the threat development projects causes to their livelihoods, the recognition of those rights is paramount to the survival of Indigenous peoples. Together with the jurisprudence of the Inter-American Court, the African Commission has taken a favourable move to defend the

interests of Indigenous peoples and to remediate their longstanding exclusion and marginalization from the development process of their states. Locally, however, it remains to be seen whether the work of the African Commission will lead to significant changes.

The general purpose of this article was to examine the various ways in which human rights norms cross-fertilize, intermingle, and integrate in an attempt to address local needs. With regards to Indigenous peoples, the struggle for their recognition and rights has occurred on a variety of stages, while changing the traditional discourse in the international legal arena and forcing the human rights regime to step away from the individual-state dichotomy. The *Endorois* decision represents the pinnacle of the human rights cross-fertilization process and a call for human rights localization. Hopefully, in going beyond *Endorois*, even with its faults, one hopes to see a continuing evolution in the advancements of Indigenous peoples' rights across Africa.

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