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# The Question of Land Grab in Africa and the Indigenous Peoples' Right to Traditional Lands, Territories and Resources\*

STEFAAN SMIS, DOROTHÉE CAMBOU & GENNY NGENDE<sup>1</sup>

On 13 September 2007, the UN General Assembly adopted the UN Declaration on the Rights of Indigenous Peoples (UNDRIP).<sup>2</sup> This event was not only a landmark for the indigenous peoples' movement but also constituted an important contribution to the universal human rights system. The declaration has indeed, after two decades of difficult negotiations, finally acknowledged that indigenous peoples are, as a group, holders of human rights.<sup>3</sup>

The adoption of the UNDRIP has confirmed that indigenous peoples' rights are crystallizing into rules of international law at the universal level. These developments have also been reflected regionally in the inter-American and, to a lesser extent, the African human rights system even though none of these regional human rights systems have adopted a binding legal instrument specifically addressing indigenous peoples' rights.<sup>4</sup> Nevertheless, through an "evolutive" interpretation of regional human rights instruments, the Inter-American Court of Human

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2. UN Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/295, U.N. Doc. A/61/L.67 and Add. 1 (Sept. 13, 2007).

3. *See id.*; *Declaration of the Rights of Indigenous Peoples*, OFF. HIGH COMM'R FOR HUM. RTS. (last visited Mar. 3, 2013), <http://www.ohchr.org/EN/Issues/IPeoples/Pages/Declaration.aspx> (showing two decades of difficult negotiations).

4. *See Areas of Work*, INT'L LAB. ORG., <http://www.ilo.org/indigenous/Aboutus/HistoryofILOswork/lang--en/index.htm> (last visited Apr. 13, 2013); *See Working Group to Prepare the Draft American Declaration on the Rights of Indigenous Peoples*, Committee on Juridical and Political Affairs, PERMANENT COUNCIL OF THE ORGANIZATION OF AMERICAN STATES <http://www.oas.org/consejo/cajp/Indigenous%20documents.asp#Record> (last visited Mar. 3, 2013) [hereinafter *Working Group*].

Rights, and recently the African Commission on Human and People's Rights, are developing an interesting body of "case law" that is contributing to a firmer understanding of indigenous peoples' rights.<sup>5</sup>

The growing recognition of indigenous peoples' rights must be confronted with the daily practice where we witness that Africa's land is again the object of foreign greed. Massive portions of land are currently being purchased by foreign investors far below market prices and often without the consent of those who live from the land, with the aim to turn these lands into lucrative projects where the state will have lost almost all rights.<sup>6</sup> The phenomenon that has been termed "land grab" has recently started to attract attention worldwide due to its intensification as a result of the global financial, food and energy crises.<sup>7</sup> Africa is, however, most affected by it.<sup>8</sup>

In the current context of Africa where controversy still exists as to who can be considered an indigenous people and where great areas of land are becoming the object of "land grabbing" projects, a better understanding and protection of the indigenous peoples' right to their land and resources is becoming a crucial issue for the survival of many of these population groups. This issue has not received sufficient attention in legal doctrine.

This contribution starts with a brief description of the causes leading to the phenomenon of land grab in Africa, followed by an overview of the instruments that have been adopted at the international level to protect indigenous peoples' rights. The UNDRIP will be presented as constituting the minimum standards for the survival, dignity and well-being of the indigenous peoples of the world,<sup>9</sup> and having the ambition to be a comprehensive instrument reflecting the current stand of indigenous rights in international law. The paper then continues with a description of some controversial issues in the UNDRIP relevant for the topic under research. Subsequently, this paper analyzes the recent practice at the African regional level, and then ends with some concluding remarks regarding the compatibility of land grab practices with standards on indigenous rights.

5. See, e.g., Ctr. for Minority Rights Dev. (Kenya) & Minority Rights Grp. Int'l on behalf of Endorois Welfare Council v. Kenya, 276/2003, Afr. Comm'n, ¶¶ 151, 162.

6. Soja Vermeulen & Lorenzo Cotula, *Over the Heads of Local People: Consultation, Consent and Recompose in Large-scale Land Deals for Biofuels Projects in Africa*, 37 J. PEASANT STUD. 899 (2010), available at [http://ccafs.cgiar.org/sites/default/files/pdf/Vermeulen\\_Cotula\\_2010.pdf](http://ccafs.cgiar.org/sites/default/files/pdf/Vermeulen_Cotula_2010.pdf).

7. Phoebe Stephens, *The Global Land Grab: An Analysis of Extant Governance Institutions*, 20 INT'L AFF. REV. 3 (2011).

8. Klaus Deininger, *Challenges Posed by the New Wave of Farmland Investment*, 38 (2) J. PEASANT STUD. 217, 218 (2011).

9. G.A. Res 61/295, *supra* note 2, art. 43.

## II. THE ISSUE OF LAND GRAB IN AFRICA

Today, in a context of financial uncertainty, which in turn has exposed the gravity of related deficiencies such as food insecurity, many governments are realizing how vital primary resources such as land can be.<sup>10</sup> Conversely, multinational companies in rich and emerging markets have recently targeted specific countries in Africa to secure land deals to respond to the food security problems,<sup>11</sup> energy crisis and the corresponding need to turn to biofuel production.<sup>12</sup> Also, the high return that agricultural investment projects seem to generate is an additional reason for the new interest in Africa's land.<sup>13</sup>

The financial crisis ushered in a new perspective in investment opportunities in the form of agricultural land because the economic collapse left investors searching for new ways to "channel their funds."<sup>14</sup> The surge in land grab is premised on an insatiable need for arable land, which in turn has been motivated by the need for food security.<sup>15</sup> It is asserted that a nexus exists between the influx of speculative investments by hedge funds, pension funds and banks and the increase in staple crop prices.<sup>16</sup> The richness and fertility of African soil, coupled with the financial turnover and economic viability in investing in the continent has led to a race to acquire African land.<sup>17</sup> Another driving force is the "climate of corporate driven globalization, neo-liberal policy regimes and natural exploitation," which has also paved the way for the acquisition of land that is occurring at an exponential rate.<sup>18</sup> This makes Africa fertile ground to exploit and to further this neo-liberal agenda, as cheap and "unused" and/or "unproductive" land has become attractive in lieu of the recent economic climate.<sup>19</sup>

The cultivation of energy crops abroad is another reason for the purchasing of African land.<sup>20</sup> As volatility in food commodity prices

10. Stephens, *supra* note 7, at 3, 5.

11. Cecilie Friis & Anette Reenberg, *Land Grab in Africa: Emerging Land System Drivers in a Teleconnected World*, GLOBAL LAND PROJECT REP. NO. 1. GLP-IPO, at 4-5 (2010); Saturnino M. Borrás Jr. & Jennifer Franco, *From Threat to Opportunity? Problems With the Idea of a 'Code of Conduct' for Land-Grabbing*, 13 YALE HUM. RTS. & DEV. L.J. 508 (2010).

12. *Id.*

13. Harry Stephan, Ryan Lobban & Jessica Benjamin, *Land Acquisitions in Africa: A Return to Franz Fanon*, 2(1) INT'L J. FOR HISTORICAL STUD. 78 (2010); GRAIN, *Pension Funds: Key Players in the Global Farmland Grab* (June 2011), at 2.

14. Stephens, *supra* note 7, at 4.

15. Stephan, *supra* note 13, at 78.

16. Stephens, *supra* note 7, at 6.

17. Stephan, *supra* note 13, at 77.

18. *Land and Research Action Network, Introduction: Global Land Grabs: Investments, Risks and Dangerous Legacies*, 54 DEVELOPMENT 5 (2011).

19. Stephens, *supra* note 7, at 4.

20. *Id.* at 5.

became apparent, it translated into volatility in oil prices; hence the need to replace fossil fuels with biofuels.<sup>21</sup> This is considered to be a win-win situation for all parties involved, as biodiversity will enable a foreign state or corporation to meet its ever-increasing demand for energy.<sup>22</sup> Conversely, the African state is said to benefit from the income derived from these deals, which will supposedly increase employment and lead to other opportunities.<sup>23</sup>

According to the Global Land Project, in 2010, between 51 and 63 million hectares of land were either part of finalized land deals or under negotiation in 27 African States.<sup>24</sup> Deininger, a senior economist at the World Bank, asserts that the 2009 demand for land in the continent was equivalent to the total land development in the region over the previous 20 years.<sup>25</sup> Prices in Africa for land purchasing or leasing are considered to be at a very low rate; thus the demand is satisfied by an abundant supply.<sup>26</sup> The inference drawn here is that sale or lease transactions are more prevalent in the region than in others. Some authors have referred to this as the “new scramble for Africa.”<sup>27</sup> In light of this, one may speak of the “africanization of land grab.”

One of the most controversial land deals was that of the Daewoo-Madagascar lease agreement, which permitted a South Korean corporation to lease 3.2 million acres of land for a period of ninety-nine years.<sup>28</sup> This amount consisted of half of Madagascar’s arable land.<sup>29</sup> This was also a prime example of a government authorizing deals without consultation or due regard to all relevant stakeholders.<sup>30</sup> Subject

21. *Id.* at 6.

22. Saturnino M. Borrás Jr. & Jennifer Franco, *From Threat to Opportunity? Problems with the Idea of a ‘Code of Conduct’ for Land-Grabbing*, 13 YALE HUM. RTS. & DEV. L.J. 508, 510 (2010).

23. *Id.*

24. Friis & Reenberg, *supra* note 11, at 11.

25. Klaus Deininger, *Challenges Posed by the New Wave of Farmland Investment*, 38(2) J. PEASANT STUD. 218 (2011).

26. Vermeulen, *supra* note 6, at 23.

27. JEREMIE GILBERT, THE NEW SCRAMBLE FOR AFRICA: TOWARDS A HUMAN RIGHTS-BASED APPROACH TO LARGE SCALE AND ACQUISITIONS IN THE SADC REGION, IN SOUTHERN AFRICAN DEVELOPMENT COMMUNITY LAND ISSUES: TOWARDS A NEW SUSTAINABLE LAND RELATIONS POLICY 144–68 (Ben Chigara ed., 2012); Vermeulen, *supra* note 6; Richard Ingwe, James Okoro & Joseph K. Ukwayi, *The New Scramble for Africa: How large-Scale Acquisition of Sub-Saharan Africa’s Land by Multinational Corporations and Rich Countries Threatens Sustainable Development*, 12(3) J. SUSTAINABLE DEV. AFR. (2010), available at [http://www.jsd-africa.com/Jsda/V12No3\\_Summer2010\\_A/PDF/The%20New%20Scramble%20for%20Africa,%20How%20Large-Scale%20Acquisition%20of%20Sub-Saharan%20Africa's%20Land%20\(Ingwe,%20Okoro,%20Ukwayi\).pdf](http://www.jsd-africa.com/Jsda/V12No3_Summer2010_A/PDF/The%20New%20Scramble%20for%20Africa,%20How%20Large-Scale%20Acquisition%20of%20Sub-Saharan%20Africa's%20Land%20(Ingwe,%20Okoro,%20Ukwayi).pdf).

28. Stephans, *supra* note 7, at 82.

29. Sheila Oviedo, *Avoiding the Land Grab. Responsible Farmland Investing in Developing Nations*, SUSTAINALYTICS, (July 2011), [http://www.sustainalytics.com/sites/default/files/avoiding-the-land-grab-responsible-farmland-investing-in-developingnations\\_final.pdf](http://www.sustainalytics.com/sites/default/files/avoiding-the-land-grab-responsible-farmland-investing-in-developingnations_final.pdf).

30. *Id.*

to the national backlash and the *coup d'état* that subsequently ensued, the deal was eventually terminated.<sup>31</sup> Similar experiences confront local populations elsewhere in Africa. In Sierra Leone, 12,500 hectares of land are being rented by a French company, and in 2010 a Swiss company acquired another 10,000 hectares.<sup>32</sup> In Guinea, 100,000 hectares of land were purchased by an American company.<sup>33</sup> A Singapore-based company purchased 300,000 hectares of land in Gabon, and a Belgian firm acquired 20,000 hectares for oil and 100,000 hectares of concession for livestock.<sup>34</sup>

These widespread land purchases have been accompanied by claims of entire villages being expropriated of their land. Often it is indigenous peoples who are being deprived of their land.<sup>35</sup> Communal land rights are being undermined by private ownership.<sup>36</sup> This is clearly highlighted by Shalmali Guttal, who claims that “[w]here [commons (water, land)] have not been individually appropriated, they are termed ‘state property’ by default.”<sup>37</sup> Investors sign contracts with governments, which in turn, claim the land as state-owned.<sup>38</sup> A 2010 World Bank report on the rising global interest in farmland shows that land grabbing has often taken place in regions where governments are corrupt or indebted.<sup>39</sup> Many of the investments did not result in developmental growth for (African) states, and the local population was left far worse than they were before the sale.<sup>40</sup> The report also makes reference to “yield gaps,” which refers to the exploitation of high arable land-to-yield ratios that benefit wealthy corporations and countries.<sup>41</sup> Since these deals often do not take the interest of indigenous populations into account and consent has not been received, this article will analyze which rights to land and resources indigenous people have under international and regional law to be able to draw conclusions as to the compatibility of these land acquisition projects with the emerging standards on indigenous peoples’ rights.

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31. *Id.* at 2.

32. GRAIN, *Land Grabbing and the Global Food Crisis* (Nov. 2011), available at <http://www.viacampesina.org/downloads/pdf/en/landgrabGRAIN-dec2011.pdf>, at 22.

33. *Id.*

34. *Id.*

35. Jérémie Gilbert, *Indigenous Peoples’ Human Rights in Africa: The Pragmatic Revolution of the African Commission on Human and Peoples’ Rights*, 60 INT’L & COMP. L. QUART. 250 (2011).

36. See Land Research Action Network, *Introduction: Global Land Grabs: Investments, Risks and Dangerous Legacies*, 54 DEVELOPMENT 5, 7 (2011).

37. *Id.*

38. *Id.*

39. See Saturnino M. Borras Jr. et al., *Towards a Better Understanding of Global Land Grabbing: An Editorial Introduction*, 38 J. PEASANT STUD. 210 (2011).

40. Land Research Action Network, *supra* note 36, at 2.

41. *Id.*

## III. INDIGENOUS PEOPLE AND THEIR RIGHTS IN INTERNATIONAL LAW

A. *Overview of Instruments and Initiatives at the Universal Level*

The cause of indigenous people has come under the limelight of the international community over the course of the last decades of the 20th century.<sup>42</sup> Before, it was an issue that only sporadically attracted some attention within the community of states, mainly in the context of the fight against discrimination and the endeavor to assimilate “tribal” and “subordinated” communities to the modernized majority.<sup>43</sup> During colonial times, some punctual initiatives by the International Labour Organization (ILO) had been taken,<sup>44</sup> but the first instrument to really address the question in a more comprehensive manner was the 1957 ILO Convention No. 107 Concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries (Convention No. 107),<sup>45</sup> supported by a Recommendation linked to that convention, namely the Indigenous and Tribal Populations Recommendation (Recommendation No. 104).<sup>46</sup> Ratified by twenty-seven states, a majority of which are countries of Latin America, the Convention had the objective to address, as a binding legal instrument, the marginalization and discrimination of indigenous and tribal populations by recognizing a number of rights and freedoms.<sup>47</sup> Examples are the prohibition from compulsory service, the right not to be discriminated against, and the right to life, education, social security, health, and participation.<sup>48</sup> More relevant for this contribution and even though it had afterwards been considered as

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42. Julian Burger & Paul Hunt, *Towards the International Protection of Indigenous Peoples' Rights*, 12 NETHERLANDS Q. HUM. RTS. 406 (1994). (The famous lectures of Professor Fransisco de Vitoria (1480-1546) of the University of Salamanca and the works of the other famous sixteenth century Spanish scholar Bartolome de las Casas prove that this is not totally true). *But see, e.g.*, Greg Marks, *Indigenous Peoples in International Law: The Significance of Fransisco de Vitoria and Bartolome de las Casas*, 13 AUST'L Y.B. INT'L L. 1-52 (1992).

43. Julian Burger & Paul Hunt, *Towards the International Protection of Indigenous Peoples' Rights*, 12 NETH. Q. OF HUM. RTS. 406 (1994).

44. The International Labour Organization showed interest in the situation of indigenous peoples already in the early 1920s. It then undertook a number of studies and in 1926 established the Committee of Experts on Native Labour to agree on standards for the protection of indigenous workers.

45. Convention Concerning the Protection and Integration of Indigenous and other Tribal and Semi-Tribal Populations in Independent Countries, June 26, 1957, 328 U.N.T.S. 247 (entered into force June 2, 1959) [hereinafter ILO Convention 107].

The convention is no longer open for ratification but remains in force for seventeen states from which five are African: Angola, Ghana, Guinea-Bissau, Malawi, and Tunisia.

46. *Id.*

47. *Id.*; Athanasios Yupsanis, *ILO Convention No. 169 Concerning Indigenous and Tribal Peoples in Independent Countries 1989-2009: an Overview*, 3 NORDIC J. INT'L LAW 79, 433-56 (2010).

48. ILO Convention 107, *supra* note 45, art. 3.

insufficient, the Convention recognized a right to individual and collective ownership of land traditionally occupied (Art. 11 Convention No. 107).<sup>49</sup> The Convention also protected indigenous and tribal populations against removal from their lands without their free consent (Art. 12 Convention No. 107).<sup>50</sup> However, for reasons of national security, national economic development, or indigenous health, broad exceptions were provided, allowing state parties to significantly curtail the right to land.<sup>51</sup> In case of displacement, compensation for lost land was to be granted of a “quality at least equal to those of the lands previously occupied by them, suitable to provide for their present needs and future development.”<sup>52</sup> Convention No. 107 placed the question of indigenous and tribal populations on the international agenda.<sup>53</sup> Convention No. 107 was, however, often criticized for its “assimilationist” and paternalistic approach as the underlying assumption was that traditional customs and culture were an impediment to social and economic development of the communities concerned as well as the states in which they were living.<sup>54</sup>

Succumbing to the growing criticism, in 1986, an ILO meeting of experts concluded that the language of Convention No. 107 was “outdated” and “destructive in the modern world” and unanimously recommended to revise the Convention.<sup>55</sup> As a result, steps were taken to draft a more up-to-date legal instrument, and in 1989, the International Labour Conference adopted Convention 169 Concerning Indigenous and Tribal Peoples in Independent Countries,<sup>56</sup> which

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49. *Id.*

50. *Id.* art. 12.

51. ALEXANDRA XANTHAKI, *INDIGENOUS RIGHTS AND UNITED NATIONS STANDARDS: SELF-DETERMINATION, CULTURE AND LAND* 63 (2007).

52. ILO Convention 107, *supra* note 45, art. 12(2).

53. *Id.* at preamble. The preamble and several provisions of the ILO Convention 107 confirm this statement. The indigenous and tribal populations are referred to as “less advanced” and governments are requested to integrate them progressively into the life of their state society hoping that they would disappear as separate groups once they have integrated into the national society. See Lee Swepston, *A New Step in the International Law on Indigenous and Tribal Peoples: ILO Convention No. 169 of 1989*, 15 OKLA. CITY U. L. REV. 682 (1990). See generally S. JAMES ANAYA, *INDIGENOUS PEOPLES IN INTERNATIONAL LAW* (1996).

54. ILO Convention 107, *supra* note 45, Preamble.

55. *Rep. of the Meeting of the Experts*, ¶ 46, reprinted in *Partial Revision of Indigenous and Tribal Populations Convention, 1957 (No. 107)*, Report VI(1), International Labour Conference, 75th Sess., at 100–18, (Geneva 1988); see Russel Lawrence Barsh, *Revision of ILO Convention No. 107*, 81 AM. J. INT’L L. 756 (1987).

56. Convention concerning Indigenous and Tribal Peoples in Independent Countries, Sept. 5, 1990, 28 I.L.M. 1382 (1989). [hereinafter ILO Convention 169]; See Athanasios Yupsanis, *ILO Convention No. 169 Concerning Indigenous and Tribal Peoples in Independent Countries 1989-2009: an Overview*, 3 NORDIC J. INT’L LAW 79, 433–56 (2010); Swepston, *supra* note 53; ANAYA, *supra* note 53, at 47–49; INTERNATIONAL LABOUR ORGANIZATION, *INDIGENOUS & TRIBAL PEOPLES’ RIGHTS IN PRACTICE: A GUIDE TO ILO CONVENTION NO. 169* (2009).

revised and improved the previous convention.<sup>57</sup> The Convention has since been ratified by some twenty-two states.<sup>58</sup> Reacting against the assimilationist tendency of Convention No. 107, Convention No. 169 now recognized a right of indigenous and tribal peoples to live and develop as distinct communities.<sup>59</sup> The Preamble confirms this shift of paradigm by stating “the developments which have taken place in international law since 1957, as well as developments in the situation of indigenous and tribal peoples in all regions of the world have made it appropriate to adopt new international standards on the subject with a view to removing the assimilationist orientation of earlier standards.”<sup>60</sup> A more elaborate and better adapted catalogue of rights is proposed in the Convention—from non-discrimination to specific economic, social and cultural rights as well as rights on participation, co-management and self-governance.<sup>61</sup> Also, the provisions on land rights, which were highly criticized,<sup>62</sup> were rephrased to better protect indigenous peoples *inter alia* via procedural mechanisms.<sup>63</sup> Compared to its predecessor, Convention No. 169 has been considered a major improvement.<sup>64</sup> Other ILO conventions that are relevant to the protection of the rights of indigenous peoples but are not specifically addressed to them are the Conventions on Equality of Opportunity and Treatment in Employment and Occupation and the Conventions Against Forced Labour.<sup>65</sup> Despite the fact that only one African state recently ratified Convention 169, ILO has initiated various projects aimed at assisting indigenous and tribal peoples in Africa as well as their governments.<sup>66</sup> Countries such as Cameroon, the Democratic Republic of Congo, Kenya, Morocco, Tanzania, and South Africa were among the beneficiaries of such support.<sup>67</sup> The ILO also supported the African Commission on Human

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57. ANAYA, *supra* note 53, at 47.

58. See NORMLEX, available at <http://www.ilo.org/ilolex/cgi-lex/ratific.pl?C169>. Among the twenty-two state parties to the Convention there is only one African state that has recently ratified the Convention—the Central African Republic.

59. See Sharon Venne, *The New Language of Assimilation: A Brief Analysis of ILO Convention no. 169*, 2 WITHOUT PREJUDICE 53 (1990).

60. ILO Convention 169, *supra* note 56, at 1384.

61. *See id.*

62. XANTHAKI, *supra* note 51, at 80. She asserts that the outdated land rights provisions of Convention 107 were one of the main reasons why the Convention had to be revised.

63. *Id.*

64. *Id.* at 90.

65. See Convention Concerning Discrimination in Respect of Employment and Occupation, June 4, 1958, 362 U.N.T.S. 31 (entered into force June 15, 1960) [hereinafter ILO Convention 111]; Convention Concerning Forced or Compulsory Labour, June 28, 1930, 39 L.N.T.S. 55 (entered into force May 1, 1932) [hereinafter ILO Convention 29]; Convention Concerning the Abolition of Forced Labour, June 25, 1957, 320 U.N.T.S. 291 (entered into force Jan. 17, 1959) [hereinafter ILO Convention 105].

66. *Areas of Work*, *supra* note 4.

67. FELIX MUKWIZA NDAHINDA, INDIGENOUSNESS IN AFRICA: A CONTESTED LEGAL

and Peoples' Rights, particularly in the context of research devoted to the analysis of constitutions, legislation and administrative acts in Africa with a view to better grasp the needs for indigenous protection.<sup>68</sup>

Around the same time, the General Assembly of the Organization of American States (OAS) adopted a resolution requesting the Inter-American Commission on Human Rights to draft a juridical instrument on indigenous populations in the Americas.<sup>69</sup> This drafting of an "American Declaration on the Rights of Indigenous Populations" took significant delay and is still under consideration by a working group of the Permanent Council.<sup>70</sup> This, however, as shown below, did not prevent the Inter-American Court on Human Rights from interpreting the American Convention on Human Rights or the ILO Convention 169 in such a way that allowed the protection of indigenous rights to come within the ambit of the Court's competence.<sup>71</sup> The organization even took the lead when it came to indigenous peoples' protection.<sup>72</sup> An interesting body of case law on indigenous peoples' rights<sup>73</sup> also served as inspiration for the African Commission on Human and Peoples' Rights in its first "indigenous peoples" case: the Endorois case.

It all started in the UN in 1971 when the UN Sub-Commission on

FRAMEWORK FOR EMPOWERMENT OF 'MARGINALIZED' COMMUNITIES 143–44 (2011); see also the references to the projects on the ILO, website at [www.ilo.org](http://www.ilo.org).

68. See, e.g., International Labour Organization, Centre for Human Rights (University of Pretoria) and African Commission on Human and Peoples' Rights, Research findings workshop Report examining constitutional, legislative and administrative provisions concerning indigenous and tribal peoples in Africa (2009), available at [http://www.ilo.org/indigenous/Resources/Eventdocumentation/Workshopseminarreports/WCMS\\_118117/lang--en/index.htm](http://www.ilo.org/indigenous/Resources/Eventdocumentation/Workshopseminarreports/WCMS_118117/lang--en/index.htm).

69. OAS, General Assembly, 19th Regular Sess., *Reports of the Inter-American Commission on Human Rights*, G.A. Res. 1022, OAS Doc. OEA/Ser.P/AG/RES/1022 (XIX-0/89) 1989, available at [http://www.oas.org/dil/AG-RES\\_1022\\_XIX-O-89\\_eng.pdf](http://www.oas.org/dil/AG-RES_1022_XIX-O-89_eng.pdf) (intending *inter alia* to use the opportunity provided by the 500th anniversary of the "meeting" of the two worlds in 1992 to adopt a juridical instrument relevant to human rights protection of indigenous peoples). See Maria Magdalena Gomez Rivera, *El Derecho Indígena Frente al Espejo de America Latina*, 26 REVISTA INSTITUTO INTERAMERICANO DE DERECHOS HUMANOS 54-58 (1998); see also Rodolfo Stavenhagen, *Los Derechos Indígenas en el Sistema Internacional: Un Sujeto en Construcción*, 26 REVISTA INSTITUTO INTERAMERICANO DE DERECHOS HUMANOS 101–02 (1998).

70. See *Working Group*, *supra* note 4 (showing a list of documents illustrating the cumbersome process of drafting an American declaration on the rights of indigenous populations).

71. ILO Convention 169, *supra* note 56.

72. *Id.*

73. See, e.g., *Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, Preliminary Objections, Judgment, Inter-Am. Ct. H.R. (ser. C) (Feb. 1, 2000); *Sahoyamaya Indigenous Community v. Paraguay*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) (Mar. 29, 2006); *Yakye Axa Indigenous Community v. Paraguay*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) (June 17, 2005); *Saramaka People v. Suriname*, Interpretation of the Judgment on Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) (Aug. 12, 2008).

the Prevention of Discrimination and Protection of Minorities appointed a special rapporteur to prepare a study on discrimination against indigenous populations.<sup>74</sup> Meanwhile, indigenous peoples lobbied successfully for the creation of a working group to instigate the development of human rights standards for indigenous peoples.<sup>75</sup> In 1982, the Working Group on Indigenous Peoples was created<sup>76</sup> with a mandate “to review developments pertaining to the promotion and protection of human rights and fundamental freedoms of indigenous populations and to give special attention to the evolution of standards concerning the rights of indigenous populations.”<sup>77</sup> The UN declared 1993 as the year of the Indigenous Peoples and later that year, the General Assembly adopted a resolution proclaiming an international decade of the world’s indigenous peoples beginning December 10, 1994, with the aim of “strengthening international cooperation for the solution of problems faced by indigenous communities in areas such as human rights, the environment, development, education, and health.”<sup>78</sup> In July 2000, ECOSOC adopted by consensus a resolution by which to establish a Permanent Forum on Indigenous Issues to “serve as an advisory body to the Council with a mandate to discuss indigenous issues within the mandate of the Council relating to economic and social development, culture, the environment, education, health and human rights.”<sup>79</sup> The Commission on Human Rights has appointed a Special

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74. The study was finally completed in 1983 when the last part was submitted. See *Study of the Problem of Discrimination Against Indigenous Populations: Final Report Submitted by the Rapporteur*, U.N. Doc. E/CN.4/Sub.2/1983/21/Add.8 (1983) (Mr. Jose R. Martinez Cobo) [hereinafter Cobo Final Report].

75. Robert T. Coulter, *The Draft UN Declaration on the Rights of Indigenous Peoples: What is it? What does it mean?*, 13 NETHERLANDS QUARTERLY ON HUMAN RIGHTS 125 (1995); Asbjorn Eide, *The Indigenous Peoples, The Working Group on Indigenous Populations and the Adoption of the UN Declaration on the Rights of Indigenous Peoples*, in MAKING THE DECLARATION WORK: THE UNITED NATIONS DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES 32 (Claire Charters & Rodolfo Stavenhagen eds., 2009) [hereinafter Adoption of the UN Dec]; Erica-Irene A Daes, *The Contribution of the Working Group on Indigenous Populations to the Genesis and Evolution of the UN Declaration on the Rights of Indigenous Peoples*, in MAKING THE DECLARATION WORK: THE UNITED NATIONS DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES 48 (Claire Charters & Rodolfo Stavenhagen eds., 2009).

76. The Working Group on Indigenous Populations (Working Group) is composed of five members of the Sub-Commission who are appointed by its chairperson. Representatives of states and indigenous peoples are encouraged to attend and participate in the annual meetings held in Geneva.

77. Econ. and Soc. Council Res. 1982/34 (May 7, 1982).

78. G.A. Res. 48/163, U.N. Doc. A/RES/48/163 (Dec. 21 1993); G.A. Res. 47/75, ¶ 2, U.N. Doc. A/RES/47/75 (Dec 14 1992). Also, on 20 December 2004 the General Assembly adopted Resolution 59/174 proclaiming a second International Decade of the World’s Indigenous People to commence on 1 January 2005. See G.A. Res. 59/174, U.N. Doc. A/RES/59/174 (Dec. 20, 2004).

79. Econ. and Soc. Council Res. 2000/22 (July 28, 2000). In the Permanent Forum, an equal number of representatives of indigenous peoples and representatives of governments sit in their personal capacity.

Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, which mandate has been renewed by the Human Rights Council.<sup>80</sup> In December 2007, an expert mechanism was set up to advise the Council on questions relating to the promotion and protection of human rights of indigenous peoples.<sup>81</sup>

To date, the most significant contribution to indigenous rights has been the drafting of the Declaration on the Rights of Indigenous Peoples. Initiated in 1985, the Working Group was able to finalize the text of the Draft Declaration at its eleventh session, in 1993.<sup>82</sup> The text then moved its way through the UN human rights standard-setting machinery.<sup>83</sup> First, the text was adopted without vote by the Sub-Commission (26 August 1994),<sup>84</sup> followed, in 2006, by a positive vote of the Human Rights Council, which had recently replaced the UN Commission on Human Rights.<sup>85</sup> Subsequently, on 13 September 2007, the UN General Assembly adopted the Declaration by a vote of 143 in favor, 11 abstentions and 4 against (Australia, Canada, New Zealand, and the United States of America).<sup>86</sup> All who are concerned with the situation of indigenous peoples have welcomed the Declaration as a major step in the protection of indigenous peoples' rights and view it as a significant contribution in the broader area of the protection of human rights.

### *B. Analysis of the Controversial Questions in the UNDRIP*

The Declaration is a lengthy treaty-like document composed of 24 preambular paragraphs, and an operative body totaling 46 substantive articles.<sup>87</sup> The drafting process of the text "reflect[s] an extraordinary liberal, transparent, and democratic procedure . . . that encouraged broad and unified indigenous input."<sup>88</sup> Some of the main hurdles in the

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80. Human Rights Council Res. 6/12 (Sept. 28, 2007).

81. Human Rights Council Res. 6/36 (Dec. 14, 2007).

82. Chairperson-Rapporteur on the Prevention of Discrimination and Protection of Minorities, Rep. of the Working Group on Indigenous Populations on its 11th Sess., Aug. 23, 1993, U.N. Doc. E/CN.4/Sub.2/1993/29 at 50–60 (1993).

83. See generally Adoption of the UN Dec, *supra* note 75, at 108–37.

84. Comm. on H.R., Rep. of the Sub-Comm'n on Prevention of Discrimination and Protection of Minorities, on its 46th Sess., Aug. 1–26, 2004, U.N. Doc. E/CN.4/Sub.2/1994/56 (Oct. 28, 1994) at 103.

85. H.R. Council, Rep. to the General Assembly on the 1st Session of the Human Rights Council, UN Doc. A/HRC/1/L.10 (2006) at 52–56.

86. See Press Release, General Assembly, General Assembly Adopts Declaration on Rights of Indigenous Peoples; 'Major Step Forward' Towards Human Rights for All, Says President, U.N. Press Release GA/10612 (Sept. 13, 2007) (Australia, Canada and New Zealand have since reconsidered their position and have officially endorsed the UN Declaration. US president Obama has also declared that the US supports the Declaration.).

87. G.A. Res 61/295, *supra* note 2.

88. Erica-Irène A. Daes, *Dilemmas Posed by the UN Draft Declaration on the Rights of Indigenous Peoples*, 63 NORDIC J. OF INT'L L. 206 (1994). See also John B. Henriksen, *The UN*

drafting of the UNDRIP were: the defining of indigenous peoples, the reference to their right to self-determination, and their access to traditional lands, territories and resources—rights which received a prominent place in the UNDRIP despite numerous states' reluctance to including these rights during the drafting process.<sup>89</sup> These controversial issues, addressed in the UNDRIP, will be briefly analyzed below.

### 1. Who are indigenous peoples?

International practice has shown that quite some controversy exists as to the definition of groups, bearer of human rights under international law.<sup>90</sup> It is not different with indigenous peoples. Although some of the instruments discussed above have attempted to define the right holders,<sup>91</sup> the UNDRIP has decided to “agree to disagree” with the objective of upholding the project of the declaration.<sup>92</sup> At times, representatives of indigenous peoples and state representatives have had radically opposing views.<sup>93</sup> While many state representatives rejected

*Declaration on the Rights of Indigenous Peoples: Some Key Issues and Events in the Process*, in MAKING THE DECLARATION WORK: THE UNITED NATIONS DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES 32, 74 (Claire Charters & Rodolfo Stavenhagen eds., 2009).

89. International Law Association, ILA Report on the Rights of Indigenous Peoples (The Hague 2010) at 20 [hereinafter ILA Report on the Rights of Indigenous Peoples]; Henriksen, *supra* note 88, at 79–81.

90. See, e.g., Douglas Sanders, *Collective Rights*, 13 HUM. RTS. Q. 168 (1991).

91. ILO Conventions referred to above have defined the right holders. If one takes ILO Convention 169, a tribal people is a group “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.” Highly relevant is whether they “descent from the populations which inhabited the country, or a geographical region to which the country belongs, at the time of conquest or colonization or the establishment of present state boundaries and who, irrespective of their legal status, retain some or all of their own social, economic and cultural and political institutions.” To these more objective criteria an important subjective one is added namely “self-identification as indigenous or tribal” group. See ILO Convention 169 Concerning Indigenous and Tribal Peoples in Independent Countries entered into force on 5 September 1990, Text in 28 I.L.M. 1382 (1989). In Operative Directive 4.20 (1991), ¶¶ 4–5, the World Bank also addressed the question of who can be considered an indigenous people (i.e., “groups with a social and cultural identity distinct from the dominant society that makes them vulnerable to being disadvantaged in the development process”). These “[i]ndigenous peoples can be identified in particular geographical areas by the presence in varying degrees of the following characteristics: (a) a close attachment to ancestral territories and to the natural resources in these areas; (b) self-identification and identification by others as members of a distinct cultural group; (c) an indigenous language, often different from the national language; (d) presence of customary social and political institutions; and (e) primarily subsistence-oriented production.” See ILO Convention 107, *supra* note 45.

92. The same approach has been used for minorities in the United Nations Declaration on Peoples Belonging to National or Ethnic, Religious and Linguistic Minorities where the minorities are not defined. The latter was adopted by the UN General Assembly in 1992. See G.A. Res. 47/135 (18 Dec. 1992); see generally Patrick Thornberry, *The UN Declaration: Background, Analysis and Observations*, in THE UN MINORITY RIGHTS DECLARATION 11–71 (A. Phillips & A. Rosas eds., 1993).

93. Asbjorn Eide, *The Indigenous Peoples, The Working Group on Indigenous Populations and the Adoption of the UN Declaration on the Rights of Indigenous Peoples*, in MAKING THE

the use of the term “people” or favored the narrowing of its meaning with the goal of preventing all possible appeal to the right of self-determination, the indigenous peoples have consistently claimed that they have the same rights.<sup>94</sup> By the end of the drafting process, African states, joined by some Asian states, generally favored the adoption of a definition in the Declaration, though they also noted either that they did not possess indigenous peoples or that all inhabitants could qualify as “indigenous peoples.”<sup>95</sup> The strategy to include a definition of the beneficiaries in the Declaration in order to limit its application or to maintain that the question was foreign to Africa was, however, unsuccessful (*see infra*).<sup>96</sup> From the beginning, the Working Group was supportive of the indigenous peoples’ demand:

Indigenous groups are unquestionably “peoples” in every political, social, cultural and ethnological meaning of this term. They have their own specific languages, laws, values and traditions; their own long histories as distinct societies and nations; and a unique economic, religious and spiritual relationship with the territories in which they have lived. It is neither logical nor scientific to treat them as the same “peoples” as their neighbors, who obviously have different languages, histories and cultures.<sup>97</sup>

The United Nations should not pretend, for the sake of a convenient legal fiction, that those differences do not exist. Although it is missing a definition, the text of the Declaration endorses the idea of equality between indigenous peoples and other peoples: “indigenous peoples and individuals are free and equal to all other peoples and individuals” in terms of dignity and rights.<sup>98</sup> The concept of belonging to the group is individually determined, but must for obvious reasons, also be “in accordance with the traditions and customs of the community and nations concerned.”<sup>99</sup> In other words, the individual belonging to a group, to a great extent, becomes a matter of personal choice as opposed to often-used theories where one’s belonging is pre-determined by

DECLARATION WORK: THE UNITED NATIONS DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES 32, 79 (Claire Charters & Rodolfo Stavenhagen eds., 2009).

94. *Id.* at 80.

95. African Group, Draft Aide Memoire on the U.N. Nations Declaration on the Rights of Indigenous Peoples (Nov. 9, 2007) [hereinafter Draft Aide Memoire]. *See also* Henriksen, *supra* note 88, at 79; Albert Barume, *Responding to the Concerns of the African States*, in MAKING THE DECLARATION WORK: THE UNITED NATIONS DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES 170–72 (Claire Charters and Rodolfo Stavenhagen eds., 2009).

96. Eide, *supra* note 93, at 80; *see* Draft Aide Memoire.

97. U.N. Sub-Comm’n on Prevention of Discrimination and Protection of Minorities, *Discrimination Against Indigenous Peoples*, U.N. Doc. E/CN.4/Sub.2/1993/26/Add.1, ¶ 7 (July 19, 1993) [hereinafter Prevention of Discrimination].

98. G.A. Res. 61/295, *supra* note 2, art. 2.

99. *Id.* art. 9.

alleged objective factors or imposed by law.<sup>100</sup> The individual approach is further reflected in Articles 8 and 33 of the Declaration<sup>101</sup> and confirmed in the report of Martinez Cobo, the Special Rapporteur on the study of discrimination against indigenous populations:

On an individual basis, an indigenous person is one who belongs to these indigenous populations through self-identification as indigenous (group consciousness) and is recognized and accepted by these populations as one of its members (acceptance by the group).

This preserves for the communities the sovereign right and power to decide who belongs to them, without external interference.<sup>102</sup>

When a definition of “indigenous peoples” is needed, reference is usually made to the now authoritative working definition elaborated by Martinez Cobo.<sup>103</sup> For him,

[i]ndigenous 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.

On an individual basis, an indigenous person is one who belongs to these indigenous populations through self-identification as indigenous (group consciousness) and is recognized and accepted by these populations as one of its members (acceptance by the group).<sup>104</sup>

The focus of the definition is the element of “historical continuity

100. See generally THOMAS M. FRANCK, *THE EMPOWERED SELF. LAW AND SOCIETY IN THE AGES OF INDIVIDUALISM* (1999).

101. Art. 8 U.N. Declaration on the Rights of Indigenous Peoples [hereinafter UNDRIP] refers to the “Indigenous peoples and individuals . . . right not to be subjected to forced assimilation or destruction of their culture” and Art. 33 UNDRIP states that “Indigenous peoples have the right to determine their own identity or membership in accordance with their customs and traditions.” See G.A. Res. 61/295, *supra* note 2, arts. 8, 33.

102. Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities, *Study of the Problem of Discrimination Against Indigenous Populations*, U.N. Doc. E/CN.4/Sub.2/1986/7/Add.4 (Vol. V), ¶¶ 381–82 (Mar. 1987) (by Jose R. Martinez Cobo) [hereinafter *Study of the Problem of Discrimination*].

103. *Id.*

104. *Study of the Problem of Discrimination, supra* note 102, ¶¶ 379–83.

with pre-invasion or pre-colonial societies.”<sup>105</sup> Therefore, the crux of the question is who originally occupied the land or more bluntly, who was there first. In a situation of Western migration and overseas resettlement, a clear distinction can be made between “those who were there first” and “those who came later.”<sup>106</sup> With respect to Africa, however, it makes less sense to speak of pre-invasion and pre-colonial societies because arguably, all African communities are to be characterized as both. The question would then turn to proving who is more indigenous/native than the other.<sup>107</sup> Echoing this argument, in January 2007, the Assembly of the African Union affirmed that the vast majority of the peoples of Africa are indigenous to the African continent.<sup>108</sup> Viljoen therefore argues that from an African perspective, there is a “need to refocus the term ‘indigenous’ to refer to ‘marginality’, and ‘self-identification,’ rather than ‘priority of time.’”<sup>109</sup> This is a view also shared by the African Commission on Human and Peoples’ Rights. In its Advisory Opinion on the United Nations Declaration on the Rights of Indigenous Peoples, it rejected the view of the African states (which defended the need to have a definition in the UN Declaration) and pointed out that it was more appropriate to only define the main characteristics used to identify indigenous populations and communities in Africa.<sup>110</sup> In particular (but not necessarily excluding other elements) the Commission suggested the following elements:

- a) Self-identification;
- b) A special attachment to and use of their traditional land whereby their ancestral land and territory have a fundamental importance for their collective physical and cultural survival as peoples;

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105. Jose R. Martinez Cobo describes historic continuity as “the continuation of, for an extended period reaching into the present, one or more of the following factors: (a) Occupation of ancestral lands, or at least of part of them; (b) Common ancestry with the original occupants of these lands; (c) Culture in general, or specific manifestations (such as religion, living under a tribal system, membership of an indigenous community, dress, means of livelihood, life-style, etc.); (d) 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); (e) Residence in certain parts of the country, or in certain regions of the world; (f) Other relevant factors.” *Id.*

106. Jérémie Gilbert, *Indigenous Peoples’ Human Rights in Africa: The Pragmatic Revolution of the African Commission on Human and Peoples’ Rights*, 60 INT’L & COMP. L. QUART. 245, 250 (2011).

107. *Id.* at 264.

108. Decision on the United Nations Declaration on the Rights of Indigenous Peoples, AU Doc., Assembly/AU/Dec.141 (VIII), ¶ 7 (Jan. 30, 2007) [hereinafter AU Doc. Assembly].

109. FRANS VILJOEN, INTERNATIONAL HUMAN RIGHTS LAW IN AFRICA 280–81 (2007).

110. Advisory Opinion on the United Nations Declaration on the Rights of Indigenous Peoples, ACHPR, 41st Sess., at 30 (May 2007), 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) [hereinafter ACHPR Advisory Opinion].

c) A state of subjugation, marginalisation, dispossession, exclusion, or discrimination because these peoples have different cultures, ways of life or mode of production than the national hegemonic and dominant model.<sup>111</sup>

With one essential exception, this position is comparable to the viewpoint of the UN Working Group on Indigenous Peoples, which worked with a flexible combination of criteria to determine the indigenous quality of a population group.<sup>112</sup> Five distinct criteria have been advanced by the Working Group to classify peoples as indigenous peoples: (1) traditional lands, (2) historical continuity, (3) distinct cultural characteristics, (4) non-dominance, and finally (5) self-identification and group consciousness.<sup>113</sup> On historical continuity, the African Commission has, for reasons explained above, a different view for the term indigenous populations. “[I]n Africa, the term indigenous populations does not mean ‘first inhabitants’ in reference to aboriginality as opposed to non-African communities or those having come from elsewhere.”<sup>114</sup> This peculiarity distinguishes Africa from the other continents where native communities have been almost annihilated by non-native populations.<sup>115</sup> With that view, the African Commission defended a view suggesting that any African can legitimately consider him/herself as an indigent on the Continent.<sup>116</sup> In the *Endorois* case (*see infra*), however, the Commission had the opportunity to apply its view to a concrete situation for the first time and decided whether the *Endorois* community constituted a beneficiary of collective rights under the African Charter on Human and Peoples’ Rights.<sup>117</sup> In identifying criteria for “indigenesness,” it referred to occupation of territory, voluntary perpetuation of culture, self-identification and recognition by other communities as indigenous.<sup>118</sup> It is relevant to note that for the Commission, even if some of the community members have joined the mainstream, the community does not lose its indigenous nature.<sup>119</sup> The question of the definition of indigenous peoples was also raised at the 2006 workshop in Yaoundé, which was co-organized by the ILO and the Working Group on

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111. *Id.*

112. U.N. Econ. and Soc. Council, Comm’n on H.R. Sub-Comm. on Prevention of Discrimination and Protection of Minorities, ¶ 11, U.N. Doc E/CN.4/Sub.2/AC.4/1995/3 (1995).

113. *Id.* ¶¶ 12–18.

114. ACHPR Advisory Opinion, *supra* note 110, at 31.

115. *Id.* at 31.

116. *Id.*

117. *Id.*

118. *Endorois Welfare Council v. Kenya*, *supra* note 5, at 162.

119. *Id.* at 34–35.

Indigenous Populations/Communities in Africa.<sup>120</sup> Not surprisingly, the ILO and Working Group again recommended taking the peculiar situation of Africa into account, suggesting not to define indigenous people, but instead proposing a criteria, similar to those used by the African Commission, to identify the indigenous peoples.<sup>121</sup>

Although it has been impossible for states to agree on an internationally accepted definition of what constitutes an indigenous community, one can fairly state that the criteria proposed by various actors involved in the debate are useful and sufficient. All criteria points to the same direction even though Africa focuses, for obvious reasons, less on historical continuity and more on marginalization. Whilst voices have been uttered to consider all Africans as being indigenous in practice, it is mainly the traditional communities of hunters-gathers and some pastoral and nomadic societies such as the pygmies in the forest areas, the San in Southern Africa, the Touareg in North-West Africa and those who continue to live at the margin of modern society, who are considered indigenous groups.<sup>122</sup>

## 2. The Right to Self-Determination for Indigenous Peoples

The controversy on the term “people” in the drafting process of the Declaration originates in the demand of indigenous peoples to be granted collective rights, particularly the right to self-determination.<sup>123</sup> Many countries expressed their reservations to recognizing collective rights in general and self-determination in particular.<sup>124</sup> For instance, during the drafting process, France and Japan rejected the existence of collective rights.<sup>125</sup> The United States proposed an approach close to what has been developed for minorities, namely individual rights to be

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120. International Labour Organization, Report of the Workshop to Determine the Scope and Methodology of the Research (Jan. 9, 2006), *available at* [http://www.ilo.org/indigenous/Resources/Publications/WCMS\\_100797/lang--en/index.htm](http://www.ilo.org/indigenous/Resources/Publications/WCMS_100797/lang--en/index.htm).

121. For the participants of the workshop, indigenous peoples are socially, culturally and economically distinct; their cultures and ways of life differ considerably from the dominant society and their cultures are often under threat, in some cases to the extent of extinction; they have a special attachment to their lands or territories because the survival of their particular way of life depends on access and rights to their traditional lands and the natural resources thereon; they suffer discrimination as they are regarded as “less developed” and “less advanced” than other more dominant sectors of society; they often live in inaccessible regions, often geographically isolated and are subjected to various forms of marginalization, both politically and socially; they are subject to domination and exploitation within national political and economic structures that are commonly designed to reflect the interests and activities of the national majority; they base themselves on self-identification, whereby the people themselves acknowledge their distinct cultural identity, way of life, and seek to perpetuate and retain their identity. *Id.* § 1.3.

122. *Id.* § 7.1.

123. ANAYA, *supra* note 53.

124. XANTHAKI, *supra* note 51, at 29–30.

125. *Id.* at 107.

exercised individually or in community with others.<sup>126</sup> As for the U.K., “[w]ith the exception of the right to self-determination, the United Kingdom did not accept the concept of collective human rights in international law.”<sup>127</sup> The right to self-determination nevertheless occupies a cardinal position in the Declaration.<sup>128</sup> This again shows how effective the indigenous movement was in pushing its agenda into the negotiating room. In no other human rights instrument did the beneficiaries play such a prominent role in the drafting.

The Declaration asserts that indigenous peoples enjoy all human rights, including the right to self-determination.<sup>129</sup> Apart from the Preamble, Article 1 of the Declaration also affirms that indigenous peoples have the right to full and effective enjoyment of all human rights and fundamental freedoms recognized by the UN and international law.<sup>130</sup> Article 3 insists on the right to self-determination in language similar to that used in common Article 1 of the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights.<sup>131</sup> This general pronouncement has to be read together with Articles 4, 5, 18, 19, 20, and 34 in order to distill the meaning and content of indigenous self-determination:

Article 3: Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

Article 4: Indigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions.

Article 5: Indigenous peoples have the right to maintain and strengthen their distinct political, legal, economic, social and cultural institutions, while retaining their right to participate fully, if they so choose, in the political, economic, social and cultural life of the State.

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126. *Id.* at 31–32.

127. Press Release, General Assembly, General Assembly Adopts Declaration of Rights of Indigenous Peoples, U.N. Press Release GA/10612 (Sept. 13, 2007).

128. *Id.*

129. G.A. Res. 61/295, *supra* note 2, at 4.

130. *Id.* at 3.

131. International Covenant on Civil and Political Rights, adopted as G.A. Res. 2200 (XXI), Annex (16 Dec. 1966), 999 U.N.T.S. 171, art. 1 at 173; International Covenant on Civil and Political Rights, Dec. 16, 1966, S. Treaty Doc. No. 95-20, 6 I.L.M. 368 (1967), 999 U.N.T.S. 171; International Covenant On Economic, Social and Cultural Rights, adopted as G.A. Res. 2200 (XXI), Annex (16 Dec. 1966), 993 U.N.T.S. 3; International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, S. Treaty Doc. No. 95-19, 6 I.L.M. 360 (1967), 993 U.N.T.S. 3.

Article 18: Indigenous peoples have the right to participate in decision-making in matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own indigenous decision-making institutions.

Article 19: States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.

Article 20:

1. Indigenous peoples have the right to maintain and develop their political, economic and social systems or institutions, to be secure in the enjoyment of their own means of subsistence and development, and to engage freely in all their traditional and other economic activities.

2. Indigenous peoples deprived of their means of subsistence and development are entitled to just and fair redress.

....

Article 34: Indigenous peoples have the right to promote, develop and maintain their institutional structures and their distinctive customs, spirituality, traditions, procedures, practices and, in the cases where they exist, juridical systems or customs, in accordance with international human rights standards.<sup>132</sup>

Indigenous peoples, being considered as a particular kind of peoples, enjoy an equal status and the same rights as those conferred to peoples in general.<sup>133</sup> Indigenous self-determination being built on the pronouncements of peoples' self-determination "does not constitute a second class exercise or expression of the rights of peoples."<sup>134</sup> In an explanatory note to the Draft Declaration, Professor Daes, Chairperson-Rapporteur of the Working Group, expounds the meaning ascribed to indigenous self-determination. She first examined the leading UN instruments on self-determination to conclude that:

"[s]elf-determination" is a continuing dynamic right, in the sense that it can be reawakened if, at any moment, representative democracy fails and no alternatives exist for the defence of fundamental rights and freedoms.

The concept of "self-determination" has accordingly taken on a new meaning in the post-colonial era. Ordinarily, it is the right of the citizens of an existing, independent State to share power democratically. However, a State may sometimes abuse this right of

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132. G.A. Res. 61/295, *supra* note 2, at 3–4, 6–7, 9 (original formatting omitted).

133. ANAYA, *supra* note 53, at 190.

134. Prevention of Discrimination, *supra* note 97, at 3.

its citizens so grievously and irreparably that the situation is tantamount to classic colonialism, and may have the same legal consequences. The international community and the present writer discourage secession as a remedy for the abuse of fundamental rights, but, as recent events around the world demonstrate, secession cannot be ruled out completely in all cases. The preferred course of action, in every case except the most extreme ones, is to encourage the State in question to share power democratically with all groups, under a constitutional formula that guarantees that the Government is “effectively representative.”<sup>135</sup>

Practice, however, has demonstrated that indigenous peoples have been marginalized politically and, except in a few cases, they seldom effectively participate in national decision-making nor have been engaged in the constitutional process of their state.

With few exceptions, indigenous peoples were never a part of State-building. They did not have an opportunity to participate in designing the modern constitutions of the States in which they live, or to share, in any meaningful way, in national decision-making. In some countries they have been excluded by law or by force, but in many countries that they have been separated by language, poverty, misery, and the prejudices of their non-indigenous neighbours. Whatever the reason, indigenous peoples in most countries have never been, and are not now, full partners in the political process and lack others' ability to use democratic means to defend their fundamental rights and freedoms.<sup>136</sup>

This observation led to the growing consensus that the indigenous peoples' fight for recognition of their right to self-determination is legitimate and legally acceptable.<sup>137</sup> It is a right to participate in political, economic, social and cultural life of the state promoting “the negotiation of arrangements to strengthen states and make them truly representative, democratic, liberal and inclusive.”<sup>138</sup> Indigenous peoples have overwhelmingly expressed their wish to participate in the decision-making process within the confines of existing state boundaries.<sup>139</sup> The fear that many states have when it comes to self-determination—that it would be used as a tool for the dismemberment of existing states—is exaggerated. Only in exceptional circumstances, when “the right to share power democratically would have been abused ‘grievously and irreparably,’”<sup>140</sup> would it be legitimate to appeal to secessionist self-

135. *Id.* at 4–5.

136. *Id.* at 5.

137. *See id.* at 5–6.

138. *Id.* at 6.

139. ANAYA, *supra* note 53, at 185, 188.

140. Catherine M. Brölmann & Marjoleine Zieck, *Some Remarks on the Draft Declaration on*

determination.<sup>141</sup> Self-determination, instead of being seen exclusively as a means to gain sovereignty or an attribute of it, must rather be considered as an aspect of a human right with all its underpinning values and connotations. For Anaya this means that:

[f]irst, self-determination is a right that inheres in human beings themselves, although collectively as “peoples” in the broadest sense of the term. Second, like all human rights, self-determination derives from common conceptions about the essential nature of human beings, and it accordingly applies universally and equally to all segments of humanity. Third, as a human right, self-determination cannot be viewed in isolation from other human rights norms but rather must be reconciled with and understood as part of the broader universe of values and prescriptions that constitute the modern human rights regime.<sup>142</sup>

The Declaration innovates in a way to exercise self-determination.<sup>143</sup> Though autonomy or self-government is generally not considered a term of art in existing international law,<sup>144</sup> and though it is rather a concept confined to domestic constitutional law, it is one of the pillars upon which the whole Declaration rests. Article 4 of the Declaration, quoted above, sets the general rule.<sup>145</sup> Combined with other substantive articles (such as Arts. 4, 21, 32, 33, 34, 35, and 36), it gives the indigenous communities the right to govern their most essential matters autonomously.<sup>146</sup> Said differently and compared to how (internal) self-determination has been interpreted by UN human rights treaty bodies such as the Human Rights Committee<sup>147</sup> and the Committee on the Elimination of All Forms of Racial Discrimination,<sup>148</sup>

*the Rights of Indigenous Peoples*, 8 LEIDEN J. OF INT'L L. 103, 107 (1995).

141. *Id.*

142. S. James Anaya, *The Right of Indigenous Peoples to Self-Determination in the Post-Declaration Era*, in MAKING THE DECLARATION WORK: THE UNITED NATIONS DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES 184 (Claire Charters and Rodolfo Stavenhagen eds., 2009).

143. G.A. Res 61/295, *supra* note 2.

144. HURST HANNUM, AUTONOMY, SOVEREIGNTY, AND SELF-DETERMINATION: THE ACCOMMODATION OF CONFLICTING RIGHTS 4 (1992).

145. G.A. Res. 61/295, *supra* note 2, art. 4.

146. *Id.* arts. 4, 21, 32, 33, 34, 35, 36.

147. Reference is made by the Human Rights Committee to self-determination as “a right belonging to all peoples to participate in their governance through democratic processes.” *See* U.N. H.R. Comm., *Rep. of the Human Rights Committee* 143, U.N. Doc. A/39/40 (1984).

148. In its General Recommendation XXI the Committee on the Elimination of All Forms of Racial Discrimination stated that “[i]n respect of the self-determination of peoples two aspects have to be distinguished. The right to self-determination of peoples has an internal aspect, i.e. the right of all peoples to pursue freely their economic, social and cultural development without outside interference. In that respect there exists a link with the right of every citizen to take part in the conduct of public affairs at any level as referred to in Article 5(c) of the International Convention on the Elimination of All Forms of Racial Discrimination. In consequence,

self-determination is more viewed as an instrument for self-rule rather than a means to achieve participation in the polite of the state. A similar view is defended by Brölmann and Zieck:

Although these [measures can] be interpreted as a means to ensure the national government is a 'representative' one, the participation envisaged seems predominantly geared to preserving indigenous autonomy. Indicative in this respect is that the gist of the participation of indigenous peoples in national affairs is confined to those instances where, without such participation, interference by the state in the 'internal affairs' of the indigenous community would be possible.<sup>149</sup>

In essence, indigenous self-determination must be considered as a means to redress past marginalization in order to be able to fully exist and develop as a distinct group.<sup>150</sup> This means that indigenous peoples must have all possibilities to participate in the decision-making process of the larger society in which it lives, but more importantly, it is also a right to an autonomous exercise of competences deemed necessary to protect the economic, social, and cultural distinctness.

### 3. The Right to Traditional Lands and Resources

The bulk of UN practice on self-determination has mainly focused on the political dimension of the right even though the basic human rights instruments also refer to the right to freely pursue its own economic development.<sup>151</sup> Although "economic self-determination" constitutes the natural counterpart of the political aspect of self-determination, however, it has never received the same attention in the UN and other circles.<sup>152</sup> It is, to quote Oloka-Onyango, "as if self-determination has been shorn of all its economic elements and [has] become solely concerned with borders, territory, and nationalism."<sup>153</sup>

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governments are to represent the whole population without distinction as to race, colour, descent, national, or ethnic origins. The external aspect of self-determination implies that all peoples have the right to determine freely their political status and their place in the international community based upon the principle of equal rights and exemplified by the liberation of peoples from colonialism and by the prohibition to subject peoples to alien subjugation, domination, and exploitation." See Office of High Comm'r for H.R., *Gen. Rec. No. 21: Right to Self-determination*, 1, U.N. Doc. CERD/48/Misc.7/Rev.3 (Aug. 23, 1996) [hereinafter *Gen. Rec. No. 21*].

149. Brölmann & Zieck, *supra* note 140, at 106.

150. FELIX MUKWIZA NDAHINDA, *INDIGENOUSNESS IN AFRICA: A CONTESTED LEGAL FRAMEWORK FOR EMPOWERMENT OF 'MARGINALIZED' COMMUNITIES* 143–44 (1st ed., 2011).

151. Alice Farmer, *Toward a Meaningful Rebirth of Economic Self-Determination: Human Rights Realization in Resources-Rich Countries*, 39 N.Y.U. J. INT'L L. & POL. 417, 457 (2006).

152. See *id.* at 419.

153. J. Oloka-Onyango, *Heretical Reflection on the Right to Self-Determination: Prospects and Problems for a Democratic Global Future in the New Millennium*, 15 AM. U. INT'L L. REV. 156 (1999).

Despite its codification as a distinct form of self-determination, the application of economic self-determination has mainly been approached from a state-centric perspective, considering the state rather than the people as the right holder.<sup>154</sup> The indigenous claims to land and territories are closely linked to the economic aspect of self-determination because without control of their traditional lands and natural resources, efforts to preserve indigenous distinctness will not bear fruit.<sup>155</sup> The UNDRIP therefore refers to political as well as economic self-determination.<sup>156</sup> Moreover, by devoting a number of provisions to indigenous peoples' rights to their traditional lands, territories and resources, it obliges the analyst to pay more attention to an aspect that has greatly been neglected in the traditional self-determination debate.<sup>157</sup>

Traditional lands and resources have always been important for the survival of indigenous peoples.<sup>158</sup> It was mentioned above that ILO Convention 169 was drafted to respond to the criticism uttered against its predecessor—criticism also related to the insufficient protection of land rights.<sup>159</sup> Recognizing rights for indigenous peoples without regulating the land question is to a great extent meaningless.<sup>160</sup> To quote Martinez Cobo,

[i]t is essential to know and understand the deeply spiritual special relationship between indigenous peoples and their land as basic to their existence as such and to all their beliefs, customs, traditions and culture . . . . Their land is not a commodity which can be acquired, but a material element to be enjoyed freely.<sup>161</sup>

The UN has consistently, through its human rights bodies, acknowledged that to be effective, the indigenous peoples' right to exist as a distinct cultural community must include rights over their traditional lands and resources.<sup>162</sup> Another avenue that has frequently

154. Farmer, *supra* note 151, at 448.

155. *Id.* at 426.

156. G.A. Res. 61/295, *supra* note 2, ¶ 3.

157. *International Work Group of Indigenous Affairs, Indigenous Peoples in Africa: The Forgotten Peoples?*, ACHPR (2006), available at [http://www.achpr.org/files/special-mechanisms/indigenous-populations/achpr\\_wgip\\_report\\_summary\\_version\\_eng.pdf](http://www.achpr.org/files/special-mechanisms/indigenous-populations/achpr_wgip_report_summary_version_eng.pdf).

158. *Id.*

159. *See id.*

160. Study of the Problem of Discrimination, *supra* note 102.

161. *Id.* ¶ 197.

162. *See UNESCO, UNESCO and Indigenous Peoples: Partnership to Promote Cultural Diversity* (May 2006), available at <http://unesdoc.unesco.org/images/0013/001356/135656M.pdf> [hereinafter UNESCO Cultural Diversity]. Martinez Cobo, Study of the Problem of Discrimination Against Indigenous People, UN Docs E/CN.4/Sub.2/476, E/CN.4/Sub.2/1982/2, E/CN.4/Sub.2/1983/21; Working Paper of the Sub-Commission on Prevention of Discrimination and Protection of Minorities, *Working Paper of the UN Working Group on Indigenous Populations by the Chairperson-Rapporteur, on the Concept of "Indigenous People"*, UN Doc

been used by international and regional organizations to recognize land and resource rights to indigenous peoples is a non-discriminatory application of property rights, which would result in the state not necessarily “owning” indigenous land and resources.<sup>163</sup> According to Mattias Ahren, “it is discriminatory to design a domestic legal system in such a way that stationary land use common to the non-indigenous population results in rights to [land, territory, and resource right] whereas more fluctuating use of land, common in many indigenous cultures, does not.”<sup>164</sup> The legal system must not only be formally nondiscriminatory, “it must also guarantee equal treatment in substance.”<sup>165</sup>

The controversy regarding indigenous peoples’ rights to their land and natural resources remains, however, heavily contested; and the UNDRIP fails to fully clarify the position of international law in this regard.<sup>166</sup> The negotiations of the land and resources provision of the Declaration were extremely difficult<sup>167</sup> and delayed the adoption of the Declaration until the end. The dependence on lands and resources for indigenous peoples’ survival is recognized in the preamble of the Declaration (in recital 6) and various provisions specify the content of indigenous peoples’ land and resource rights.<sup>168</sup> The most important provisions are the following:

Article 25:

Indigenous peoples have the right to maintain and strengthen their distinctive spiritual relationship with their traditionally owned or otherwise occupied and used lands, territories, waters and coastal seas and other resources and to uphold their responsibilities to future generations in this regard.

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

/CN.4/Sub.2/AC.4/1996/2 (June 10, 1996) (by Erica-Irene A. Daes).

163. See *Saramaka People v. Suriname*, Judgment, Order of the Court, Inter-Am. Ct. H.R., 204 (ser. E) No. 172 (Nov. 28, 2007).

164. Mattias Ahren, *The Provisions on Lands, Territories and Natural Resources in the UN Declaration on the Rights of Indigenous Peoples: An Introduction*, in MAKING THE DECLARATION WORK: THE UNITED NATIONS DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES (Claire Charters & Rodolfo Stavenhagen eds., 2009).

165. *Id.*

166. ILO Report on the Rights of Indigenous Peoples, *supra* note 89, at 21.

167. Ahren, *supra* note 164, at 205–09.

168. Similar but less far-reaching and less detailed provisions are found in Articles 13, 14 and 15 of ILO Convention 169.

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.

....

Article 28:

1. Indigenous peoples have the right to redress, by means that can include restitution or, when this is not possible, just, fair and equitable compensation, for the lands, territories and resources which they have traditionally owned or otherwise occupied or used, and which have been confiscated, taken, occupied, used or damaged without their free, prior and informed consent.

2. Unless otherwise freely agreed upon by the peoples concerned, compensation shall take the form of lands, territories and resources equal in quality, size and legal status or of monetary compensation or other appropriate redress.<sup>169</sup>

The first provision recognizes the special (spiritual) relationship between indigenous peoples and their traditional lands.<sup>170</sup> One could argue that this is more a general statement without far-reaching legal consequences. The two latter provisions are much more significant in terms of law and corresponding state obligations.<sup>171</sup> They stipulate that indigenous peoples have a right of ownership over these lands and resources, and that they consequently have a right to control and decide how to use and develop them.<sup>172</sup> Ownership should not be construed in its traditional Western view of property rights but more in the sense of custody and usufructs of something belonging collectively to past, present and future generations. According to the International Law Association, land rights are not aimed at safeguarding “property rights,” *i.e.*, an exclusive absolute right to use, enjoy and dispose of a thing (*uti, frui, fui*)—which according to the Western world, has an *economic* connotation—but rather as a prerogative with a primarily spiritual, *i.e.*, cultural, purpose.<sup>173</sup> In other words, the right is functional to the safeguarding—through ensuring the maintenance of the special link between indigenous peoples and their Motherland—of the very distinct cultural identity of indigenous peoples as well as of their ability to survive and flourish as *different* human communities.<sup>174</sup>

What is important is whether the traditional land and resources

169. G.A. Res. 61/295, *supra* note 2, at 7–8 (original formatting omitted).

170. *Id.* at 10.

171. *Id.*

172. *Id.*

173. ILA Report on the Rights of Indigenous Peoples, *supra* note 89.

174. *Id.* at 12.

have been in “use” by indigenous peoples rather than “owned” by them. In situations where they have lost their land and resources without consent, indigenous peoples have a right to redress preferably via restitution or alternatively via fair and equitable compensation.<sup>175</sup> Compared to ILO Convention 169, the Declaration constitutes an important improvement for indigenous peoples because, besides restating what was already recognized in that convention, it refers for the first time to the right over traditional lands and resources they have been deprived of.<sup>176</sup> This right of restitution, however, could be construed on the basis of universal and regional human rights instruments such as the International Covenant on Civil and Political Rights, the Covenant on the Elimination of All Forms of Racial Discrimination, and the African Charter on Human and Peoples’ Rights. For example, in General Recommendation XXIII on indigenous peoples, the Committee of the Elimination of Racial Discrimination stipulated that:

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. Only when this is for factual reasons not possible, the right to restitution should be substituted by the right to just, fair and prompt compensation. Such compensation should as far as possible take the form of lands and territories.<sup>177</sup>

Although the consensus around rights to traditional lands and resources was hard to reach for political and financial reasons, the Declaration mainly codifies existing rules on the issue.<sup>178</sup> This view, combined with the growing recent state practice, has shown that land rights, although not fully crystallized, have entered the domain of customary international law.<sup>179</sup>

It is relevant to note that even though the Declaration recognizes that indigenous peoples possess extended land rights, it remains silent

175. G.A. Res 61/295, *supra* note 2, ¶ 28.

176. Ahren, *supra* note 164, at 212.

177. CERD, General Recommendation XXIII, Rights of Indigenous Peoples, 55th sess., U.N. Doc. A/52/18, annex V at 122 (1997), reprinted in Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.6 at 213 (2003).

178. Declaration of the Rights of Indigenous Peoples, OFF. HIGH COMM’R FOR HUM. RTS. (last visited Mar. 3, 2013), available at <http://www.ohchr.org/EN/Issues/IPeoples/Pages/Declaration.aspx>; Ahren, *supra* note 164, at 213.

179. ILA Report on the Rights of Indigenous Peoples, *supra* note 89, at 23.

when it comes to defining the concept of traditional lands.<sup>180</sup> As will be shown below, the regional human rights systems currently involved with indigenous peoples' rights have been able to define the concept in such a way that it becomes very significant for indigenous peoples.

#### 4. The legal value of the UNDRIP

The UNDRIP has been adopted as a resolution of the UN General Assembly and has therefore, legally speaking, only the status of a recommendation.<sup>181</sup> There is, however, a growing understanding that the Declaration (if not all provisions, at least some of them) can be considered as declaratory of customary international law<sup>182</sup> or “an authoritative statement of norms concerning indigenous peoples on the basis of generally applicable human rights principles.”<sup>183</sup> Not only did the drafting process mirror that of an international treaty, it was also adopted by a significant majority of 143, 4 against, and with 11 abstentions.<sup>184</sup> States, which voted against the Declaration, have recently declared a willingness/readiness to endorse the Declaration.<sup>185</sup> Practice on indigenous peoples' rights is growing at the regional and state levels.<sup>186</sup> This has prompted the ILA to conclude that it can now be considered as a reflection of customary international law.<sup>187</sup> It is relevant to note that the African Commission, in its first decision on indigenous peoples' rights extensively quoted the UN Declaration, thereby showing that it considered it to possess an *opinio juris* character.<sup>188</sup>

### IV. AFRICAN REGIONAL PRACTICE

#### *A. The emergence of an indigenous friendly interpretation of the African human rights instruments*

The recognition of indigenous peoples as holders of specific human rights in Africa is of very recent date and is mainly due to ground work done by international NGOs therein, followed by the African Commission on Human and Peoples' Rights (African

180. ILA Report on the Rights of Indigenous Peoples, *supra* note 89, at 20–21; G.A. Res 61/295, *supra* note 2, at 10.

181. ILA Report on the Rights of Indigenous Peoples, *supra* note 89, at 5.

182. S. Wiessner, *Indigenous Sovereignty: A Reassessment in Light of the UN Declaration on the Rights of Indigenous Peoples*, 41 VAND. J. TRANSNAT'L L. 1176 (2008).

183. XANTHAKI, *supra* note 51, at 120.

184. ILA Report on the Rights of Indigenous Peoples, *supra* note 89, at 4–5.

185. *Id.* at 5.

186. *Id.* at 47, 49.

187. *Id.* at 6.

188. Endorois Welfare Council v. Kenya, *supra* note 5.

Commission).<sup>189</sup> The origin of Africa's involvement with indigenous peoples' rights can be traced back to an international conference on indigenous peoples in Africa organized by the International Work Group for Indigenous Affairs (IWGIA) in Arusha in 1999.<sup>190</sup> The conference was attended by the African Commissioner Pityana who encouraged "the African Commission . . . to address the human rights situation of indigenous peoples in Africa, which it had so far never done before."<sup>191</sup> Initially, however, the African Commission opposed the idea to consider any issue relating to indigenous peoples; however, already one year after the conference it decided to put the question of indigenous peoples on its agenda as a specific item of interest. This encouraged both the Commission and indigenous peoples' organizations to pursue the matter further.<sup>192</sup> In 2000, a Working Group on Indigenous Populations/Communities (Working Group) was set up by the African Commission with a mandate to "[e]xamine the concept of indigenous peoples and communities in Africa; Study the implications of the ACHPR and well being of indigenous communities; Consider appropriate recommendations for the monitoring and protection of the rights of indigenous communities; and Submit a report to the African Commission."<sup>193</sup>

Between 2000 and 2003, the Working Group, in consultation with human rights experts and representatives of indigenous communities, drafted a comprehensive report on the situation of indigenous peoples in Africa, which was adopted by the African Commission in November 2003.<sup>194</sup> It confirmed the existence of indigenous populations while also proposing possible criteria for identifying these population groups in Africa.<sup>195</sup> This had been an actual concern, as African governments were often reluctant to recognize the existence of indigenous communities in Africa for fear of exacerbating tensions between ethnic

189. Frans Viljoen, *Reflections on the Legal Protection of Indigenous Peoples' Rights in Africa*, in PERSPECTIVES ON THE RIGHTS OF MINORITIES AND INDIGENOUS PEOPLES IN AFRICA 96 (Solomon Dersso ed., 2010).

190. UN Comm'n on H.R.: Rep., *Seminar on Multiculturalism in Africa: Peaceful and Constructive Group Accommodation in Situations Involving Minorities and Indigenous Peoples*, UN doc. E/CN.4/Sub.2/AC.5/2000/WP.3 (May 13–15, 2000).

191. Kaeleboga N. Bojosi, *Protecting Indigenous Peoples in Africa: An Analysis of the Approach of the African Commission on Human and Peoples' Rights*, 6 AFR. HUM. RTS. L.J. 382, 390 (2006).

192. IWGIA, *The Indigenous World Yearbook 2001-2002* (2002), available at [http://www.iwgia.org/iwgia\\_files\\_publications\\_files/IW\\_2002.pdf](http://www.iwgia.org/iwgia_files_publications_files/IW_2002.pdf).

193. U.N. Comm'n H.R., ACHPR Res. 51, African Commission on Human and Peoples' Rights (Nov. 6, 2000) [hereinafter ACHPR Res. 51].

194. ACHPR, Report of the African Commission's Working Group of Experts on Indigenous Populations/Communities (2005) [hereinafter ACHPR Report]; See Resolution on the Adoption of the 'Report of the African Commission's Working Group on Indigenous Populations/Communities' (IV), 28th Ordinary Sess. (Nov. 20, 2003) [hereinafter Resolution].

195. See *id.* Ch. 4.

groups and also because it was believed that their legal recognition could threaten the territorial integrity of states.<sup>196</sup> A further argument advanced was that all Africans are indigenous to the continent and therefore the concept might not be suitable for African situations.<sup>197</sup> The report also specified the human rights of indigenous peoples and referred to related issues of concern.<sup>198</sup> To specify the human rights of indigenous peoples, reference was made to individual and collective rights referred to in the African Charter on Human and Peoples' Rights, which were analyzed in light of the jurisprudence of the African Commission.<sup>199</sup> Interestingly, the report referred to the fact that people were not defined in the Charter, and used that fact to defend a very progressive stance—that the ACHPR peoples' rights provisions were equally relevant for “a section of the population” such as minority and indigenous populations.<sup>200</sup> Describing human rights violations undergone by indigenous peoples, the report *inter alia*, emphasized the violations of land and natural resources.<sup>201</sup> In the words of the report,

Dispossession of land and natural resources is a major human rights problem for indigenous peoples. They have in so many cases been pushed out of their traditional areas to give way for the economic interests of other more dominant groups and large-scale development initiatives that tend to destroy their lives and cultures rather than improve their situation. The establishment of protected areas and national parks has impoverished indigenous pastoralist and hunter-gatherer communities . . . . Large-scale extraction of natural resources such as logging, mining, dam construction, oil drilling and pipeline construction have had very negative impacts . . . . So has the widespread expansion of areas under crop production. They have all resulted in loss of access to fundamental natural resources that are critical for the survival of both pastoral and hunter-gatherer communities such as grazing areas, permanent water sources and forest products.<sup>202</sup>

These examples are considered by the report to be violations of Articles 20, 21, 22, and 24 of the ACHPR.<sup>203</sup> These rights clearly suggest that the drafters of the report believe that indigenous peoples possess expansive land and resource rights under the African human rights system.<sup>204</sup> This is contrary to the traditional state-centric

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196. *Id.* at 58.

197. *Id.* at 68.

198. *Id.*

199. ACHPR Report, *supra* note 194; *see* Resolution, *supra* note 194, at 72–79.

200. *Id.* at 57, 76.

201. *Id.* at 12–13, 20.

202. *Id.* at 20.

203. *The Forgotten Peoples?*, *supra* note 157.

204. *Id.*

approach, which confers ownership rights to land and natural resources to the governments.<sup>205</sup> The report also manifested its concern regarding customary rights of indigenous peoples and recommended that states recognize and protect these rights as they are central to indigenous survival.<sup>206</sup>

The mandate of the Working Group has been successively prolonged, but in 2007, following the African Union decision to defer the adoption of the UN Declaration in the UN General Assembly, the Working Group proceeded to draft the Commission's Advisory Opinion on the United Nations Declaration on the Rights of Indigenous Peoples.<sup>207</sup> In the 2007 Advisory Opinion, the Commission made an effort to convince the African states of the necessity to protect indigenous rights by responding to the African states' skepticism with respect to the draft UN Declaration.<sup>208</sup> Because of the strong opposition of African states, the arguments put forth by the Commission in the Advisory Opinion proved crucial to change the position of African states in the UN.<sup>209</sup> The Advisory Opinion referred to the Commission's previous report on indigenous peoples and argued that indigenous peoples should be understood differently because "in Africa, the term indigenous populations does not mean 'first inhabitants' in reference to aboriginality as opposed to non-African communities or those having come from elsewhere."<sup>210</sup> As to the content of the rights recognized in the draft UN Declaration, the African Commission tried to persuade the

205. Group of African States, Draft Aide-Memoire on the United Nations Declaration on the Rights of Indigenous Peoples New York (Nov. 9, 2006).

206. ACHPR Report, *supra* note 194, at 97.

207. See Draft Aide Memoire, *supra* note 205 (showing that after the adoption of the draft UN Declaration on the Rights of Indigenous Peoples by the Human Rights Council in June 2006, African states therein supported by the African Union started a strategy to defer the adoption of the UN Declaration. In January 2007 the AU Assembly welcomed the deferral of the adoption of the draft UN Declaration and mandated the African Group of states at the UN to guard Africa's interests and concerns in this debate. The concerns of the AU mainly focused on the definition of indigenous peoples; the reference to a right to self-determination; ownership of land and resources; the establishment of political and economic institutions; and the destabilizing effect it could have on national and territorial integrity); see also Rachel Murray, *The UN Declaration on the Rights of Indigenous Peoples in Africa: The Approach of the Regional Organisations to Indigenous Peoples*, in REFLECTIONS ON THE UN DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES 485-505 (Stephen Allen & Alexandra Xanthaki eds., 2011).

208. ACHPR Advisory Opinion, *supra* note 110.

209. See Rachel Murray, *The UN Declaration on the Rights of Indigenous Peoples in Africa: The Approach of the Regional Organisations to Indigenous Peoples*, in REFLECTIONS ON THE UN DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES 485-505 (Stephen Allen & Alexandra Xanthaki eds., 2011) (stating that prior to the Advisory Opinion little consideration was given to the Commissions' and the Working Groups' view on indigenous peoples by the AU and its member states. For example, when it came to consider the draft UN Declaration at the UN and later within the AU, African states and the AU main organs made no reference to the work of the African Commission and Working Group on indigenous peoples); see also ACHPR Advisory Opinion, *supra* note 110.

210. ACHPR Advisory Opinion, *supra* note 110, ¶ 13.

African states that they largely correspond to human rights standards already existing at the African continent.<sup>211</sup> For example, on the issue of land rights, the Advisory Opinion emphasized that the Declaration's provisions were similar to those found in instruments already adopted by the AU.<sup>212</sup> For example,

the African Convention on the Conservation of Nature and Natural Resources whose major objective is: "to harness the natural and human resources of our continent for the total advancement of our peoples in spheres of human endeavor" (preamble) and which is intended "to preserve the traditional rights and property of local communities and request the prior consent of the communities concerned in respect of . . . their . . . traditional knowledge."<sup>213</sup>

Similarly, with regard to the right of self-determination, the Advisory Opinion stated that:

Article 46 of the Declaration . . . is in conformity with the African Commission's jurisprudence on the promotion and protection of the rights of indigenous populations based on respect of sovereignty, the inviolability of the borders acquired at independence of the member states and respect for their territorial integrity . . . .

. . . .  
[T]he notion of self-determination has evolved with the development of the international visibility of the claims made by indigenous populations whose right to self-determination is exercised within the standards and according to the modalities which are compatible with the territorial integrity of the Nation States to which they belong.<sup>214</sup>

In doing so, the Advisory Opinion has undoubtedly contributed to countering the reluctance of the African states so that the UNDRIP could be adopted by an overwhelming majority.<sup>215</sup> The role of the African Commission in favor of indigenous rights protection has, thus, been both valuable at the international and regional level.<sup>216</sup> On one hand, it has participated in "reconnecting" the African continent with the developments taking place at the international level,<sup>217</sup> and on the other hand, it has increased awareness of the human rights violations suffered by indigenous peoples in Africa, as well as the need to address them on the basis of both the individual and collective rights provisions

211. Advisory Opinion of the African Comm. on Human and Peoples' Rights on the U.N. Declaration on the Rights of Indigenous Peoples, African Comm. on Human & Peoples' Rights, Rep. on its 41st Sess. (2007).

212. *Id.*

213. *Id.* ¶ 35.

214. *Id.* ¶¶ 18, 22 (emphasis omitted).

215. See also Gilbert, *supra* note 35, at 247.

216. *Id.*

217. *Id.*

of the ACHPR.<sup>218</sup>

*B. The Implementation of the Indigenous Peoples' Rights to Land and Resources: From Theory to Practice*

1. Regional practice

The African Commission played an important role in convincing African states of the need to address the situation of indigenous peoples.<sup>219</sup> When acting as an implementation organ of the ACHPR, it complemented this advocacy work by showing its commitment to giving its work practical meaning. In both state reporting as well as individual communication procedures, the Commission has increasingly drawn attention to issues regarding indigenous peoples. Although the 1991 Commission Guidelines for state reporting recommended states to indicate the measures taken to promote the cultural heritage of “national ethnic groups and minorities and of indigenous sectors” of society,<sup>220</sup> it is only since 2002, with the establishment of the Working Group on Indigenous Populations/Communities, that the Commission has started to effectively pose questions on the situation of indigenous peoples in the states under scrutiny.<sup>221</sup>

The same openness to indigenous peoples' demands can be perceived in the individual communication mechanism. In a small number of cases, the African Commission was able to clarify the collective rights recognized in the ACHPR.<sup>222</sup> At the beginning, however, the peoples' rights were interpreted in such a way that it was not fully clear whether it applied to other collectivities or to the entire

218. *Id.*

219. ACHPR Res. 51, *supra* note 193.

220. Afr. Charter, Guidelines for Nat'l Periodic Reps., ¶ III(14)(b)(iv), *available at* [http://www.chr.up.ac.za/images/files/documents/ahrdd/theme02/african\\_commission\\_resolution\\_13.pdf](http://www.chr.up.ac.za/images/files/documents/ahrdd/theme02/african_commission_resolution_13.pdf).

221. *See, e.g.*, Concluding Observations of the Afr. Comm'n on Human and Peoples' Rights (ACHPR) on the Initial Rep. of Kenya, 41st Sess., May 16–30, 2007, *available at* [http://www.chr.up.ac.za/images/files/documents/ahrdd/kenya/kenya\\_concluding\\_observations\\_2007.pdf](http://www.chr.up.ac.za/images/files/documents/ahrdd/kenya/kenya_concluding_observations_2007.pdf); Concluding Observations of the Afr. Comm'n on Human and Peoples' Rights (ACHPR) on S. Afr. Periodic Rep., 38th Sess., Nov. 21–Dec. 5, 2005, *available at* [http://www.chr.up.ac.za/images/files/documents/ahrdd/southafrica/southafrica\\_concluding\\_observations\\_periodic\\_report\\_2005.pdf](http://www.chr.up.ac.za/images/files/documents/ahrdd/southafrica/southafrica_concluding_observations_periodic_report_2005.pdf); Supp. Rep. on the Inaugural Rep. of Uganda to the Afr. Comm'n on Human and Peoples' Rights (ACHPR), May 2006, *available at* [http://www.chr.up.ac.za/images/files/documents/ahrdd/theme02/uganda\\_shadow\\_report\\_indigenous\\_peoples\\_2006\\_a.pdf](http://www.chr.up.ac.za/images/files/documents/ahrdd/theme02/uganda_shadow_report_indigenous_peoples_2006_a.pdf).

222. *Katangese Peoples' Congress v. Zaire* (2000) AHRLR 72 (ACHPR 1995); *Malawi African Association and Others v. Mauritania* (2000) AHRLR 149 (ACHPR 2000); *Legal Resources Foundation v. Zambia*, African Commission on Human and Peoples' Rights, Comm. No. 211/98 (2001).

state population.<sup>223</sup>

In 2001, a decision was handed out by the African Commission that has been described as an important victory for those defending minority rights as well as economic, social and cultural rights in Africa.<sup>224</sup> In the *Ogoni* case, the African Commission found that the killings and destruction by Nigerian governmental forces and agents of the state-controlled oil company in Ogoniland had violated the right to life and dignity, the right to health, the right to property, the rights to shelter and food, and the right to economic, social and cultural development of the *Ogoni*.<sup>225</sup> Although the case was not explicitly approached as an indigenous peoples' question, the case seemed relevant for indigenous peoples for two reasons: first, the communication has largely inspired the Working Group to describe indigenous peoples' rights; and second, it has paved the way for the development of a more significant implementation of indigenous rights in Africa. With the *Ogoni* case the Commission opened a door to a progressive interpretation of the beneficiaries of peoples' rights.<sup>226</sup> Despite the lack of express recognition of the *Ogoni* community as an indigenous people, the Commission's decision to approach the rights of the *Ogoni* people collectively demonstrates that the decision created the implication that the *Ogoni* were a people.<sup>227</sup> In addition, the Commission argued that "the African Charter, in Articles 20 through 24, clearly provides for peoples to retain rights as peoples, that is, as "collectives" and that "the importance of community and collective identity in African culture is recognized throughout the African Charter."<sup>228</sup> Thus, it could be implicitly inferred from the decision that the provisions on people's rights were applicable to minorities as well as to indigenous peoples. The second element of relevance for indigenous peoples in the *Ogoni* case is the express acknowledgment by the Commission that "with regard to a collective group, the resources belonging to it should be respected, as it has to use the same resources

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223. *Id.*

224. Kwadwo Appiagyei-Atua, *Self-Determination v. State Sovereignty: A Critique of the Afr. Comm'n Decision in the Ogoni Case*, in INTERNATIONAL LAW AND INDIGENOUS PEOPLE 303 (Josh Castellino and Niamh Walsh eds., 2005).

225. The complaint was lodged by two NGOs in 1996 alleging human rights violations perpetrated by the Nigerian government against the Ogoni people. The Ogoni inhabit the Niger Delta where important oil reserves are exploited since the 1950s. Nigeria was accused of being directly involved in the development of oil activities, which led to massive environmental degradation, widespread contamination of Ogoniland and resulted in the death of numerous members of the community. See The Social and Economic Rights Action Center for Center for Economic and Social Rights v. Nigeria, African Comm'n on Human and Peoples' Rights, Report No. 155/96 at 60, 68, 69, 72 (2001) [hereinafter *Ogoni Case*].

226. Bojosi, *supra* note 191, at 400–05.

227. *Id.* at 404.

228. *Ogoni Case*, *supra* note 225, ¶ 40.

to satisfy its needs.”<sup>229</sup> For the Commission, the right to property “includes not only the right to have access to one’s property and not to have one’s property invaded or encroached upon, but also the right to undisturbed possession, use and control of such property however the owners deem fit.”<sup>230</sup> This statement is of great significance to the land and resources rights of indigenous peoples as it sets a specific standard that can be applied to all kinds of peoples.<sup>231</sup>

Following the *Ogoni* case, several communications were brought to the attention of the African Commission, but none of these cases reached the merits stage<sup>232</sup> until the *Endorois* case was decided on the merits in 2009.<sup>233</sup> In the landmark *Endorois* case concerning indigenous peoples, the African Commission found that the Kenyan government’s eviction of the *Endorois* people from their ancestral lands amounted to several violations of the ACHPR, in particular Articles 8, 14, 17, 21, and 22.<sup>234</sup> Further, the African Commission recommended restitution of their traditional lands, recognition of their ownership rights, and compensation for harm suffered during the displacement.<sup>235</sup>

In the 1970s the government of Kenya created the Lake Hannington and the Lake Bogoria Game Reserves on the ancestral territories of the Endorois community and relocated them to areas claimed to be unsuitable for their pastoral way of life.<sup>236</sup> The Endorois were only sporadically allowed to visit sites associated with their spiritual belief, and the promised compensation and share of income from the game reserves and exploitation of precious gems found on their lands never materialized.<sup>237</sup> The complaint on behalf of the

229. *Id.* ¶ 45.

230. *See e.g.*, *Malawi African Association and Others v. Mauritania* (2000) AHRLR 149 (ACHPR 2000).

231. In the complaint led by the Endorois people to the African Commission (*see infra*), multiple references to the Ogoniland case were made by the Endorois indigenous community to sustain its claims. *See* George Mukundi Wachira, *Indigenous Peoples’ Rights to Land and Natural Resources in Africa*, in *PERSPECTIVES ON THE RIGHTS OF MINORITIES AND INDIGENOUS PEOPLES IN AFRICA* (Solomon Dersso ed., 2010).

232. *Bakweri Land Claims Committee v. Cameroon* (2004) AHRLR 43 (ACHPR 2004).

233. *Endorois Welfare Council v. Kenya*, *supra* note 5, ¶ 162.

234. These are respectively the provisions on the right to religion, to property, the right to cultural identity, to land and natural resources and the right to development. *See id.* ¶ 22.

235. *Id.* The African Commission recommended that Kenya: (a) Recognise rights of ownership to the Endorois and Restitute Endorois ancestral land; (b) Ensure that the Endorois community has unrestricted access to Lake Bogoria and surrounding sites for religious and cultural rites and for grazing their cattle; (c) Pay adequate compensation to the community for all the loss suffered; (d) Pay royalties to the Endorois from existing economic activities and ensure that they benefit from employment possibilities within the Reserve; (e) Grant registration to the Endorois Welfare Committee; (f) Engage in dialogue with the Complainants for the effective implementation of these recommendations; and (g) Report on the implementation of these recommendations within three months from the date of notification. *Id.* at 8.

236. *Endorois Welfare Council v. Kenya*, *supra* note 5, ¶ 220.

237. *Id.* ¶¶ 80, 112, 124.

Endorois alleged that the government of Kenya, in creating those reserves, forcibly removed the community from their lands without proper prior consultations or adequate and effective compensation.<sup>238</sup> Not only were the Endorois deprived of a share of the income their land generated, but they were also prohibited from enjoying the resources produced by their land.<sup>239</sup>

On many accounts, the decision innovates, but that should not be surprising taking into account the progressive stance the African Commission had recently taken in indigenous peoples' matters.<sup>240</sup> It is beyond the scope of this contribution to analyze each violation and we will—taking into account the scope of it—limit ourselves to property and natural resources rights.<sup>241</sup>

The Commission agreed with the complainants that the contested lands were traditional lands of the Endorois community.<sup>242</sup> The Commission referred to the fact that the Endorois had lived in the Lake Bogoria area from time immemorial, constructed homes on the land, cultivated the land, enjoyed unchallenged rights to pasture, graze, and forest land, and relied on the land to sustain their livelihood.<sup>243</sup>

apart from a confrontation with the Masai over the Lake Bogoria region three hundred years ago, the Endorois have been accepted by all neighbouring tribes, including the British Crown, as *bona fide* owners of their land. The Respondent State does not challenge those statements of the Complainants.<sup>244</sup>

The criteria defining traditional lands are the centuries of uncontested occupation and use prior to the eviction.<sup>245</sup> Knowing that many pastoral but also other traditional societies in Africa claim that type of relationship with their land, this position of the African Commission has the potential to turn the accepted view on land property/ownership upside down. Having acknowledged that customary rights and effective occupation over ancestral lands constitute property under the African Charter, the Commission could then give its view on the nature of property rights taking into account “the informal, unwritten nature of such rights and the vulnerability this gives rise to in

238. *Id.* ¶ 2.

239. *Id.* ¶ 124.

240. See ACHPR Advisory Opinion, *supra* note 110, at 9.

241. It is, for example, the first time that an international human rights treaty implementation body gave its view on the right to development.

242. Endorois Welfare Council v. Kenya, *supra* note 5, ¶ 184; Rhodri C. Williams, *African Commission 'Endorois Case'-Toward a Global Doctrine of Customary Tenure?*, TERRANULLIUS (Feb. 17, 2010), available at <http://terra0nullius.wordpress.com/2010/02/17/the-african-commission-endorois-case-toward-a-global-doctrine-of-customary-tenure/>.

243. Endorois Welfare Council v. Kenya, *supra* note 5, ¶ 184.

244. *Id.*

245. *Id.* ¶ 150.

cases where they are not given some degree of formal recognition.”<sup>246</sup> To that end the Commission not only draws on its prior jurisprudence, but also refers to the case law of the European Court on Human Rights and the Inter-American Court on Human Rights.<sup>247</sup> Even in the absence of formal title, someone may exercise property rights in the meaning of undisturbed possession, use, and control. It may also include broader interests and assets. For the Commission, Kenya “has a duty to recognise the right to property of members of the Endorois community, within the framework of a communal property system, and establish the mechanisms necessary to give domestic legal effect to such right recognised in the Charter and international law.”<sup>248</sup> Thus, for the Commission, mere access to Lake Bogoria was insufficient because “only de jure ownership can guarantee indigenous peoples’ effective protection.”<sup>249</sup>

“The African Commission notes that if international law were to grant access only, indigenous peoples would remain vulnerable to further violations/dispossession by the State or third parties. Ownership ensures that indigenous peoples can engage with the state and third parties as active stakeholders rather than as passive beneficiaries.”<sup>250</sup> This means that in order for the indigenous group to exercise their right to “use and enjoyment,” the respondent state must grant them title to their territory. Those rules are of practical interest in matters of land grabbing, and provide indigenous peoples a clear base upon which they can claim their right to property and contest the impact of large scale land acquisitions taking place without prior consent.

The right to property is, however, not an absolute one. It is thus possible for the government to justify the eviction of a community based upon public interest purposes on the condition that it is also in accordance with the law.<sup>251</sup> Both requirements are cumulative.<sup>252</sup> Regarding the justification for public interest, the African Commission took the view that a much higher threshold needs to be used in case of encroachment of indigenous land compared to individual private property.<sup>253</sup> It therefore found inspiration in a statement of the UN Special Rapporteur of the United Nations Sub-Commission for the Promotion and Protection of Human Rights, which remarked that:

[I]mitations, if any, on the right to indigenous peoples to their

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246. *See id.* ¶ 187.

247. *Id.* ¶¶ 186–90.

248. *Id.* ¶ 196.

249. *Id.* ¶ 205.

250. *Endorois Welfare Council v. Kenya*, *supra* note 5, ¶ 204.

251. *Id.* ¶ 211.

252. *Id.*

253. *Id.* ¶ 212.

natural resources must flow 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 human rights, including the right to life, food, the right to self-determination, to shelter, and the right to exist as a people.<sup>254</sup>

Because land is essential to the survival of indigenous peoples, another threshold must be applied. Having defended this view, the Commission comes to the “view that the upheaval and displacement of the Endorois from the land they call home and the denial of their property rights over their ancestral land is disproportionate to any public need served by the Game Reserve.”<sup>255</sup> Regarding the second justification, the Commission argued that law refers to national and international law.<sup>256</sup> After analyzing Kenyan applicable law, it also referred to the requirements of consultation and compensation found in the jurisprudence of the Inter-American Court of Human Rights.<sup>257</sup> In the *Saramaka* case, the Inter-American Court developed three safeguards regarding consultation and compensation.<sup>258</sup> The state must:

first, ensure the effective participation of the members of the [indigenous] people, in conformity with their customs and traditions, regarding any development, investment, exploration or extraction plan within [the territory of the indigenous people]; second, guarantee that the [indigenous people] will receive a reasonable benefit from any such plan within their territory; [and] third, ensure that no concession will be issued within the [indigenous peoples'] territory unless and until independent and technically capable entities, with the State's supervision, perform a prior environmental and social impact assessment.<sup>259</sup>

“In terms of consultation, the threshold is especially stringent in favor of indigenous peoples, as it also requires that consent be accorded. Failure to observe the obligations to consult and to seek consent - or to compensate - ultimately results in a violation of the right to property.”<sup>260</sup> Again, according to the Commission, these safeguards are intended to preserve, protect and guarantee the special relationship that the members of the indigenous people have with their territory, which in

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254. Erica-Irène A. Daes, *Indigenous Peoples' Rights to Land and Natural Resources*, in MINORITIES, PEOPLES AND SELF-DETERMINATION: ESSAYS IN HONOUR OF PATRICK THORNBERRY 89 (Nazila Ghanea-Hercock & Alexandra Xanthaki eds., 2005) (emphasis added).

255. Endorois Welfare Council v. Kenya, *supra* note 5, ¶ 214.

256. *Id.* ¶ 219.

257. *Id.*

258. *Id.*

259. *Id.* ¶ 227. The criteria were originally developed by the Inter-American Court of Human Rights in *Saramaka People v. Suriname*, Judgment, *supra* note 163.

260. Endorois Welfare Council v. Kenya, *supra* note 5, ¶ 226 (emphasis omitted).

turn ensures their survival as a tribal people.<sup>261</sup> The Commission came to the conclusion that no effective participation of the Endorois had been sought and that they had been barred from the benefits of the game reserve.<sup>262</sup> As to the question of compensation, the Commission used the national and international standards to conclude that no compensation was given.<sup>263</sup> As the property of the Endorois has severely been encroached upon and as this encroachment was not proportional to any public need and was not in accordance with national and international law, the fact proved to be a violation of the right to property protected under Article 14 of the ACHPR.<sup>264</sup>

In addition to the right to property, indigenous people might also seek to protect their natural resources. The right to natural resources is expressly protected under Article 21 of the African Charter.<sup>265</sup> The African Commission, after analyzing the case law of the Inter-American Court of Human Rights in the *Saramaka* case, found that the Endorois have, under the ACHPR, the right to freely dispose of their wealth and natural resources in consultation with the state, and in cases of violation by spoliation, restitution, and compensation must be provided.<sup>266</sup> As the Endorois have neither received compensation nor restitution of their land, the facts indicate a violation of the right to resources recognized in Article 21 of the ACHPR.<sup>267</sup>

With the Endorois case the African Commission extended the application of the African Charter to an indigenous people for the first time.<sup>268</sup> The decision is important because the express recognition of the Endorois as an indigenous people completes the process initiated a decade ago at the Arusha conference.<sup>269</sup> With its bold description of traditional lands and the property rights over land and resources, the decision also provides practical and precise guidance with regard to the protection of indigenous rights, and recommends reparative measures that should be granted to indigenous community whose rights have been infringed upon.

261. *Id.* ¶ 227.

262. *Id.* ¶ 228.

263. *Id.* ¶¶ 229–37.

264. *Id.* ¶ 238.

265. African Charter on Human and People's Rights, OAU Doc. CAB/LEG/67/3 rev.5, 21 I.L.M. 58, art. 21 (June 27, 1981) [hereinafter African Charter].

266. Gabrielle Lynch, *Becoming Indigenous in the Pursuit of Justice: the African Commission on Human and Peoples', Rights and the Endorois*, 111 AFRICAN AFFAIRS 24–45, 39 (2012).

267. *Id.* at 40.

268. *See id.* at 26.

269. *See Becoming Indigenous in the Pursuit of Justice, supra* note 266.

## 2. National practice

It has been shown that indigenous peoples are quickly being recognized by the African human rights machinery as beneficiaries of human rights and that the African Commission has been willing to move forward on the engaged path in its application of the ACHPR.<sup>270</sup> This growing receptiveness to indigenous peoples' rights is also perceivable in African national practice. Timid steps are made by African countries to adapt the constitutional framework to this new context.<sup>271</sup> Without mentioning indigenous communities' *expressis verbis*, some constitutions, such as the 2010 Kenyan Constitution, reserve a number of seats in parliament for vulnerable groups or special interest groups.<sup>272</sup> These groups are often indigenous communities. The 2005 Burundian Constitution even expressly mentions that three members of the National Assembly must be co-opted from the Twa indigenous community.<sup>273</sup> The South African Constitution in turn explicitly protects indigenous languages.<sup>274</sup> While some African states have thus recognized indigenous communities, with regard to the right to traditional lands and resources, the situation still remains far from satisfactory for indigenous peoples and the progressive stand of the African Commission has not (yet) been echoed in national practice; African states have in general not changed their approach to who owns the land and its resources.<sup>275</sup> This is attested by the research finding of the co-sponsored ILO-African Commission on Human and Peoples' Rights project examining constitutional, legislative and administrative provisions concerning indigenous and tribal peoples in Africa.<sup>276</sup>

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270. *Id.* at 37.

271. *See* CONSTITUTION, art. 97 (2010) (Kenya).

272. *Id.*

273. La Constitution De la Republique Du Burundi [Constitution of the Republic of Burundi] 2005, art. 164 (stating that "l'Assemblée nationale est composée d'au moins cent députés ... [dont] trois députés issus de l'ethnie Twa cooptés conformément au code electoral").

274. S. AFR. CONST., sec. 6(2), 1996. (recognizing that "the historically diminished use and status of the indigenous languages of [the country's] people" imposes upon "the state [to] take practical and positive measures to elevate the status and advance the use of these languages").

275. *See* Int. Labor Org. (ILO) and Afr. Comm'n on Human and Peoples' Rights (ACHPR), *Examining Constitutional, Legislative and Administrative Provisions Concerning Indigenous and Tribal Peoples in AFRICA*, WORKSHOP REP. (2009), at 12–15.

276. The report of the workshop concludes that indigenous peoples are unable to obtain recognition of their ownership rights in their traditional territories with the consequence that states often assert ownership over territories, and may sell those rights to third parties. Even when indigenous peoples have ownership rights to surface territory, the state generally holds the rights to subsurface resources. There is often no framework in place to ensure respect for indigenous peoples' right to use and control their territories when the state or third parties exploit those resources. When the state carries out development activities in indigenous peoples' traditional territories, or licenses third parties to do so, the community that is disadvantaged often receives little or no benefit. In more extreme cases, the exploitation of natural resources on indigenous lands has led to severe environmental degradation with devastating long-term effects. There is

An exception is “Law 5-2011 on the promotion and protection of indigenous populations,” adopted by the Parliament of the Republic of Congo in December 2010 and promulgated by the President on 25 February 2011.<sup>277</sup> The law, which is the first on the continent to really address indigenous issues comprehensively, aims to respond to the discrimination and marginalization of indigenous groups generally known under the term “pygmies” and representing between 1.4-10% of the total population of the Republic.<sup>278</sup> The legislative initiative, having been taken at the time when the UN (draft) Declaration on the Rights of Indigenous Peoples entered its final phase, the latter clearly inspired the drafters of the law.<sup>279</sup> One can therefore speak about the law as implementing the UNDRIP in the national framework.<sup>280</sup> As the UNDRIP, the Congolese law recognizes a whole list of (human) rights to be exercised individually or collectively by the indigenous group.<sup>281</sup> Reference is made to civil and political rights such as equality and non-discrimination (Art. 2), the right to be consulted and to participate in the decision making process when it directly or indirectly affects them (Art. 3), the right of marriage and inheritance in accordance with traditional practices (Art. 5), access to justice (Art. 10) and the right to recourse to their own customs for the resolution of conflicts (Art. 11), various cultural rights (Arts. 13-16), the right to education (Arts. 17-21), the right to health (Arts. 22-25), labor rights (Arts. 26-30), and the right to a healthy environment (Art. 43).<sup>282</sup> An important section of the law is devoted to property rights and the rights of ownership over traditional lands and resources.<sup>283</sup> According to the law, indigenous peoples have a right (to be exercised collectively and individually) “to own, possess, access and use the lands and natural resources they have traditionally used or occupied for their subsistence, pharmacopeia and work” (Art. 31).<sup>284</sup> The state has to facilitate delimitation of these lands on the basis of indigenous customary rights and must ensure “legal recognition of the title according to customary rights, even in cases where indigenous

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therefore a need to develop effective means to consult with the community in question, so that they have participation in decision-making that is free, fair and informed. *See id.*

277. Portant Promotion et Protection des Droits des Populations Autochtones, Loi Février 25, 2011. For an analysis of the law *See* Rep. of the Human Rights Council, *Rep. of the Special Rapporteur on the Rights of Indigenous Peoples on the Situation of Indigenous Peoples in the Republic of the Congo*, U.N. Doc. A/HRC/18/35/Add.5, ¶ 40 (July 11, 2011) (analyzing this specific Republic of Congo law).

278. The use of the term “pygmy” is, however, prohibited by the law for its pejorative connotation.

279. *The Situation of the Indigenous Peoples in the Republic of the Congo*, *supra* note 277.

280. *See id.* at 12.

281. *Id.* at 13.

282. *Id.*

283. *Id.*

284. *Id.*

peoples do not previously possess any kind of formal title (Art. 32).<sup>285</sup> Indigenous peoples can only be removed from their lands for public purposes (Art. 33) and when expropriated, they must benefit from the advantages provided by law (Art. 34). Exploitation, expropriation, and conservation of natural resources and land are only possible after a sociological and environmental impact assessment study (Art. 35).<sup>286</sup> Indigenous peoples have a right to decide on strategies and priorities for valorizing the lands and natural resources (Art. 36) and must be consulted when projects affect their lands, resources or way of life (Arts. 38-39).<sup>287</sup>

Though they have not adopted specific legislation to recognize rights over traditional land and resources for indigenous peoples, in some countries, the existing legal framework has been interpreted in such a way as to achieve results similar to that intended by the Congolese law. In 2003, a case was brought to the South African Constitutional Court by the Richtersveld indigenous community on the basis of the Restitution Land Claim Act with the objective of being granted an order for restoring their land from which they had been dispossessed in order to operate mining activities.<sup>288</sup> The court recognized that indigenous ownership of land occupied prior to colonization survives change in regime as long as it is not clearly extinguished by law or act of Crown, state or court.<sup>289</sup> To evidence indigenous ownership, the court agreed to look at customary law which existed prior to colonization.<sup>290</sup> Beyond the recognition of indigenous land ownership, the case also constitutes an example of emerging state practice aimed at redressing indigenous peoples for the lands they have been deprived of.<sup>291</sup> Similarly, in 2006, the eviction of the San community from their land in Botswana led to an investigation into their right over the territories they traditionally occupied.<sup>292</sup> On the basis of

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285. Portant Promotion et Protection des Droits des Populations Autochtones, Loi Février 25, 2011. For an analysis of the law *See* Rep. of the Human Rights Council, *Rep. of the Special Rapporteur on the Rights of Indigenous Peoples on the Situation of Indigenous Peoples in the Republic of the Congo*, U.N. Doc. A/HRC/18/35/Add.5, ¶ 13 (July 11, 2011) (analyzing this specific Republic of Congo law).

286. Act No. 5-2011 On the Promotion and Protection of Indigenous Populations (2011) (Republic of Congo), available at [http://www.iwgia.org/iwgia\\_files\\_news\\_files/0368\\_Congolese\\_Legislation\\_on\\_Indigenous\\_Peoples.pdf](http://www.iwgia.org/iwgia_files_news_files/0368_Congolese_Legislation_on_Indigenous_Peoples.pdf).

287. *Id.*

288. Mark Everingham & Crystal Jannecke, *Land Restitution and Democratic Citizenship in South Africa*, 32 J. S. AF. STUDIES 543, 547-48 (Sept. 2006).

289. *Alexkor Limited v. Richtersveld Community* 2003 (5) SA 460 (CC) (S. Afr.) [hereinafter *Alexkor v. Richtersveld*].

290. *Id.* at 24.

291. Everingham & Jannecke, *supra* note 288, at 543.

292. *Botswana Sued Over San People's Water Access*, AFROL NEWS, available at <http://www.afrol.com/articles/36237> (last visited Mar. 31, 2013).

the common law doctrine of aboriginal title, the High Court of Botswana recognized the existence of land rights to San hunter-gatherers while declaring that the removal of the community living in the Central Kalahari Game Reserve was unlawful.<sup>293</sup>

Practice at the regional African level shows that although the situation concerning traditional lands and resources of indigenous peoples is still problematic, concern over their rights is growing both at the regional level as well as at the state level, and initiatives have been taken to bring the existing legal framework further in conformity with the spirit and content of international instruments such as the ILO Convention 169 or even the UNDRIP.

## V. CONCLUSIONS

The current contribution has shown that there is a consensus at the international level to consider indigenous peoples as beneficiaries of human rights to be exercised individually or collectively. Even though it has proved impossible to agree on a definition of indigenous peoples, the practice of human rights bodies has shown that a workable alternative could be found by identifying criteria defining indigenous peoples.<sup>294</sup> The criteria used at the universal level are traditional lands, historical continuity, distinct cultural characteristics, non-dominance, and self-identification and group consciousness.<sup>295</sup> In Africa, “historical continuity” as a criteria has been criticized for being irrelevant to the continent and the emphasis is put on marginalization.<sup>296</sup> The result is that many traditional communities in Africa fulfill the requirement to be called indigenous peoples.<sup>297</sup>

Indigenous peoples possess a whole set of rights from which the right to land and resources is granted a cardinal position in the international legal instruments on indigenous peoples because traditional land and resources are essential to what they are; and without a right of access to their land and resources, indigenous peoples’ rights would often be meaningless.<sup>298</sup> The right to traditional land and resources include the right of ownership over traditional land and resources, a right to be consulted and to receive prior consent when decisions affecting their land and resources are taken.<sup>299</sup> Expropriation

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293. See Roy Sesana and Keiwa Setlohubogwa v. Attorney General (High Ct. 2006) (Botswana) Misca. No 52 of 2002.

294. LEENA HEINAMAKI, *THE RIGHT TO BE A PART OF NATURE: INDIGENOUS PEOPLES AND THE ENVIRONMENT* 2–3 (Lapland University Press 2010).

295. *Id.* at 3–4.

296. *Id.* at 3–4, 38.

297. *Id.* at 2–3.

298. *Id.* at 4.

299. *The Forgotten Peoples?*, *supra* note 157.

is nevertheless possible for public purposes in which case-effective compensation must be provided.

With regard to the phenomenon of land grab in Africa, it has been shown that in these land deals between state governments and foreign actors, the indigenous peoples who leave from the lands are often forgotten. They are seldom consulted, do not have a say in the final decision and do not participate in the profits that the deals generate.<sup>300</sup> The indigenous peoples' rights to traditional lands and resources as they have been interpreted by the human rights implementation bodies on the continent, however, make many of the large scale land acquisitions questionable in terms of law. If the land in question is traditionally owned—as a good amount of the land in Africa is—indigenous and traditional communities living on the land have property rights over the land. Therefore, states cannot sell these lands without proper consultation and consent. As a result, these lands must be returned to the traditional communities, or alternatively, the communities must be fully and effectively compensated.

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300. *Id.*