

INDIGENOUS GROUPS AND THE DEVELOPING JURISPRUDENCE OF THE AFRICAN COMMISSION ON HUMAN AND PEOPLES' RIGHTS: SOME REFLECTIONS

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I. INTRODUCTION

The African Charter on Human and Peoples' Rights – also known as the African or Banjul Charter (AfrCH) - lies at the core of the African human rights regime. It was adopted in 1981 and entered into force in 1986 following ratification by a majority of member states of the (then) Organisation of African Unity.¹ Together with a number of classical individual rights of civil, political and/or socio-economic nature, it enshrines rights of 'peoples' in Articles 19 through to 24.

The AfrCH is monitored by the African Commission on Human and Peoples' Rights (ACHPR), which performs both promotional and protective functions. Such functions are principally organised around examining states' reports (Article 62), examining communications from individuals, NGOs or states parties on alleged breaches (Articles 47, 55), and interpreting the AfrCH more generally (Article 45(3)). Importantly individuals or NGOs may petition the ACHPR irrespective of whether they are the direct victims of the violation complained of, subject to pre-defined procedural requirements. As the number of African institutions increases,² the ACHPR still remains central to enhancing human rights protection in Africa.³

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¹ 27 June, 1981, OAU Doc. CAB/LEG/67/3/Rev.5 (1981), reprinted in 21 ILM 59 (1982).

² The African Court on Human and Peoples' Rights (AfCtHPR) was established in 1998 with a view to complementing the ACHPR's work. It delivered its first judgment in December 2009 (*Michelot Yogogombaye v. The Republic of Senegal*, Application No. 001/2008, Judgment of 15 December 2009). Further judicial developments are expected as a result of the 2008 Protocol on the African Court of Justice and Human Rights. Upon entry into force of the latter (which requires ratifications by at least fifteen member states of the

While the AfrCH has no direct provision on indigenous rights – let alone minority groups generally – specialised standard-setting activities in the field have triggered discussions within African states as to the impact that the resulting standards are likely to have on the African system. This debate came to the fore during the negotiations of the UN Declaration on the Rights of Indigenous Peoples (DRIP), adopted by UN General Assembly Resolution 61/295 in 2007 following a negotiating process that lasted for more than two decades. In an aide-memoir of November 2006, the African group voiced concerns about the constitutional and political implications of the draft DRIP for African states. More specifically, it pointed to Article 19 (indigenous participation in decision-making) and Article 26 (land rights) as potential sources of contention. The initiative, led by Namibia, was successful in that it obtained deferment of consideration of the text by one year, despite objections from African civil society and experts.⁴ In January 2007 the General Assembly of the African Union reaffirmed its concern regarding DRIP in relation to a range of matters, particularly the definition of indigenous peoples, land rights, and self-determination vis-à-vis territorial integrity.⁵ Later in the year, on adoption of DRIP by the UN General Assembly, many African states voted in favour while others abstained (e.g. Kenya and Nigeria) or did not take part in proceedings.⁶

African Union – the successor to the Organisation of African Unity), the newly set up regional court will merge the AfCtHPR and the Court of Justice, created in 2003 (see e.g. <http://www.africancourtcoalition.org/default.asp?page_id=2>).

³ For a comprehensive overview of the system, see M Evans and R Murray (eds), *The African Charter on Human and Peoples' Rights: The System in Practice* (2nd edn OUP, Oxford 2008); F Viljoen, *International Human Rights Law in Africa* (OUP, Oxford 2007) chs 7-12.

⁴ General Assembly, Sixty-first session, Third Committee (21 November 2006) A/C.3/61/L.57/Rev.1; Draft Aide Memoire of the African Group on the UN Declaration on the Rights of Indigenous Peoples (9 November) New York, <<http://www.ipacc.org.za>>; Indigenous Peoples of Africa Co-ordinating Committee (IPACC) Statement on the UN General Assembly decision to postpone the vote on the UN Declaration on the Rights of Indigenous Peoples, Press Release (5 December 2006); Response Note to the 'Draft Aide Memoir of the African Group on the UN Declaration on the Rights of Indigenous Peoples', presented by an African group of experts (21 March 2007).

⁵ African Union General Assembly, 30 January 2007, Decision on the United Nations Declaration on the Rights of Indigenous Peoples, Doc. Assembly/AU/9 (VIII) Add.6.

⁶ Sixty-first General Assembly, Plenary, 107th & 108th Meetings, GA/10612. The DRIP was adopted on 13 September 2007 by a vote of 143 in favour, 4 against (Australia, Canada, New Zealand and United States), and 11 abstentions; UN Doc. A/Res/61/295.

Some states, however, qualified their affirmative vote. Guyana noted that DRIP ‘was political in character as opposed to being a legally binding document’, and expressed hope that the international community would ‘in the future’ be able to reach consensus on the rights of indigenous peoples. Namibia understood DRIP as creating no new, separate rights, and emphasised that this text was subject to the constitution and national laws. For its part, Nigeria stated that concerns relating to self-determination and control over land and resources had not been satisfactorily addressed, thereby justifying its abstention.

While these views are not necessarily indicative of wider or dominant preoccupations within the African continent, they do reflect genuine uncertainties, if not hostilities, surrounding domestic policies and legislation in Africa towards indigenous communities. They involve matters such as domestic law-based group recognition/status, internal requirements to secure legal protection for traditional lands and resources (for example, that they be used ‘productively’), and the fundamentally fiduciary nature of such entitlements.⁷

Parallel to this process, practice from the last ten years within the African human rights regime – particularly jurisprudence under the ACHPR’s communications procedure – is leading to a reassessment of concepts and rights under the AfrCH as they affect indigenous groups. It contextualises the reading of the AfrCH, explains the relationship between international and domestic law, and raises additional questions as to the extent to which African human rights jurisprudence interacts with specialised international standards.

II. OPENING UP THE AFRICAN CHARTER: PEOPLES’ RIGHTS AND ‘INDIGENOUSNESS’

Until relatively recently indigenous issues were virtually absent from the human rights discourse in Africa. The legacy of colonialism made national ‘unity’ the most veritable legal and political mantra of newly emerged African states. However, the ACHPR has begun to tackle the plight of indigenous communities in the region and is influencing state practice accordingly. As part of its promotional tasks the ACHPR set up

⁷ For a recent survey of domestic law and policy in selected African countries, see ILO/ACHPR, Overview Report of the Research Project by the International Labour Organization and the African Commission on Human and Peoples’ Rights on the Constitutional and Legislative Protection of the Rights of Indigenous Peoples in 24 African Countries (2009) [hereinafter, ‘2009 ILO/ACHPR Report’] 87-120.

the Working Group on Indigenous Populations/Communities in Africa (AWGIPC) in 2000. It was entrusted with conducting a preliminary investigation into this matter.⁸ The AWGIPC delivered a report in 2003 that was subsequently endorsed by the ACHPR.⁹ The report confirms the existence of indigenous communities in Africa, exposing their special attachment to and use of traditional land, as well as experiences of subjugation, marginalization and dispossession.¹⁰

Conceptually, two elements underpin this new approach under the AfrCH. First, the specific and unique category of peoples' rights has been interpreted in such a way as to encompass minority sectors of the state population – regardless of the specific position of the groups concerned. This opposes traditional notions of peoples' rights being associated with whole (effectively pro-dominant) national entities, or even the state.¹¹ Second, the AWGIPC has linked some such rights, particularly the right to existence and self-determination (Article 20), the right to natural resources (Article 21), and the right to development (Article 22), to an expansive conception of African indigenes which is not linked to 'prior occupancy' of traditional communal lands and resources.¹² As clearly indicated in the 2003 Report:

⁸ ACHPR/Res 51 (XXVIII) 00 Resolution on the Rights of Indigenous Populations/Communities in Africa (2000).

⁹ ACHPR/Res 65 (XXXIV) 03 Resolution on the Adoption of the Report of the African Commission's Working Group on Indigenous Populations/Communities.

¹⁰ 'Report of the African Commission's Working Group of Experts on Indigenous Populations/Communities', submitted in accordance with the Resolution on the Rights of Indigenous Populations/Communities in Africa, IWAGIA (Copenhagen) and ACHPR (Banjul) (2005) [hereinafter, '2003 AWGIPC Report']; see also 2009 ILO/ACHPR Report (n 7).

¹¹ 155/96 (2001); *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v. Kenya*, Comm. 276/2003 (2009) paras 145-162, at 154, 156, 159, 161-162; 2003 AWGIPC Report (n 10) Ch III. For commentary, see SA Dersson, 'The Jurisprudence of the African Commission on Human and Peoples' Rights with Respect to Peoples' Rights' (2006) 6 *African Human Rights Law Journal* 358, 372-373; F Viljoen, *International Human Rights Law in Africa* (n 3) 281-284. Interestingly, the reassessment of 'people' under the AfrCH does not enable a sector of the population to claim independence under Article 20 (n 30). Rather, discrete rights are being recognised within the polity. For a traditional understanding of peoples' rights, see generally J Crawford (ed), *The Rights of Peoples* (OUP, Oxford 1988).

¹² 2003 AWGIPC Report (n 10) Section 4.2; Advisory Opinion of the African Commission on Human and Peoples' Rights on *The United Nations Declaration on the Rights of Indigenous Peoples*, May 2007, paras 9-13; *Centre for Minority Rights Development (Kenya) and*

‘Domination and colonisation has not exclusively been practiced by white settlers and colonialists. In Africa, dominant groups have also after independence suppressed marginalized groups, and it is this sort of present-day internal suppression within African states that the contemporary African indigenous movement seeks to address ... if the concept of *indigenous* is exclusively linked with a colonial situation, it leaves us without a suitable concept for analysing internal structural relationships of inequality that have persisted after liberation from colonial dominance.’¹³

By relying on the criteria of self-identification, territorial connection, cultural distinctiveness, and exclusion (broadly understood), in line with some definitional attempts at the international level,¹⁴ the ACHR has not only generally endorsed the post-colonial reading of the AWGIPC, but it specifically built upon it in its 2007 Advisory Opinion on *The United Nations Declaration on the Rights of Indigenous Peoples*¹⁵ and the recent landmark decision in the *Endorois* case against Kenya.¹⁶ In this case they recognised the pastoralist community in question as an indigenous community for AfrCH purposes, based on a connection with traditional lands and associated long-standing cultural practices, ‘beyond the “narrow/aboriginal/pre-Colombian” understanding of indigenous peoples’.¹⁷

III. TOWARDS A JURISPRUDENTIAL ARTICULATION OF INDIGENOUS (LAND) RIGHTS

Recent ACHPR jurisprudence indicates a progressive alignment with international jurisprudence, most notably from the Inter-American

Minority Rights Group International on behalf of Endorois Welfare Council v. Kenya (n 11) para 159; 2009 ILO/ACHPR Report (n 7) 17.

¹³ 2003 AWGIPC Report (n 10) 92.

¹⁴ *ibid* 93.

¹⁵ See n 12.

¹⁶ *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v. Kenya* (n 11).

¹⁷ *ibid* para 159.

system. In *Katangese Peoples' Congress v. Zaire*,¹⁸ concerning a claim that Katanga was entitled to independence under Article 20 AfrCH, the ACHPR refrained from determining whether the Katangese 'consist[ed] of one or more ethnic groups'. Still, it did show, albeit implicitly, a connection between the existing political rights of the Katangese and the possibility for them to achieve internal self-determination in its multiple variants, including self-government.¹⁹ This exclusively participation-based appreciation of self-determination in *Katangese Peoples' Congress* was openly confirmed in the ACHPR's Advisory Opinion on the draft DRIP.²⁰ The rationale for internal self-determination as reflected in the decision of the UN Human Rights Committee (HRC) in *Apirana Mabuika v. New Zealand* is arguably similar. The case involved a comprehensive settlement between the government and the Maori people establishing a new framework for Maori autonomy in areas critical to their cultural integrity, including traditional fishing and hunting activities. By considering that settlement compatible with the rights of minorities in Article 27 of the International Covenant on Civil and Political Rights (ICCPR), the HRC linked the narrative of minority identity with that of internal self-determination, while providing procedural (participatory) criteria to justify such a connection. Using this approach, the right to self-determination interacts with other rights in ways that provide additional content for expanding the scope of the latter.

The ACHPR took a similar line in *The Social and Economic Rights Action Center for Economic and Social Rights v. Nigeria* – the so-called Ogoni case.²¹ The case turned on the impact of oil development activities on the Ogoni people living in the area of the Niger delta. The ACHR found that the Nigerian Government violated, *inter alia*, the right of the Ogoni people to freely dispose of their wealth and natural resources (Article 21).²² It articulated the scope of Article 21 in a way that resonated with

¹⁸ Comm. No. 75/92 (1995).

¹⁹ *ibid* paras 4-6.

²⁰ Advisory Opinion of the African Commission on Human and Peoples' Rights on *The United Nations Declaration on the Rights of Indigenous Peoples* (n 12) para 23.

²¹ Comm. No. 155/96 (2001).

²² *ibid* para 55. In connection with the pollution and environmental degradation of the Ogoniland that threatened the survival of the Ogonis and their traditional livelihood, the ACHPR also found a breach of the right to life in Article 4, and the right to a satisfactory environment favourable to their development (Article 24).

separate provisions, most notably in relation to property, health and the environment, and recognised substantive rights which were not explicitly mentioned in the AfrCH, such as the right not to be subjected to forced evictions.²³ Somewhat echoing the themes of indigenous land rights to be taken up in the Inter-American Court of Human Rights' judgment in *The Saramaka People v. Suriname* and other decisions of the Inter-American system,²⁴ the reasoning concerning Article 21 built on the destruction of the Ogoniland, the lack of Ogoni participation in decisions affecting that land as well as the lack of material benefits accruing to the community. Parallel to this, the ACHPR construed protection against forced evictions as integral to the individual right to adequate housing, which was then upheld as a right to be enjoyed by the Ogonis collectively.

Although there is little indication that this decision was inspired by external international standards or jurisprudence, the AWGIPC's 2003 Report unsurprisingly uses this case (together with a few others) to demonstrate the relevance of the AfrCH to indigenous groups.²⁵ More significantly, in its 2007 Advisory Opinion on the draft version of DRIP,²⁶ the ACHPR dismisses the claim made by the African group in the course of the negotiations of this text: that recognition of indigenous land rights would be impracticable because 'the control of land and natural resources is the obligation of the State'.²⁷ Instead, the ACHPR refers to Article 21 of AfrCH to indicate that not only do such rights exist and are compatible with the constitutional framework of each country, they are in line with the AfrCH and the participatory requirements over indigenous traditional knowledge and natural resources set out in the African Convention of Nature and Natural Resources, adopted within the African Union.²⁸ From a broader perspective, it translates major entitlements to self-determination and land protection under the draft version of DRIP as a 'series of rights' relative to self-government (as opposed to secession or independence),

²³ *ibid* paras 53, 55; the right to housing and the right to food were found on the basis of a combination of individual and collective rights contained in the AfrCH.

²⁴ G Pentassuglia, *Minority Groups and Judicial Discourse in International Law: A Comparative Perspective* (Martinus Lijhoff Publishers, Leiden 2009).

²⁵ 2003 AWGIPC Report (n 10) 13.

²⁶ Advisory Opinion of the African Commission on Human and Peoples' Rights on *The United Nations Declaration on the Rights of Indigenous Peoples* (n 12).

²⁷ *ibid* paras 32-35.

²⁸ See also F Viljoen (n 3) 285.

culture and control over natural resources, which are viewed as reinforcing those that are set forth in the AfrCH.²⁹

The expansive approach to indigenous land rights culminates in the above-mentioned *Endorois* case.³⁰ The claims related to the establishment of a game reserve on traditional indigenous lands. The Endorois, a pastoralist community, were evicted from their traditional land during the 1970s and 1980s. Private concessions were also granted to a private company for ruby mining. Applicants claimed *inter alia* a breach of property rights (Article 14), the right to natural resources (Article 21) and cultural rights (Article 17). In a landmark decision of May 2009, the ACHPR found that Kenya had violated the Endorois' rights to property over land, natural resources and development (Articles 14, 21 and 22), and to freely practice their religion and enjoy their cultural identity (Articles 8 and 17). Such rights – in the ACHPR's words – 'go to the heart of indigenous rights'.³¹ This decision aligns the AfrCH with the HRC's case law on Article 27 ICCPR by reading Article 17 as affording protection to ethno-cultural minority groups and entailing a duty to take 'positive steps' to achieve this objective.³² At the same time, based on the community's ancestral patterns of land use and customs, the ACHR recognised the land surrounding Lake Bagoria as the traditional land of the Endorois people. It held that, while a trust land system was in place in order to benefit all of the residents within the relevant jurisdiction³³ and no legislative framework existed on the rights of indigenous pastoralist and hunter-gatherer communities, Kenya had failed to protect the land in question as 'property' of the Endorois within the meaning of Article 14 AfrCH:

²⁹ Advisory Opinion of the African Commission on Human and Peoples' Rights on *The United Nations Declaration on the Rights of Indigenous Peoples* (n 12) paras 23-24, 27, 35. The ACHPR insists that self-determination must be exercised in a way that is compatible with the territorial integrity of the state. Recent practice appears to be in line with this view in that it focuses on distinctive rights to participation, culture and land.

³⁰ *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v. Kenya* (n 11).

³¹ *ibid* para 157.

³² *ibid* para 248.

³³ Whether the Trust had been legally extinguished as a result of the creation of the game reserve was also in dispute. The ACHPR upheld the applicants' claim that the obligations to the Endorois deriving from the Trust were still in existence. *ibid* paras 221-224.

‘[T]he first step in the protection of traditional African communities is the acknowledgment that the rights, interests and benefits of such communities in their traditional lands constitute “property” under the Charter and that special measures may have to be taken to secure such “property rights”’.³⁴

The most striking feature of the findings regarding Articles 14, 21, and 22 is that they draw almost entirely upon the Inter-American land rights jurisprudence. I have discussed the ramifications of this jurisprudence elsewhere, as such this is not the forum for engaging in a similar exercise.³⁵ Suffice it to say that the relevant body of cases reflects a number of key elements built around mainly the right to property in Article 21 of the American Convention on Human Rights (ACHR). They principally include the autonomous meaning of indigenous property under international law compared to domestic law, an obligation upon the state to title the land in fulfilment of an international duty to protect such property and secure its judicial protection, the ‘hierarchical’ sequencing of restitution, provision of alternative lands of equal size and quality and monetary compensation, in the event of involuntary dispossession, and a three-pronged test to justify any restrictions on existing indigenous property rights. The latter encompasses effective participation (in the ‘standard’ form of consultation, and specific form of consent to large scale development projects), benefit-sharing and prior environmental and social impact assessment. The substantive and procedural articulation of indigenous land rights in *Endorois* is thus understood in accordance with this dynamic interpretive approach, particularly in relation to the distinctive nature of protection afforded by international human rights law in the face of separate, restrictive domestic legislation and policies.³⁶ A reinforced public interest,

³⁴ *ibid* paras 155, 187. In addition to domestic law deficiencies, Kenya was not a party to ILO Convention 169 and did not vote in favour of the DRIP.

³⁵ G Pentassuglia, ‘Towards a Jurisprudential Articulation of Indigenous Land Rights’ (2010) 21 *European Journal of International Law*, forthcoming; *id.*, *Minority Groups and Judicial Discourse in International Law: A Comparative Perspective* (Martinus Nijhoff Publishers, Leiden 2009).

³⁶ *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v. Kenya* (n 11) paras 174-238, particularly paras 197, 199, 205-206, 208-209, 216-217, 227-228, 233.

proportionality-based test applies to restrictions on Article 14 AfrCH involving indigenous property rights, while the requirement that such restrictions be imposed ‘in accordance with the law’ essentially draws on the *Saramaka* test and extends to the rights to natural resources (Article 21) and development (Article 22).³⁷ Although the case – like the *Ogoni* case – involved forced evictions, which in themselves constitute serious violations of human rights, the ACHPR’s reading of the AfrCH unquestionably diffuses this judicially-generated view of indigenous land rights within the African system of international human rights law.

IV. CONCLUDING REMARKS

I will make two observations here. First, while specialised standard-setting inevitably generates a view of indigenous rights as a set of entitlements separate from the traditional human rights framework, the protection of indigenous communities under the AfrCH appears to have been spread along a scale of ‘general’ guarantees, ranging from basic cultural and land-related rights, to property rights *stricto sensu*, to rights to natural resources. Classic individual rights, including the right to property, have been re-read to accommodate communal perspectives in ways that challenge rigid dichotomies between the individual and the group within human rights law. ‘Peoples’ rights’ are being made available at the sub-national level. The right to natural resources (Article 21) works largely (though by no means exclusively) within the constraints of the right to property in Article 14. As with the jurisprudence of the Inter-American system,³⁸ this practice is functionally adjusting the African regime as a ‘living instrument’ by locating it within a wider set of developments – or ‘subsequent practice’ for example Article 31(3)(b) of the Vienna Convention on the Law of Treaties – in the relevant field. At the same time, based on the interplay of individual and collective rights, individual and collective dimensions of the AfrCH, the above-mentioned cross-fertilisation process arguably retains an element that is specific to the possibilities offered by the treaty.

The interpretation of Article 21 in *Endorois* is an illustration of this. The ACHPR has not only confirmed the significance of the right to

³⁷ *ibid*, paras 227-228, 267. At one juncture, the ACHPR seems ambiguously to point to a duty to both obtain and seek indigenous consent (para 226); still, the general thrust of the argument is clearly defined by the approach to consultation/consent in *Saramaka*.

³⁸ For discussion from a comparative perspective, see n 36.

indigenous peoples as implicitly reflected in its own ('pre-*Saramaka*') case law, i.e. the *Ogoni* case.³⁹ It has made the crucial point that, unlike Article 21 of ACHR, Article 21 of AfrCH protects the whole of the natural resources that are found on or beneath the land. They are not limited to those that are connected to the group's identity and land tenure systems, as indicated in *Saramaka*.⁴⁰ Although the Inter-American Court of Human Rights allows for a flexible understanding of this limitation to include activities that impact on the group indirectly, it is fairly clear that, on the ACHPR's line Article 21 AfrCH expands on Article 21 ACHR, though still upholding the Inter-American case-by-case approach to competing claims (crucially including justifications for limiting individual private property rights and rejection of private use and 'productivity' as reasons for dismissing *prima facie* the indigenous claim),⁴¹ based on consultation with the state.⁴²

Second, and most importantly, the *Endorois* decision is a case of jurisprudential dialogue rather than specific elaboration upon specialised instruments. Un-ratified ILO Convention 169 is unused as a 'soft' source, while references to DRIP are few and far from illuminating;⁴³ at best, they point to general principles or expectations, while lacking the ability to provide significant responses to the issues raised. In contrast with the rather scant reasoning style of the ACHPR in past decisions,

³⁹ *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v. Kenya* (n 11) para 255.

⁴⁰ *ibid* paras 262, 266-267; the private concessions involved in both cases concerned resources - ruby and gold, respectively - that were not per se linked to the communities' culture or economy.

⁴¹ *Yakye Axa Indigenous Community v. Paraguay*, Judgment of 17 June 2005, Series C No. 125, paras 146, 148; *Sawhoyamaxa Indigenous Community v. Paraguay*, Judgment of 29 March 2006, Series C No. 146 paras 137-140.

⁴² '[T]he Respondent State has a duty to evaluate whether a restriction of these private property rights is necessary to preserve the survival of the Endorois community ... the Endorois have the right to freely dispose of their wealth and natural resources in consultation with the Respondent State' (*Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v. Kenya* (n 11) paras 267-268). On the 'productivity' argument as a domestic bar to indigenous title, see 2009 ILO/ACHPR Report (n 7) 117-120.

⁴³ *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v. Kenya* (n 11) paras 204, 207, 232. It should be pointed that, although Kenya is not a party to ILO Convention 169 (para 155), the ACHR makes extensive use of the ACHR's jurisprudence notwithstanding the obvious inapplicability of the ACHR as a matter of binding treaty law.

international law-based notions of property, remedies for infringements on property rights, as well as access to natural resources and 'development', borrow heavily from global and regional jurisprudence as key sources of inspiration under Article 60 AfrCH.⁴⁴ The comparative approach reinforces and enhances the quality and persuasiveness of ACHPR analyses.

Specialised indigenous standards help relate the position of African indigenous groups to more general developments in the field. The ACHPR, for example, has in principle recognised the importance of DRIP as an interpretive tool within the African system.⁴⁵ I argue though, that there is something distinctively jurisprudential in both the way in which the AfrCH has been interpreted, and the kind of case law that has generated, and is likely to generate in the future. Not only have indigenous issues been channelled into a discourse about 'peoples' rights' as a uniquely African human rights category, the very basis for addressing such issues under the AfrCH, unlike in specialised texts, does not seem to rest on a rigid distinction between 'indigenous peoples' and sub-national minority groups generally, other than perhaps in terms of the extent of the threat to the physical and cultural integrity of the former. It is no surprise that, as I mentioned, what constitutes an 'indigenous' community in Africa is itself based on wider interpretation,⁴⁶ whose exposition or justification may not be required in the case at issue.⁴⁷

On the other hand, the trajectory from *Ogoni* to *Endorois* (African system) through *Saramaka* (Inter-American system) does provide more

⁴⁴ *ibid* paras 174-238, particularly paras 196, 197, 199, 205-206, 208-209, 213, 216-217, 227-228, 233.

⁴⁵ N 12; HPR/Res 121 (XXXXII) 07 Resolution on the United Nations Declaration on the Rights of Indigenous Peoples, 28 November 2007.

⁴⁶ Ns 11, 12, and a similar line from *later* Inter-American case law.

⁴⁷ For example, in the *Ogoni* case the ACHPR does not specifically refer to the Ogonis as 'indigenous peoples' or a 'minority'; in *Malawi African Association and Others v. Mauritania*, Comm. Nos. 54/91, 61/91, 98/93/, 164/97 à 196/97 and 210/98 (2000), the ACHPR uses the 1992 United Nations Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities to articulate fundamental principles of non-discrimination and respect for group existence, *ibid* para 131. See also the *Endorois* case (n 11) para 187; 2009 ILO/ACHPR Report (n 7) 20. The *de facto* conflation of 'indigenous peoples' and 'minorities' within the African context may or may not have wider repercussions in international law, given the complex interplay of regional specificities and global cross-fertilisation processes.

practical and precise guidance to the ACHPR and national courts (as well as African Union institutions generally) as they tackle the complexities of indigenous land issues in the region, especially in relation to competing claims to natural resources as well as domestic (as opposed to *international* and *indigenous*) law criteria over group status, land use, and rights.⁴⁸ It is also entirely possible that the current African Court on Human and People's Rights (AfCtHPR), and the newly established (but not yet operational) African Court of Justice and Human Rights will have to consider indigenous issues in the future, within the context of these jurisprudential developments. The jurisprudential way of accommodating indigenous land issues within the scope and structure of the AfrCH, coupled with cross-fertilising perspectives across jurisdictions, escape, or are likely to escape, assumptions about the exhaustive role of specialised indigenous standards, while propelling international human rights jurisprudence as a distinctive, if parallel, line of discourse in this fast evolving area of human rights law.

In light of the doubts expressed by some African countries over the impact of DRIP on national legal systems and its broader legal significance, it is difficult to foresee the pace at which African states – particularly African courts – will internalise the AfrCH's progressive jurisprudence on indigenous rights in the region in ways that can reinforce state practice across regional systems as a matter of customary international law. It is clear though that the ACHPR's understanding of the obligations arising from the AfrCH does establish a framework for clarifying the relationship between African indigenous groups and wider African nations before and after independence, elaborating upon the human rights (participatory) implications of internal democratic processes (as opposed to secession), and providing an articulated view of land rights that rests on a dynamic and balanced interplay of indigenous rights over lands and natural resources and wider state interests or prerogatives. It helps assuage concerns over the role of indigenous rights in Africa, while still offering solid international benchmarks against

⁴⁸ F Viljoen (n 3) 282; 2009 ILO/ACHPR Report (n 7) 117-120. As noted, Article 60 AfrCH allows for consideration of a range of sources, including global jurisprudence, such as the HRC's.

which state conduct is to be measured, in partnership with national judiciaries.⁴⁹

⁴⁹ Recent litigation does indicate greater protection of indigenous rights through national courts: in relation to South Africa, Botswana, and Kenya, see, respectively, *Alexkor Ltd and the Government of South Africa v. The Richtersveld Community and Others*, CCT 19/03 (2003), Judgment of 14 October 2003; *Roy Sesana and Ke/na Setlobogwa v. The Attorney General*, Misc No. 52 of 2002 (13 Dec. 2006); *Lemeiguran and ors v. Attorney General of Kenya and ors*, ILDC 698 (KE 2006) <www.oxfordlawreports.com>.