The Rights of Non-Indigenous 'Forest Peoples' with a focus on Land and Related Rights

Existing International Legal Mechanisms and Strategic Options

Forest Peoples Programme

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Executive Summary

There are a number of ways that non-indigenous forest peoples (and others, e.g., pastoralists), who have demonstrable collective tenure systems, wholly or partially governed by customary law, can assert and seek protection for rights related to their lands and territories under international human rights law. They may do so without simplistically transferring the indigenous peoples' rights framework and jurisprudence to non-indigenous contexts, but by drawing on the principles and norms of extant human rights law to independently support and assert their rights. This would be both consistent with and draw support from recent international initiatives that seek to recognise and protect rights to land, including communal rights, "that are reducible neither to the protection of the individual's right to property nor to the specific protection granted to the lands and territories of indigenous peoples."[1]

Forest peoples can draw considerable support from the International Convention on the Elimination of All Form of Racial Discrimination, which protects the rights of 'ethnic groups', including their right to own property in association with others, and which would thus include their right to lands and resources, to free, prior and informed consent, to exercise their customary law and to maintain their customary institutions. In principle this would include the recognition of communal property rights arising from customary tenure systems and customary law as well as a corresponding obligation on the state to regularise and protect such rights equally under the law.

[1] O. De Schutter, *The Green Rush: The Global Race for Farmland and the Rights of Land Users*, 52 HARVARD INT'L L.J. 304 (2011), at p. 534, http://www.harvardilj.org/wp-content/uploads/2011/07/HILJ_52-2_De-Schutter.pdf.

The Human Rights Committee has interpreted the protections for minorities to enjoy their culture in the International Covenant on Civil and Political Rights to include their cultural connections to the lands and resources they depend on. Although long term residence by itself may not be enough to give rise to land rights for minorities, where such residence can be shown to be linked to a distinctive way of life then their rights to the use and enjoyment of their lands are protected. Minorities also enjoy the right to effective participation in decisions which affect them and, if certain criteria are present, also to free, prior and informed consent.

Human rights law also recognises that persons can assert individual rights in community with others, including various economic, social and cultural rights, and as such their rights are recognised to freely take part in decision-making, cultural heritage, cultural practices, to the resources to sustain a dignified life, and participation in the elaboration of laws that may affect them. These provisions provide scope for arguing that forest peoples have rights to lands and resources as a property right held in community with others and for rights to participate in decision making, among others.

The African Charter on Human and Peoples' Rights recognises peoples' rights to self-determination, to freely dispose of wealth and resources, to cultural development, to peace and security and to a satisfactory environment, as collective rights, as well as a series of individual rights. As such forest peoples have a strong basis for asserting rights to their collective lands under customary law, although to date this has only been affirmed by the African Commission for indigenous peoples drawing on precedents in international law pertaining to indigenous peoples' rights. The Commission however has been reluctant to get involved in determining the modalities of the exercise of the right to self-determination, at least in an overtly political sense, within existing states.

Compared to the jurisprudence on indigenous peoples' rights, there is relatively little about non-indigenous forest peoples. It is therefore advisable to present reports and cases to international human rights bodies and mechanisms on the basis of sound field studies and in respect of specific situations and by drawing on applicable norms of human rights law. This is possible given the overlapping (and sometimes imprecise) use of the terms 'minority', 'ethnic groups' and 'peoples' as well as the rights that vest in those categories (independent of the use of the 'indigenous' descriptor). International standard-setting and other advocacy related initiatives are also relevant in this respect. The newly established UN working group to develop a declaration on peasant rights is one existing standard setting process that may provide an important venue for raising many of these issues and may lead to a UN instrument that could have significant impact on the further development of international human rights law in this area. This approach would both contribute to the further development of specific norms and jurisprudence on the rights of forest peoples while, at the same time, not negatively affecting the body of law that applies to indigenous peoples and their advocacy initiatives.

The Rights of Non-Indigenous 'Forest Peoples'

I. Introduction

The rights of indigenous and tribal peoples are relatively well defined in international law and to some extent, however imperfectly, also in a growing number of national laws.[2] This is largely due to decades of indigenous advocacy at the national and international levels, which has resulted in considerable (although still evolving) jurisprudence, international instruments on indigenous peoples' rights, and an established institutional presence within intergovernmental organisations. Indigenous peoples' rights are unique insofar as they represent the first time[3] that the international community has elaborated a rights framework explicitly grounded in the right to self-determination outside of the classic colonial context.[4] This is especially the case when the collective nature of the majority of these rights and the far reaching measures that would need to be adopted to give them effect within existing states are considered.[5]

The same is not true however for non-indigenous 'forest peoples' or 'local communities', which have not been the subject of concerted treatment or jurisprudence under the human rights regime, at least in the sense of there being a distinct category of rights that may be associated with these terms. This is a problem in a number of settings, and at multiple levels, as there is a lack of clarity about how to conceptualise and address the collective rights of non-indigenous (forest) peoples or communities. There is also a tendency, particularly by some NGOs, to simplistically and indiscriminately transfer the indigenous rights framework to all local communities. This often causes serious problems for indigenous advocacy initiatives and is not justifiable on legal grounds given the particular characteristics and needs of indigenous peoples and the rights framework that has concretised to respond thereto.

This is not to say that the rights of forest peoples or local communities are not in need of urgent and concerted attention; to the contrary, in many cases such attention is indeed required and long overdue, particularly in light of the phenomenon generically referred to as 'land-grabbing'.[6] However, how to do so from a rights-based perspective is the most relevant consideration and the focus herein. The current UN Special

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[2] The distinction between 'indigenous' and 'tribal' peoples is set out in Article 1(1) of ILO 169 (stating that "This Convention applies to: (a) tribal peoples in independent countries whose social, cultural and economic conditions distinguish them from other sections of the national community, and whose status is regulated wholly or partially by their own customs or traditions or by special laws or regulations. …").

[3] *See e.g.*, A. Xanthaki, *Indigenous Rights in International Law over the Last 10 Years and Future Developments,* 10 MELBOURNE J. INT'L. L. 1, at p. 4 (stating that "indigenous peoples are accorded an unqualified right to self-determination that does not extend to secession, and focuses on — but is not limited to — self-government. In essence, the extent of their right is no different from that of any other current beneficiary of the right. This is a major step forward: international law and practice have never before agreed to recognise the unqualified right of self-determination to sub-national groups"), http://www.law.unimelb.edu.au/files/dmfile/download6a901.pdf.

[4] *See e.g.,* J. Castellino *Territorial Integrity and the "Right" to Self-Determination: An Examination of Conceptual Tools*, 33 BROOK. J. INT'L L. 499 (2008), http://eprints.mdx.ac.uk/1500/1/Castellino.pdf.

[5] On collective rights, *see e.g.*, S. Wiessner, *The Cultural Rights of Indigenous Peoples: Achievements and Continuing Challenges,* 22 EURO. J. INT'L. LAW 121 (2011), http://www.ejil.org/pdfs/22/1/2128.pdf.

[6] *See e.g., Report of the Special Rapporteur on the right to food, Olivier De Schutter, Addendum, Large-scale land acquisitions and leases: A set of minimum principles and measures to address the human rights challenge*, A/HRC/13/33/Add.2, 28 December 2009.

Rapporteur on the Right to Food has explained that there "are a number of indications that new forms of protection of access to natural resources are now emerging, that are reducible neither to the protection of the individual's right to property[7] nor to the specific protection granted to the lands and territories of indigenous peoples"[8] and; there is no reason why indigenous and tribal peoples "should be the only beneficiaries of this recognition of communal forms of ownership. There are in fact a number of arguments in favor of recognizing the relevance to other groups of this renewed recognition of communal notions of property…."[9] This paper endorses this view and concludes that there are sufficient grounds in extant human rights law to sustain that communal property rights are vested in some non-indigenous entities and that these and other associated rights should be enforceable through existing human rights mechanisms and procedures.

While it will not discuss indigenous peoples' rights conceptually, unless this may be useful for comparative reasons, this paper seeks to articulate, in outline at least and from a human rights law perspective, how to conceptualize the rights of non-indigenous forest peoples or communities (hereinafter "forest peoples").[10] To do this, it will look at the different legal mechanisms and rights that may be available to forest

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[7] For a survey of the right to property in human rights law including in its individual aspect, *see* C. Golay & I. Cismas, *Legal Opinion: The Right to Property from a Human Rights Perspective* (ADH Geneva & Rights and Democracy 2010) (explaining, at p. 10, that "The review of provisions of international instruments, regional treaties and national constitutions reveal the universal recognition of the human right to property. It appears that generalized and consistent State practice and *opinio juris* reflect the customary nature of the first paragraph of Article 17 of the [Universal Declaration of Human Rights] '[e]veryone has the right to own property alone as well as in association with others'"), http://www.geneva-academy.ch/docs/publications/ESCR/humanright-en.pdf.

[8] O. De Schutter, The Green Rush, *supra,* at p. 534 (further explaining, at p. 525, that "This new understanding of land rights is based partly on the paradigm of the rights of indigenous peoples over their lands and territories. But it now extends beyond the context of indigenous peoples to other groups that rely on communal notions of property rights").

[9] *Id*. at p. 536 (citing the following as arguments in favour of this proposition: "the dangers of importing a Western concept of property rights to developing regions where customary forms of tenure are accorded a high degree of legitimacy, and where communal rights play an important role as safety nets for many rural poor" (at p. 507); a "shift away from a focus on individual titling and the creation of a market for land rights, and towards the recognition of customary forms of tenure over communal lands and common property resources, is particularly important in light of the vulnerability of certain groups that are dependent on the commons for their livelihoods" (at p. 533)). *See also Report of the Special Rapporteur on the right to food, Olivier De Schutter*, A/65/281, 11 August 2011 (further elaborating on these issues).

[10] For information on conceptualising indigenous rights, *see inter alia* H. Quane, *A Further Dimension to the Interdependence and Indivisibility of Human Rights?: Recent Developments Concerning the Rights of Indigenous Peoples*, 25 HARVARD HUMAN RIGHTS J. 49 (2012), http://harvardhrj.com/wp-content/uploads/2009/09/Quane.pdf; B. Kingsbury, *Reconciling Five Competing Conceptual Structures of Indigenous Peoples' Claims in International and Comparative Law*, 34 NYU JOURNAL INT'L. LAW & POLITICS 189 (2001), http://alojamientos.us.es/mhrd/MatKingsburyPGV.pdf; PEOPLES' RIGHTS (P. Alston, ed., Oxford University Press 2001); S. Wiessner, *Indigenous Sovereignty: A Reassessment in Light of the UN Declaration on the Rights of Indigenous Peoples*, 41 VAND. J. TRANSNAT'L L. 1141 (2008); S. J. Anaya, INDIGENOUS PEOPLES IN INTERNATIONAL LAW (Oxford University Press: Second Ed. 2004); W. Kymlicka, *Theorizing Indigenous Rights*, 49 U. TORONTO L. J. 281, 284 (1999); W. van Genugten, *Protection Of Indigenous Peoples On The African Continent: Concepts, Position Seeking, And The Interaction Of Legal Systems* 104 AM. J. INT'L L. 29 (2010); P. Thornberry, INDIGENOUS PEOPLES AND HUMAN RIGHTS (Manchester University Press, 2002); J. Pasqualucci, *International Indigenous Land Rights: A Critique of the Jurisprudence of the Inter-American Court of Human Rights in Light of the United Nations Declaration on the Rights of Indigenous Peoples*, 27 WISCONSIN INT'L L.J. 51; G. Pentassuglia, *Towards a Jurisprudential Articulation of Indigenous Land Rights,* 22 EURO. J. INT'L. LAW 165, (2011), http://www.ejil.org/pdfs/22/1/2126.pdf; K. Engle, *On Fragile Architecture: The UN Declaration on the Rights of Indigenous Peoples in the Context of Human Rights,* 22 EURO. J. INT'L. LAW 141 (2011), http://www.ejil.org/pdfs/22/1/2123.pdf.

peoples and attempt to elaborate the means by which rights arguments can be made for advocacy purposes as well as the means by which these rights may be (further) articulated in jurisprudence, enforced and implemented. For the purposes of the analysis herein, 'forest peoples' are ethnically distinct and collective entities living in forests or their periphery or areas that were once forested, but who nevertheless do not self-identify as 'indigenous', and who have long-standing relations to lands expressed primarily through customary tenure systems. This paper therefore does not attempt to address rights that may pertain to all 'local communities' (although some of its conclusions may be transferrable to groups or groups of persons not included in the understanding of the term 'forest peoples' employed herein).[11]

As rights are generally tailored to, or triggered by, particular characteristics or needs (and thus in large part factually based), this paper will focus on what characteristics or needs may trigger certain rights, noting that there may also be regional variations depending on the exact content of specific human rights instruments (Africa especially) or the lack of any meaningful regional rights framework (Asia). The need to focus on characteristics and needs derived from specific facts as a basis for rights and the assertion thereof – e.g., the nature and extent of various relationships to lands/forests, the existence of customary tenure and/or governance systems – means that while certain generalisations can be made in relation to the use of the various categories of human rights law, the specific facts of each situation need to be analysed independently and the arguments that could be made need to be derived from the specific factual situations. Also, international human rights law, with some exceptions, includes a variety of in-built mechanisms whereby rights may be limited or balanced with the rights of others, including those of the state/public interest, or thresholds that must be crossed in order to establish violations, and these mechanisms need to be carefully considered and addressed as part of the overall analysis.

To analyse the various human rights law avenues that may be available for forest peoples to address collective rights issues,[12] this paper will, in the following order, review:

- international instruments on racial discrimination;
- minority rights;
- the possibilities for aggregating individual rights;
- the individual and collective rights protected by the African Charter on Human and Peoples' Rights;
- the possible application of the right to self-determination; and,
- the possible articulation of rights in a proposed UN declaration on 'the rights of peasants'.

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[11] In the absence of a definition that narrows the scope of the term 'local communities', the vast diversity in this category almost certainly means that all local communities are not 'created equal' in terms of rights – collective rights, for instance – or in terms of the modalities of exercising such rights.

[12] For different ways of conceptualizing collective rights, *see* A. Buchanan, *The Role of Collective Rights in the Theory of Indigenous peoples' Rights*, 3 TRANSNAT'L. LAW & CONTEMP. PROBS. 89, 93-94 (1993) (observing that two variations of collective rights can be identified: first, collective rights that can only be asserted by the group, but not by its individual members, unless an individual has been designated a representative or has received express authorization from the group. Second, a collective right that may be asserted by an individual member of the group acting either in their own capacity, on behalf of other members of the group or the group as a whole. This second variation may be defined as a dual standing collective right in that both the group and its individual members can exercise or invoke them, whereas, the first category can only be invoked by the group as a whole or through its agent and/or representative).

There is to some extent an overlap between these various categories and this will be highlighted where relevant. The jurisprudence of the various human rights mechanisms also intersects and is often mutually reinforcing. The jurisprudence of one body may therefore be used to support arguments in another body, particularly as the various human rights mechanisms strive to ensure consistency in human rights jurisprudence. Also, the paper will focus primarily on existing law because, as stated above, there appear to be sufficient grounds for raising many issues under extant law, and attempt to identify any gaps, including where jurisprudence is sparse or in need of adjustment. The final section contains a discussion of general and other considerations that relate to how to approach these issues from the standpoint of international human rights law (and to some extent also in domestic law as the two need not be entirely separate lines of analysis), including legal personality issues and how to take care to ensure that any arguments made do not undermine indigenous peoples' rights.

II. International Human Rights Law

A. Racial Discrimination

While almost all international human rights instruments contain an article or articles that prohibit discrimination on various grounds (race, gender, etc.), either in relation to the rights recognized in the instrument itself or in general, the most useful means (in terms of ease) of addressing these issues is through the various procedures utilised by the UN Committee on the Elimination of Racial Discrimination ("UNCERD"), which supervises state compliance with the 1966 International Convention on the Elimination of All Forms of Racial Discrimination ("ICERD"). Presently 175 states are bound by ICERD.[13] It is discussed first and most extensively while other instruments and mechanisms are identified in a more cursory way in sub-section 2 below.

1. The International Convention on the Elimination of All Forms of Racial Discrimination

Indigenous peoples have invoked ICERD with considerable success through the various procedures available in the UNCERD.[14] These procedures include: a periodic reporting procedure (in theory, every 5 years); a 'follow up' procedure (to follow up on concluding observations adopted under the reporting procedure); the urgent action and early warning procedures (to address urgent situations that threaten grave and irreparable harm);[15] and the individual petitions procedure[16] (a mechanism for filing formal cases against a state party that has agreed to be

[13] For a list of state parties *see* http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-2-a&chapter=4&lang=en.

[14] *See* P. Thornberry, *Confronting Racial Discrimination: A CERD Perspective*, 5 HUMAN RIGHTS L. R. 239 (2005); and F. MacKay, *Indigenous Peoples' Rights and the United Nations Committee on the Elimination of Racial Discrimination*, *in* PERSPECTIVES ON THE RIGHTS OF MINORITIES AND INDIGENOUS PEOPLES IN AFRICA. (S. Dersso, ed., Pretoria University Law Press, 2010), http://www.pulp.up.ac.za/pdf/2010_02/2010_02.pdf.

[15] The background to these procedures is described in the 1993 UNCERD working paper, *Prevention of racial discrimination, including early warning and urgent procedures: working paper adopted by the Committee on the Elimination of Racial Discrimination*, UN Doc. A/48/18, Annex III, http://www.ohchr.org/english/bodies/cerd/docs/A_48_18_Annex_III_English.pdf. The 2007 criteria for the use of these procedures is available at, http://www2.ohchr.org/english/bodies/cerd/docs/Revised_Guidelines_2007_en.doc.

[16] For a list of state parties that accepted the UNCERD's jurisdiction in this respect *see* *http://www.forestpeoples.org/topics/guides-human-rights-mechanisms/publication/2010/guide-indigenous-peoples%E2%80%99-rights-under-intern*, at p. 38. To date, only 51 states have recognized UNCERD's jurisdiction to

subject to this procedure).[17] The UNCERD also issues 'General Recommendations', which are essentially interpretations of state obligations under the ICERD (35 have been adopted to date).[18]

In the case of indigenous peoples, the UNCERD views the failure to recognize, respect and protect their rights as discriminatory *per se* under ICERD and, therefore, it does not necessarily employ a comparative or other standard non-discrimination analysis to decide if state acts or omissions are discriminatory. While it is unlikely for a variety of reasons that the UNCERD would do the same in the case of forest peoples (indeed, it would be difficult to do so in the absence of an identifiable category of 'forest peoples' rights'), to what extent may forest peoples make use of ICERD and UNCERD, and has the UNCERD previously issued any recommendations on forest peoples or those who may be similarly situated that may be instructive?

Article 1 of the ICERD, which contains the 'definitional keys' to the ICERD, prohibits discrimination based on, among other things, ethnic origin,[19] and applies wherever there is any "distinction, exclusion, restriction or preference," which has the aim or effect of "nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights…."[20] In its General Recommendation XXIV of 1999, UNCERD stresses that, according to the definition given in Article 1(1), ICERD "relates to all persons who belong to different races, national or ethnic groups or to indigenous peoples."[21] Article 1(1) also makes clear that ICERD prohibits not only intentional racial discrimination but also discrimination in effect, so there is no need to prove that the state intended to discriminate.[22]

Therefore, any group of persons (in practice this also means groups) that self-identifies as 'ethnically' distinct may seek both to assert rights and to obtain protection should the state adopt any distinction etc., that has the aim or effect of impairing or nullifying their rights.[23] ICERD contains an open-ended list of rights so all

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receive individual complaints and the procedure itself has been invoked only 40 times since 1982, and to date only 12 decisions have been adopted. *See Statistical survey of individual complaints considered under the procedure governed by article 14 of the International Convention on the Elimination of All Forms of Racial Discrimination*, http://www.ohchr.org/english/bodies/cerd/stat4.htm.

17 On UNCERD procedures *see id.* On UNCERD more generally *see* M. Banton INTERNATIONAL ACTION AGAINST RACIAL DISCRIMINATION (Oxford Univ. Press, 1996); and T. van Boven, *Discrimination and Human Rights Law: Combating Racism in* DISCRIMINATION AND HUMAN RIGHTS: THE CASE OF RACISM (S. Fredman, ed., Oxford Univ. Press, 2001)

18 *See* http://www2.ohchr.org/english/bodies/cerd/comments.htm.

19 In General Recommendation XXIV of 1999, UNCERD stresses that, according to the definition given in Article 1(1), ICERD "relates to all persons who belong to different races, national or ethnic groups or to indigenous peoples."

20 Article 1(1) reads: "In this Convention, the term "racial discrimination" shall mean any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life."

21 *General Recommendation XXIV on Article 1*, at para. 1.

22 *Inter alia*, Australia, 14/04/2005, CERD/C/AUS/CO/14, at para. 19 (expressing concern about the "wide gap that still exists between the indigenous peoples and others, in particular in the areas of employment, housing, health, education and income" and recommending that Australia "intensify its efforts to achieve equality in the enjoyment of rights and allocate adequate resources to programmes aimed at the eradication of disparities…").

23 In its 1990 General Recommendation VIII, CERD formally stated that membership in a group "shall, if no justification exists to the contrary, be based upon self-identification by the individual concerned." More generally, CERD's General Recommendation XXIV observes that "a number of States parties recognize the presence on their territory of some national or ethnic groups or indigenous peoples, while disregarding others," and that some states, "decide at their own discretion which groups constitute ethnic groups or indigenous peoples that are to be recognized and treated as such."

human rights, including economic, social and cultural rights, are covered (see discussion on Article 5 of ICERD below).

The correlate of the non-discrimination norm is the equality principle (equal protection), which requires positive action by the state, and the UNCERD frequently notes in this respect that "the principle of non-discrimination requires [states parties] to take account of the cultural characteristics of ethnic groups."[24] Accordingly, the UNCERD adheres to the principle that discrimination is evident and illegitimate where states treat persons differently in analogous situations without an objective and reasonable justification and where they, without satisfying this test, fail to treat differently persons whose situations are significantly different.[25] A significant difference, for instance, may be communal property rights grounded in customary law coupled with culturally constitutive relations to lands rather than individual property rights accorded by the national legal system.

Article 2 of the ICERD defines the obligations of states to give effect to the rights set out therein at the domestic level. These obligations are extensive and include adopting, modifying or repealing legal instruments and/or policy statements, and adopting social, economic, cultural and various other measures to give immediate and full effect to ICERD in domestic law and practice.[26] According to the UN's *Manual on Human Rights Reporting*, this provision recognizes "that almost all States Parties have ethnic or minority groups, such as indigenous populations, tribes, nomads, migrant workers, refugees, etc. Consequently, attention must be paid

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It continues that CERD "believes that there is an international standard concerning the specific rights of people belonging to such groups" and; "that the application of different criteria in order to determine ethnic groups or indigenous peoples, leading to the recognition of some and refusal to recognize others, may give rise to differing treatment for various groups within a country's population." *See also inter alia* Yemen, 19/10/2006, CERD/C/YEM/CO/16, at para. 8 (concluding and recommending that "The Committee takes note of the discrepancy between the assessment of the State party, according to which Yemeni society is ethnically homogenous, and credible information the Committee has received regarding descent-based and/or culturally distinguishable groups including the Al-Akhdam. In light of its general recommendation 4 (1973) as well as of paragraph 8 of its reporting guidelines, the Committee reiterates its recommendation to the State party that information on the ethnic composition of the population be provided in its next periodic report. It also recalls its general recommendation 8, which states that identification of ethnic or racial groups shall, if no justification exists to the contrary, be based upon self-identification by the individual concerned…").

[24] *Inter alia*, Democratic Republic of Congo, 17/08/2007, CERD/C/COD/CO/15, para. 14. *See also Connors v. United Kingdom*, Euro. Ct. H. R., Judgment of 27 May 2004, Application no. 66746/01, para. 84 (declaring that states have an obligation to take positive steps to provide for and protect the different lifestyles of minorities as a way to provide equality under the law).

[25] *General Recommendation XIV, Definition of discrimination (Art. 1, par.1),* 22/03/93, at para. 2.

[26] *Inter alia*, India, 05/05/2007, CERD/C/IND/CO/19, para. 11 (recommending that the *Habitual Offenders Act* be amended to remove provisions perpetuating stigmatization of tribal people); Indonesia, 15/08/2007, CERD/C/IDN/CO/3, at para. 16 (recommending that national laws be amended to so that "concepts of national interest, modernization and economic and social development are defined in a participatory way, encompass world views and interests of all groups living on its territory"); and New Zealand, 15/08/2007, CERD/C/NZL/CO/17, at para. 13-14 (observing that the Treaty of Waitangi is not part of domestic law except to the extent that it is incorporated by statute and recommending that "the Treaty of Waitangi is incorporated into domestic legislation where relevant, in a manner consistent with the letter and the spirit of that Treaty. It should also ensure that the way the Treaty is incorporated, in particular regarding the description of the Crown's Treaty obligations, enables a better implementation of the Treaty").

to the socio-economic and political situation of these groups in order to ensure that their development in the social, economic and cultural spheres takes place on an equal footing with that of the general population."[27]

The reference to 'groups' in Article 2(2) substantiates the conclusion that ICERD offers protection to group or collective rights.[28] This conclusion is further supported by Articles 2(1)(a) and 4(a), which, respectively, provide that states undertake not to engage in any acts "of racial discrimination against persons, groups of persons or institutions" and shall punish incitement to racial discrimination "against any race or groups of persons." Article 14(1), the provision governing the submission of formal complaints to the CERD, also directly refers to the Committee's competence to receive communications from "groups of individuals." In this respect, Thornberry, a current member of UNCERD, explains that ICERD "is group-orientated to the extent that 'advancement', 'development' and 'protection' relate to groups as well as individuals…."[29]

As would be expected, ICERD is replete with references to equality, all of which affirm that human beings are free and equal in dignity and rights and entitled to equal protection of the law against any discrimination. In Article 5, for example, states parties "undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality of before the law" in the enjoyment of all human rights and fundamental freedoms. Among the rights specifically enumerated are the right to equal treatment before tribunals and all other organs administering justice;[30] the right to participate in the conduct of public affairs;[31] the right to own property alone or in association with others;[32] the right to inherit;[33] the right to freedom of thought, conscience and religion;[34] the right to housing;[35] the right to education and training;[36] and the right to equal participation in cultural affairs.[37]

Article 5(d)(v) of ICERD is especially relevant and guarantees, without discrimination, "the right to own property alone ***as well as in association with others***" (emphasis added). In principle then, there is no reason that forest peoples that self-identify as ethnically distinct cannot seek protection for their property rights pursuant to ICERD, and the language 'in association with others' certainly, and at the very least, opens the door to collective property rights should the group in question maintain such a system by virtue of customary law or otherwise. The right to inherit in Article 5(d)(vi) may also be relevant to the extent that it involves equal treatment in the transmission of collective property rights. UNCERD's jurisprudence also supports the application of various rights to non-indigenous entities, including, in some instances, groups (Roma and some

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27 *Manual on Human Rights Reporting*. Geneva: United Nations 1997 (HR/PUB/91/1 (Rev.1)), at 277.

28 Article 2(2) provides, in pertinent part, that "States Parties shall, when the circumstances so warrant, take, in the social, economic, cultural and other fields, special and concrete measures to ensure the adequate development and protection of certain racial groups or individuals belonging to them, for the purpose of guaranteeing them the full and equal enjoyment of human rights and fundamental freedoms. …").

29 P. Thornberry *Indigenous Peoples and Human Rights* (2002), at p. 208.

30 Art. 5(a).

31 Art. 5(c).

32 Art. 5(d)(v).

33 Art. 5(d)(vi).

34 Art. 5(d)(vii).

35 Art. 5(e)(iii).

36 Art. 5(e)(v).

37 Art. 5(e)(vi).

Afro-descendant groups, for example). In principle then, a forest people that is ethnically distinct and employs a customary and collective land tenure system, which is not recognized by the state or is otherwise impaired by the state, could seek protection for its collectively owned lands under ICERD and the procedures available in the UNCERD.

Article 6 of ICERD recognizes that effective judicial and other remedies are an indispensable element of the overall human rights protection regime. It reads in pertinent part that states parties shall ensure "effective protection and remedies, through the competent national tribunals and other state institutions, against any acts of racial discrimination … as well as the right to seek from such tribunals just and adequate reparation or satisfaction for any damage suffered as a result of such discrimination." Therefore, analysis of discrimination against forest peoples may also extend into the arena of the administration of justice, the provision of non-discriminatory judicial and other remedies, and whether customary laws or systems are acknowledged and treated equally in judicial and other proceedings.

Has UNCERD dealt with the rights of forest peoples or analogous groups in its procedures previously? The short answer is yes, although some of the groups mentioned may actually be indigenous peoples who are not specifically identified as such (*Amazigh* or Berbers in Mauritania, for instance), and there are not many examples that directly concern non-indigenous peoples in forests or otherwise. Nonetheless, it is possible to analogise to forest peoples and the jurisprudence supports the contention that forest peoples' collective and customary rights are guaranteed and protected by ICERD (or at least could be if explained and substantiated in this way). This jurisprudence (based on a review from 2004 to the present) may be broken down into seven main issues: 1) the right of ethnic groups to cultural identity/integrity in general[38] and, *inter alia*, linguistic and educational rights more specifically); 2) specific protections for land and resource rights on the basis of ethnicity or descent;[39] 3) rights to participate in decision making and government structures on the basis of ethnicity;[40] 4) recognition of customary laws and rejection of restrictions to their applicability to the extent that they may be compatible with general human rights guarantees; 5) disparities in the enjoyment of economic, social and cultural rights;[41] 6) access to judicial and other remedies; and 7) criteria applicable to resettlement.[42]

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[38] *See e.g.,* Tajikistan, 10/12/2004, CERD/C/65/CO/8, at para. 19 (The Committee notes with interest that the 1997 Culture Act guarantees the right of national and ethnic minorities to preserve and develop their cultural identity. The Committee wishes to receive more information on the content and effective implementation of this law, the specific programmes adopted to that end, and the mechanisms ensuring the participation of the groups concerned in the elaboration and implementation of these programmes).

[39] On descent based discrimination, *see* Yemen, 19/10/2006, CERD/C/YEM/CO/16, at para. 16 (noting "with concern reports it has received that indicate that members of the Al-Akhdam community allegedly face difficulties in, if not outright barriers to, effectively exercising their right to own property (art. 5(d)(v))" and; requesting that the state "provide further information regarding the right of all persons within its territory, including members of marginalized or vulnerable groups to obtain and own property").

[40] *See e.g.,* Nigeria, 27/3/2007,CERD/C/NGA/CO/18, para. 19.

[41] *See e.g.,* Mongolia, 19/10/2006, CERD/C/MNG/CO/18, at para. 19 (concluding and recommending that "The Committee … remains concerned about the significant disparities in the enjoyment of economic, social and cultural rights that persist in the State party, particularly affecting ethnic groups in rural and remote areas (art. 5 (e)). The Committee recalls that the low level of economic, social and cultural development of certain ethnic groups as compared with the rest of the population might be an indication of de facto discrimination, even if it is not the direct result of a deliberate effort by the Government to prevent part of its population from enjoying its rights").

With regard to property rights, the UNCERD explicitly stated with respect to Bedouin in Israel that the State should recognise "the rights of the Bedouins to own, develop, control and use their communal lands, territories and resources traditionally owned or otherwise inhabited or used by them. It recommends that the State party enhance its efforts to consult with the inhabitants of the villages and notes that it should in any case obtain the free and informed consent of affected communities prior to … relocation."[43] This language is normally used in the indigenous context and it may be the case that the UNCERD considers the Bedouin to be indigenous. Although likely referring to peoples who self-identify as indigenous, the UNCERD recommended that Laos "review its land regime with a view to recognizing the cultural aspect of land, as an integral part of the identity of some ethnic groups."[44] The application of this principle however transcends whether a particular group self-identifies as indigenous and the use of the term "ethnic groups" further allows for generalisation to groups that so define themselves.[45] It added that it "regrets that it has not been given information … as to how communities'

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[42] *Inter alia* Tanzania, CERD/C/TZA/CO/16, 27 March 2007, at para. 14 (noting "with concern the lack of information from the State party regarding the expropriation of the ancestral territories of certain ethnic groups, and their forced displacement and resettlement (art. 5). The Committee recommends that the State party provide detailed information on the expropriation of the land of certain ethnic groups, on compensation granted and on their situation following their displacement") and; Ethiopia, 20/6/2007, CERD/C/ETH/CO/15, at para. 20 (The Committee is concerned at the programme of voluntary resettlements of rural communities to fertile agricultural lands, in particular when not done in an intraregional context, and at the measures taken to ensure the equal enjoyment of economic, social and cultural rights by those who participate in such programmes (article 5 (b) and (e) of the Convention). The Committee recommends that the State party adopt all necessary measures to ensure that resettlements occur on a genuinely voluntary basis and that, especially when in a different region, the resettled population is guaranteed non-discriminatory enjoyment of economic, social and cultural rights, in particular regarding adequate infrastructure for an effective improvement in their living conditions. The Committee further recommends that the State party provide information, in its overdue report, on any initiatives undertaken to resolve disputes concerning land and resource distribution between ethnic groups and the support offered to civil society organizations involved in the peaceful mediation of such conflicts"). *See also* South Africa, 19/10/2006, CERD/C/ZAF/CO/3, at para. 18 (distinct from treatment of indigenous peoples (para. 19), "noting the promulgation of the Restitution of Land Rights Amendment Act of 2004 and the post-settlement support programmes, the Committee is concerned about the extent of restitution, the sustainable development of resettled communities and the enjoyment of their rights under the Convention, in particular their rights to housing, health, access to water and education (art. 5 (e))" and; encouraging the state "to strengthen its policy of land restitution and post-settlement support in order to ensure to those resettled ethnic communities an improvement in the enjoyment of their economic, social and cultural rights under the Convention").

[43] Israel, 14/6/2007, CERD/C/ISR/CO/13, at para. 25 (expressing "concern about the relocation of inhabitants of unrecognized Bedouin villages in the Negev/Naqab to planned towns. While taking note of the State party's assurances that such planning has been undertaken in consultation with Bedouin representatives, the Committee notes with concern that the State party does not seem to have enquired into possible alternatives to such relocation, and that the lack of basic services provided to the Bedouins may in practice force them to relocate to the planned towns. (Articles 2 and 5 (d) and (e) of the Convention"). *See also* Communication of the UNCERD to Israel (follow up procedure), 28 September 2009, at p. 2 (taking note of a resolution establishing a new authority on the Bedouin within the Ministry of Construction and Housing and expressing concern that the resolution "does neither expressly mention the recognition of existing villages nor the question of free and informed consent by the affected communities"), http://www2.ohchr.org/english/bodies/cerd/docs/followup/Israel28092009.pdf; and Communication of UNCERD to Kenya (urgent action procedure), 9/3/2012, http://www2.ohchr.org/english/bodies/cerd/docs/CERD_Kenya.pdf.

[44] Laos, 9/3/2012, CERD/C/LAO/CO/16-18, at para. 16 (concluding that "In view of the customs and traditional practices of members of ethnic groups in mountainous areas, the Committee is concerned that the land regime of the State party, whereby land is allotted for housing, farming, gardening and grazing, fails to recognize a link between the cultural identity of ethnic groups and their land. (art. 5 (e))").

[45] *See e.g.,* Turkmenistan, 9/3/2012, CERD/C/TKM/CO/6-7, at para. 10 (expressing concern "about a lack of information about measures to respect and protect the cultural and ethnic identity of ethnic and national minorities and to avoid

free prior and informed consent is ensured in practice in the implementation of projects that affect the use of their lands and resources, in particular in the implementation of development projects….”[46]

Again most likely referring to indigenous peoples, but using the more generic ‘ethnic group’ terminology, the UNCERD observed that “various forestry and environment protection laws may have a discriminatory effect on ethnic groups living in forests” and recommended that Thailand “review the relevant forestry laws in order to ensure respect for ethnic groups’ way of living, livelihood and culture, and their right to free and prior informed consent in decisions affecting them, while protecting the environment.”[47] In the case of Kenya, it recommended that the state “take measures without delay to operationalize the machinery and mechanisms for addressing land problems fairly, taking into account the historical contexts of land ownership and acquisition,” which presumably would include customary tenure.[48] Likewise, in 2008, it recommended that Namibia “Implement its policies on land reform in such a way to ensure the equal exercise by the different ethnic communities of the rights enshrined in the Convention….”[49]

There are also instances of UNCERD raising concerns about property rights under its early warning and urgent action procedures, albeit considering the affected people to be indigenous whereas they may not self-identify as such. In the case of Ethiopia, it raised concerns about “a fifty year lease to an Indian Company (Verdanta Harvests) on ancient forests in the Godere District that reportedly belong to the Manzenger and other

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any kind of forced assimilation, in particular of the Baluchi minority group;” and recommending that “the State party observe the principle of self-identification of members of ethnic and national minorities and consult their representatives on the issues of concern to them, and adopt as a matter of priority, wherever necessary, special measures to enable the preservation of the language, culture, religious specificities and traditions of such groups…”); and, at para. 21 (reiterating “its concern about the lack of information on the involvement of minority groups in cultural activities and efforts to preserve and develop their culture, in order to maintain their cultural identity as guaranteed by law (arts. 5(e)(v) and 7)” and urging “the State party to take specific measures for the preservation and development of cultures of minority groups so that they may be enabled to maintain their cultural identity”).

46 Laos, 9/3/2012, CERD/C/LAO/CO/16-18, at para. 17 (urging “the State party to ensure that the right of communities to free prior and informed consent is respected in the planning and implementation of projects affecting the use of their lands and resources. The Committee calls upon the State party to ensure that communities have the capacity to effectively represent their interests in decision-making processes. The Committee also recommends that the State party take all measures to ensure that communities have effective access to redress”).

47 Thailand, 31/8/2012, CERD/C/THA/CO/1-3, at para. 16.

48 Kenya, 14/9/2011, CERD/C/KEN/CO/1-4 , at para. 18 (noting “with concern that little progress has been made in resolving land issues over the years and that inter-ethnic violence over land disputes continues to occur. The Committee notes that the State party has adopted the National Land Policy and that the establishment of the National Land Commission is provided for in the new Constitution (art. 5 (d) and (e))”); and stating, at para. 19 (19. The Committee notes with interest the introduction of the concept of community lands in the 2010 Constitution, which recognizes the rights of marginalized and vulnerable ethnic minorities (art. 5). The Committee calls on the State party to take the necessary legislative measures and to adopt policies to implement the constitutional provisions on community lands and minority rights”).

49 Namibia, 22/09/2008, CERD/C/NAM/CO/12, at para. 17 (observing that “The Committee acknowledges the difficulties within a democratic system in implementing land reform policies with a view to addressing existing imbalances. However, it is concerned about the apparent lack of clear and transparent criteria for the redistribution of land in practice, and notes with concern the paucity of information concerning the implementation of relevant policies in this field. (art. 5(d)(v))”).

indigenous peoples of Gambella, for cultivation of tea and spice destined to export."[50] It requested that Ethiopia provide information on this situation and "on measures taken to consult them in effective and appropriate manner."[51]

UNCERD's General Recommendation on persons of African descent both further demonstrates that it is willing to address collective property rights for non-indigenous groups and provides a good indication of the factors that it considers relevant in this respect. It states that people of African descent "are entitled to exercise, without discrimination, individually or in community with other members of their group," the "right to property and to the use, conservation and protection of lands traditionally occupied by them and to natural resources in cases where their ways of life and culture are linked to their utilization of lands and resources…."[52] Note that the term "traditionally occupied" does not require that this occupation be previously sanctioned or even recognised by the state. Note also the qualifying language "in cases where their ways of life and culture are linked to their utilization of lands and resources," which would appear to be the factors deemed most relevant by the UNCERD to substantiating property rights on the basis of traditional occupation. For such groups, the UNCERD also stresses various rights to participate in decision making, including "[t]he right to prior consultation with respect to decisions which may affect their rights, in accordance with international standards;"[53] and by recommending that states parties "[e]nsure that authorities at all levels in the State respect the right of members of communities of people of African descent to participate in decisions that affect them."[54]

On the applicability of customary law systems, the UNCERD both highlights the obligations of the states not to discriminate against custom and also to ensure that the maintenance and operation of customary systems is not to the detriment of the rights of certain groups or sub-groups thereof (women, for instance).[55] With respect to the former, it importantly stressed in 2007 "that respect for customary law and practices should not be ensured through a general exception to the principle of non-discrimination, but should rather be

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[50] Communication of UNCERD to Ethiopia (urgent action procedure), 02/09/2011, at p. 2, http://www2.ohchr.org/english/bodies/cerd/docs/early_warning/Ethiopia02092011.pdf.

[51] *Id*.

[52] *General recommendation No. 34: Racial discrimination against people of African descent,* 3 October 2011, at para. 4 (further recognising "The right to their cultural identity, to keep, maintain and foster their mode of life and forms of organization, culture, languages and religious expressions; [and] [t]he right to the protection of their traditional knowledge and their cultural and artistic heritage…"), http://www2.ohchr.org/english/bodies/cerd/docs/GR34_English.pdf.

[53] *Id*. (*see also*, at para. 13, recommending that states "Encourage and develop appropriate modalities of communication and dialogue between communities of people of African descent and/or their representatives and the relevant authorities in the State;" and, at para. 19, recommending that states parties "Formulate and put in place comprehensive national strategies with the participation of people of African descent, including special measures in accordance with articles 1 and 2 of the Convention, in order to eliminate discrimination against people of African descent and ensure their full enjoyment of all human rights and fundamental freedoms").

[54] *Id*. at para. 42.

[55] *See e.g.,* South Africa, 19/10/2006, CERD/C/ZAF/CO/3, at para. 12. The Committee notes the lack of information on how the Traditional Leadership and Governance Framework Act of 2003 addresses the status of customary law and traditional leadership, vis-à-vis both national and provincial legislation (art. 2 (c)), in relation to the elimination of racial discrimination. The Committee recommends that the State party include detailed information in its next periodic report on the role of traditional leadership and on the status of customary law, including on the measures adopted to ensure that the application of such laws does not have the effect of creating or perpetuating racial discrimination.

implemented through positive recognition of cultural rights."[56] Also in 2007, it welcomed a constitutional provision on traditional authorities and recognized the "importance of customary law, including with regard to land ownership," but observed that it needed further information "on the status of those institutions vis-à-vis national law and judicial institutions."[57] It consequently recommended that Mozambique provide detailed information "on its customary law and on the role of community leaders ("*régulos*") in extrajudicial conflict resolution, including any measures adopted to ensure that the actions of traditional authorities, and customary laws, are in conformity with the provisions of the Convention."[58]

Discussing the Botswana constitution, which provides that the prohibition of non-discrimination "on the basis of ethnic origin or tribe does not apply in matters of personal and customary law," the UNCERD explained the general principle that "differential treatment constitutes discrimination if the criteria for such differentiation, judged in the light of the objectives and purposes of the Convention, are not applied pursuant to a legitimate aim, and/or are not proportional to the achievement of this aim."[59] This indicates that the converse position is also true: that rights held or assigned under custom are likely valid and protected to the extent that any differential treatment is designed to be and in fact is beneficial to a particular ethnic group, without violating the rights of its members, and thus equally protects the rights of the group. Eradicating discrimination and providing for equality are both legitimate aims and the object and purpose of the ICERD and, therefore, securing the rights of different ethnic groups, including where this may objectively require differential treatment for those in different situations, is not only valid, but required.

The UNCERD raised the recognition of traditional leadership in the case of Namibia – using the terminology 'indigenous' as Namibia had insisted that all groups were indigenous but at the same time *de facto* excluded the San and Nama and others from traditional leadership structures. It requested additional information on the criteria used "to recognize traditional leaders under the Traditional Authorities Act of 2000 as well as the Council of Traditional Leaders Act of 1997, including on whether the scope of the laws includes all indigenous communities."[60] It expressed particular concern "that no institution exists to assess applications for recognition independently of the Government. (art. 5(b))."[61] It then recommended that Namibia "ensure that the criteria used for the recognition of traditional leaders under the Traditional Authorities Act of 2000 are objective and fair and that their application process is monitored by an independent body charged with

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[56] Zambia, 27/3/2007, CERD/C/ZMB/CO/16, at para. 9. ("the Committee, while welcoming the establishment of a Constitution Review Commission in 2003, reiterates its concern that article 23 of the Constitution, which allows for extended restrictions to the prohibition of discrimination with respect to non-citizens, matters of personal law and of customary law, is not in compliance with the Convention (art. 1)").

[57] Mozambique, 17/8/2007, CERD/C/MOZ/CO/12 at para.13.

[58] *Id. See also* South Africa, 19/10/2006, CERD/C/ZAF/CO/3, at para. 12 (noting "the lack of information on how the Traditional Leadership and Governance Framework Act of 2003 addresses the status of customary law and traditional leadership, vis-à-vis both national and provincial legislation (art. 2 (c)), in relation to the elimination of racial discrimination;" and recommending that the state "include detailed information in its next periodic report on the role of traditional leadership and on the status of customary law, including on the measures adopted to ensure that the application of such laws does not have the effect of creating or perpetuating racial discrimination").

[59] Botswana, 4/4/2006, CERD/C/BWA/CO/16, at para. 8.

[60] Namibia, 22/09/2008, CERD/C/NAM/CO/12, at para. 16.

[61] *Id*.

assessing the legitimacy of applications for recognition by indigenous groups."[62] One conclusion that may be drawn from this is that the UNCERD considers the failure to treat the traditional leadership of all ethnic groups equally to contravene the ICERD. Another is that the recognition of traditional leadership is not the prerogative of the state but must be based on objective and fair criteria that are independently monitored.

A similar situation was raised under the UNCERD's follow up procedure in relation to Botswana, where the UNCERD explained that "the Tribal Territories Act, the Chieftainship Act and Sections 77 to 79 of the Constitution, as currently drafted, have a discriminatory effect, in particular against those ethnic groups which are subordinate to a dominant tribe on a Tribal territory, and are not represented on an equal basis in the House of chiefs."[63] It stressed that Botswana "should not discriminate between groups, and should not lead to a situation where some groups are recognized while others are not, or where the interests of some groups are taken into consideration while interests of other groups are not."[64] It added that it would like further information "clarifying what the terms 'dominant tribe' and 'historical agreement of all concerned', by which a paramount chief rules over all tribal groupings living in Tribal territories, actually mean."[65]

In sum, the UNCERD appears to provide fertile ground for raising and seeking protection for the rights of forest peoples. This is supported by the text of the ICERD itself as well as the underlying spirit and purpose of that instrument, which prohibits discrimination and requires equal protection of ethnic groups with regard to all human rights, including rights that may be recognized in national law. The jurisprudence of the UNCERD further supports this conclusion, although this is clouded somewhat by the imprecise use of terminology and the UNCERD's tendency to not directly use the term indigenous when reviewing some states even though the objects of its recommendations are peoples that self-identify as indigenous. Likewise, it sometimes uses the term 'indigenous' in relation to peoples who may not self-identify as such. These issues aside the general principles developed by the UNCERD and their applicability to ethnic groups irrespective of whether they self-identify as indigenous allows for the articulation of rights in the case of forest peoples and the use of the UNCERD's procedures in relation to those rights.

It is also clear from the jurisprudence and standards set in ICERD that groups that define themselves as ethnically distinct may assert collective property rights and other protections in relation to that property. Its General Recommendation on people of African descent, for instance, demonstrates that the UNCERD is willing to extend collective or collectivised property rights protections to non-indigenous groups where their "ways of life and culture are linked to their utilization of lands and resources." Similar criteria are also used by the UN Human Rights Committee (see below), among others, and in soft-law instruments such as the *United Nations Guiding Principles on Internal Displacement*.[66] Additionally, customary tenure systems should be treated and

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[62] *Id*.

[63] Communication of UNCERD to Botswana, 10 March 2005, at p. 2, http://www2.ohchr.org/english/bodies/cerd/docs/CERD.C.66.BOT.letter.pdf.

[64] *Id*.

[65] *Id*.

[66] *United Nations Guiding Principles on Internal Displacement,* UN Doc. E/CN.4/1998/53/Add.2 (11 February 1998) (providing that "States are under a particular obligation to protect against the displacement of indigenous peoples, minorities, peasants, pastoralists and other groups with a special dependency on and attachment to their lands"). Emphasizing this principle, in *Moiwana Village*, the Inter-American Court held that many of the *Guiding Principles on Internal Displacement* "illuminate the reach and content of Article 22 of the [American] Convention [the right to

protected equally to state endorsed property regimes. Equal treatment in this context does not necessarily mean the same as, but should be interpreted to mean that they are equally protected by law. Similarly, equally protected by law should be interpreted to mean protected at least to the same extent as state issued property rights and likely to an even higher standard where cultural and other attachments to land are present and where livelihoods are dependent on access to and the productive capacity of those lands. The state also may not discriminate against traditional leadership/governance structures by privileging one group over another or, in principle, by failing to recognize those structures.

It is surprising however that the UNCERD has not addressed non-indigenous customary tenure rights more frequently. This is likely due in large part to the failure to bring these issues to its attention and may be corrected precisely by doing so. This should involve the strategic identification of clear cases of violations of forest peoples' collective and customary tenure rights, which would then be presented to the UNCERD in such a way as to highlight the relevant issues for the purposes of developing and applying jurisprudence. ICERD is binding on 175 states at present and is incorporated or reflected in domestic laws, often in fundamental rights sections of national constitutions. There are therefore grounds for seeking national level protections that can be bolstered by UNCERD's interpretations of the non-discrimination/equal protection norms. There are of course also non-legal methods of raising these same points.

Finally, the UNCERD adopts 'General Recommendations' that elaborate on the rights protected by the ICERD and the corresponding obligations of state parties. While 35 of these general recommendations have been adopted to date, there is not one that specifically or exclusively deals with the property rights guaranteed by Article 5(d)(v) and related provisions (the right to inherit in Article 5(d)(vi), for instance). It is possible to advocate that the UNCERD adopt such a general recommendation. This would best be done subsequent to highlighting these issues under its reporting and other procedures and, once supporting jurisprudence has been developed, to then seek the adoption of a general recommendation.

2. Other Instruments and Mechanisms

Very briefly, all of the major human rights instruments also prohibit discrimination, either in relation to the various rights set forth in their operative articles or as a stand-alone prohibition (meaning not tied to a specific right), and discrimination on the basis of race and ethnicity are usually explicitly prohibited. It is also possible to raise non-discrimination issues on behalf of groups of similarly situated individuals. The Committee on the Rights of the Child, for instance, often raises non-discrimination issues under Article 2 of the Convention of the same name and this also may be done in conjunction with the rights of minority children recognised in Article 30 (see below). The same is also the case for both the Human Rights Committee (in relation to the International Covenant on Civil and Political Rights ("ICCPR")) and the Committee on Economic, Social and Cultural Rights (in relation to the Covenant of the same name ("ICESCR")).[67] Note in particular that Article 2(1) of the ICCPR and Article 2(2) of the ICESCR both obligate states parties to recognize and respect the exercise of the

freedom of movement and residence] in the context of forced displacement." *Moiwana Village v. Suriname*, 15 June 2005, Series C No. 124, at para. 111.

[67] *See e.g., General Comment No. 20, Non-discrimination in economic, social and cultural rights (art. 2, para. 2, of the International Covenant on Economic, Social and Cultural Rights),* E/C.12/GC/20, 2 July 2009, http://www2.ohchr.org/english/bodies/cescr/comments.htm.

rights therein without discrimination of any kind as to, *inter alia*, "property." Likewise, regional bodies such as the Inter-American Commission and Court and the African Commission and Court may also deal with discrimination issues, and they often use the UNCERD's jurisprudence to support their views.[68] It is therefore possible to raise discrimination and equal protection concerns as they pertain to property rights in a variety of human rights bodies and procedures, including the Special Procedures of the Human Rights Council (e.g., the Special Rapporteur on the Right to Food or on Racism and Racial Discrimination).[69]

B. Minority Rights

Minority rights are most prominently protected by Article 27 of the ICCPR, which recognizes a right of 'persons belonging to minorities' not to be 'denied' the enjoyment of their culture, practice of their religion and use of language.[70] An almost identical provision is found in Article 30 of the Convention on the Rights of the Child.[71] While technically an individual rights provision that is limited to the three enumerated areas (culture, language and religion), a measure of collectivity is introduced by the phrase 'in community with other members of their group.' This recognizes that the three enumerated areas concern spheres of communal human interaction and cannot exist or be exercised without other members of the community. The existence of minorities for the purposes of Article 27 "does not depend upon a decision by [the] State party but requires to be established by objective criteria."[72] Additionally, 'minorities' need neither be citizens nor even permanent residents of the state to hold rights that require respect and protection and, thus, "migrant workers or even visitors in a State party constituting such minorities are entitled not to be denied the exercise of those rights."[73] Positive measures of protection are also required in relation to the acts of third parties (e.g., corporations and other non-state entities).[74]

While the language 'shall not be denied' represents a considerable hurdle (threshold) to overcome,[75] this provision has been used by indigenous peoples and others – with varying degrees of success – to seek

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[68] *See e.g., Report on Admissibility and Merits No. 09/06 on the Case of the Twelve Saramaka Clans (Suriname)* (2 March 2006), at para. 235 (finding that indigenous and tribal peoples in Suriname "have endured racial discrimination, and that one major manifestation of such discrimination has been the failure of state authorities to recognize customary indigenous forms of land possession and use"); and at para. 237, (concluding that "[t]he Commission considers that the lack of constitutional and legislative recognition or protection of the collective rights of the Saramaka communities reflects unequal treatment in the law, which is not compatible with the guarantees of the American Convention").

[69] On the Special Procedures, *see* http://www.ohchr.org/EN/HRBodies/SP/Pages/Welcomepage.aspx.

[70] Article 27 reads: "In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language."

[71] Article 30 provides that "In those States in which ethnic, religious or linguistic minorities or persons of indigenous origin exist, a child belonging to such a minority or who is indigenous shall not be denied the right, in community with other members of his or her group, to enjoy his or her own culture, to profess and practise his or her own religion, or to use his or her own language."

[72] Human Rights Committee, *General Comment on 23, The Right of Minorities, CCPR/C/21/Rev.1/Add.5* (4 August 1994), at para. 5.2, http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/fb7fb12c2fb8bb21c12563ed004df111?Opendocument.

[73] *Id*.

[74] General Comment 23, at para. 6.1.

[75] *See e.g*., *Länsman III v. Finland* (1023/2001), ICCPR, A/60/40 vol. II (17 March 2005) 90, at para. 10.1 (stating that "As noted by the Committee in its Views on case No. 511/1992 of *Länsman et al. v. Finland*, however, measures with only a limited impact on the way of life and livelihood of persons belonging to a minority will not necessarily amount to a

protection for relationships to lands, traditional economic activities, and other things that are integral to culture and/or spirituality.[76] Most of the jurisprudence concerns indigenous peoples, and shows that the Human Rights Committee distinguishes indigenous peoples from minorities in general on the basis of their relations to lands, including traditional and other land based economic activities, under the rubric of culture. This is supported by the language of the Committee's 1994 General Comment on Article 27, which states that "one or other aspect of the rights of individuals protected under that article - for example, to enjoy a particular culture - may consist in a way of life which is closely associated with territory and use of its resources. This may particularly be true of members of indigenous communities constituting a minority."[77] Particularly, but not exclusively true; there is therefore no reason that a non-indigenous minority (technically, the members of) that may have similar relations to lands and resources may not also seek protection. This may be done through a reporting and a formal complaints procedure (the latter provided the state in question is a party to the ICCPR (165 at present)[78] and has additionally ratified Optional Protocol I to the ICCPR).[79]

With respect to the content of the rights protected by Article 27, the Committee explains that culture-based relations to land, and the rights related thereto, "may include such traditional activities as fishing or hunting and the right to live in reserves protected by law. The enjoyment of those rights may require positive legal measures of protection and measures to ensure the effective participation of members of minority communities in decisions which affect them."[80] With regard to effective participation, the OHCHR explains that "it is not sufficient for States to ensure their formal participation; States must also ensure that the participation

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denial of the rights under article 27") and, at 10.3 (clarifying that "In weighing the effects of logging, or indeed any other measures taken by a State party which has an impact on a minority's culture, the Committee notes that the infringement of a minority's right to enjoy their own culture, as provided for in article 27, may result from the combined effects of a series of actions or measures taken by a State party over a period of time and in more than one area of the State occupied by that minority. Thus, the Committee must consider the overall effects of such measures on the ability of the minority concerned to continue to enjoy their culture. In the present case, and taking into account the specific elements brought to its attention, it must consider the effects of these measures not at one particular point in time - either immediately before or after the measures are carried out - but the effects of past, present and planned future logging on the authors' ability to enjoy their culture in community with other members of their group"). *See also Howard v. Canada* (879/1998), ICCPR, A/60/40 vol. II (26 July 2005) 12 at para. 12.7 (stating that "the Committee considers that States parties to the Covenant may regulate activities that constitute an essential element in the culture of a minority, provided that the regulation does not amount to a de facto denial of this right").

[76] *See* D. Kugelmann, *The Protection of Minorities and Indigenous Peoples Respecting Cultural Diversity,* 11 MAX PLANCK YEARBOOK OF UNITED NATIONS LAW 233 (2007) (discussing the development of the minority rights regime and the similarities and differences between minority rights and indigenous peoples' rights, including the overlap between the two categories), http://www.mpil.de/shared/data/pdf/pdfmpunyb/06_kugelmann_11.pdf.

[77] General Comment 23*,* at para. 3.2.

[78] *See* http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en.

[79] For parties to the Optional Protocol, *see* http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-5&chapter=4&lang=en. *See also* Human Rights Committee, *General Comment No 33, The Obligations of States Parties under the Optional Protocol to the International Covenant on Civil and Political Rights*, 5 November 2008, http://www2.ohchr.org/english/bodies/hrc/docs/CCPR.C.GC.33.pdf.

[80] General Comment 23, at para. 7. *See also UN Declaration on the Rights of Persons belonging to National, Ethnic, Religious or Linguistic Minorities* (1992), Art. 2(2) and 2(3) (providing, respectively, that "Persons belonging to minorities have the right to participate effectively in cultural, religious, social, economic and public life" and; "Persons belonging to minorities have the right to participate effectively in decisions on the national and, where appropriate, regional level concerning the minority to which they belong or the regions in which they live, in a manner not incompatible with national legislation").

of representatives of minorities has a substantial influence on the decisions which are taken, so that there is, as far as possible, shared ownership of these decisions."[81] 'Shared ownership" implies, at a minimum, some degree of consensus about the decision and could be interpreted as requiring consent. As discussed below, this view has also been adopted by the Human Rights Committee in its case law provided that certain circumstances are evident.

Further, the rights accorded to members of minorities are additional to and distinct from the general human rights that apply to everyone. Thus, the Committee explains (also illustrating the inter-connection between minority rights and non-discrimination rights) that:

> positive measures by States may also be necessary to protect the identity of a minority and the rights of its members to enjoy and develop their culture and language and to practise their religion, in community with the other members of the group. In this connection, it has to be observed that such positive measures must respect the provisions of articles 2.1 and 26 of the Covenant [prohibiting discrimination] both as regards the treatment between different minorities and the treatment between the persons belonging to them and the remaining part of the population. However, as long as those measures are aimed at correcting conditions which prevent or impair the enjoyment of the rights guaranteed under article 27, they may constitute a legitimate differentiation under the Covenant, provided that they are based on reasonable and objective criteria.[82]

What does the Human Rights Committee's jurisprudence say? As with the UNCERD, there is surprisingly little direct jurisprudence on forest peoples and it is clear that at times the Committee is referring to indigenous peoples but using the term 'minorities'. Nonetheless, the general principles stated above are elaborated on in specific circumstances and this is instructive as to how to (by analogy) frame rights assertions for forest peoples. As a general proposition, it may be said that the term 'indigenous' allows the Committee to make a short cut to the specific rights that pertain to 'indigenous minorities', particularly as it allows it to presume cultural/spiritual relations to lands. For forest peoples, this would need to be substantiated by sufficient evidence (anthropological studies, community testimony, etc.,) to make clear the existence and extent of such relationships.[83]

The Committee's decision in the *Diergaardt et al. v. Namibia* case illustrates this point. This case involves 'Basters' (mostly persons of mixed Afrikaner/Nama descent) who asserted violations of the right to self-

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[81] OHCHR, MINORITY RIGHTS: INTERNATIONAL STANDARDS AND GUIDANCE FOR IMPLEMENTATION, United Nations: New York & Geneva 2010, at p. 12 (citing UN Doc. A/HRC/13/23, para. 52, "in which the independent expert on minority issues refers to: Council of Europe, Advisory Committee on the Framework Convention for the Protection of National Minorities, Commentary on the effective participation of persons belonging to national minorities in cultural, social and economic life and public affairs (ACFC/31DOC(2008)001, paras. 18 and 19)"). Available at: http://www.ohchr.org/documents/publications/minorityrights_en.pdf

[82] General Comment 23, at para. 6.2.

[83] On the role of anthropologists and community testimony in human rights litigation *see* K. de Feyter, *Treaty Interpretation and the Social Sciences*, *in* METHODS OF HUMAN RIGHTS RESEARCH (F. Coomans, F. Grünfeld, & M. Kamminga, eds., Intersentia Press, 2009).

determination and cultural rights when their lands were expropriated by the newly-independent Namibia.[84] Reciting the protections that may be accorded under Article 27, the Committee observed that it

> is unable to find that the authors can rely on article 27 to support their claim for exclusive use of the pastoral lands in question. This conclusion is based on the Committee's assessment of the relationship between the authors' way of life and the lands covered by their claims. Although the link of the Rehoboth community to the lands in question dates back some 125 years, it is not the result of a relationship that would have given rise to a distinctive culture. Furthermore, although the Rehoboth community bears distinctive properties as to the historical forms of self-government, the authors have failed to demonstrate how these factors would be based on their way of raising cattle. The Committee therefore finds that there has been no violation of article 27 of the Covenant in the present case.[85]

In a separate opinion, two members of the Committee wrote that

> This claim raises some difficult issues as to how the culture of a minority which is protected by the Covenant is to be defined, and what role economic activities have in that culture. These issues are more readily resolved in regard to indigenous communities which can very often show that their particular way of life or culture is, and has for long been, closely bound up with particular lands in regard to both economic and other cultural and spiritual activities, to the extent that the deprivation of or denial of access to the land denies them the right to enjoy their own culture in all its aspects. In the present case, the authors have defined their culture almost solely in terms of the economic activity of grazing cattle. They cannot show that they enjoy a distinct culture which is intimately bound up with or dependent on the use of these particular lands, to which they moved a little over a century ago, or that the diminution of their access to the lands has undermined any such culture. Their claim is, essentially, an economic rather than a cultural claim and does not draw the protection of article 27.[86]

The Committee has otherwise made direct reference to lands – as part of the right to enjoy culture – on a number of occasions. In the case of Israel, it recommended that the state "should respect the Bedouin population's right to their ancestral land and their traditional livelihood based on agriculture;"[87] referring to the Ogiek and Endorois in Kenya (both of who self-identify as indigenous), it recommended that "in planning its development and natural resource conservation projects, the State party respect the rights of minority and indigenous groups to their ancestral land and ensure that their traditional livelihood that is inextricably linked to their land is fully respected;"[88] and referring to 'highlanders' in Thailand, it recommended that the state "should

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84 *Diergaardt et al. v. Namibia* (760/1997), ICCPR, A/55/40 vol. II (25 July 2000) 140, at para. 10.6 (alleging "a violation of article 27 in that a part of the lands traditionally used by members of the Rehoboth community for the grazing of cattle no longer is in the *de facto* exclusive use of the members of the community. Cattle raising is said to be an essential element in the culture of the community").

85 *Id*.

86 *Id*. Individual Opinion by Elizabeth Evatt and Cecilia Medina Quiroga.

87 Israel, 3/9/2010, CCPR/C/ISR/CO/3, para. 24 (observing that "the Committee is concerned at allegations of forced evictions of the Bedouin population on the basis of the Public Land Law (Expulsion of Invaders) of 1981 as amended in 2005, and of inadequate consideration of traditional needs of the population in the State party's planning efforts for the development of the Negev, in particular the fact that agriculture is part of the livelihood and tradition of the Bedouin population").

88 Kenya, 31/8/2012, CCPR/C/KEN/CO/3, para. 24.

guarantee the full enjoyment of the rights of persons belonging to minorities that are set out in the Covenant, in particular with respect to the use of land and natural resources, through effective consultations with local communities."[89]

Further, while the Committee has discussed the operation of customary law in relation to human rights, it generally does so with respect to ensuring that custom is not the basis for allowing human rights violations or in relation to operation of customary courts vis-à-vis fair trial guarantees and access to effective domestic remedies.[90] The review of jurisprudence did not reveal any instance of the Committee explicitly relating customary law rights to lands via the optic of the right to enjoy culture, except in the case of indigenous peoples. Nonetheless, the existence of a customary tenure system would seem to be part of demonstrating, per the terms of *Diergaardt* above, a "distinctive culture" and "that their particular way of life or culture is, and has for long been, closely bound up with particular lands in regard to both economic and other cultural and spiritual activities, to the extent that the deprivation of or denial of access to the land denies them the right to enjoy their own culture in all its aspects." In this respect, contextualising these principles to forest peoples would appear to provide strong grounds for asserting their rights to lands and resources and to maintain and benefit from their traditional economies as well as the other rights deemed integral to Article 27.

As with the UNCERD, the Committee does not accept discriminatory distinctions between ethnic groups in relation to the rights recognized in Article 27. In the case of Botswana, for instance, the Committee recommended that the state "should ensure that it repeals any discriminatory element in the appointment and representation of tribes in the Ntlo ya Dikgosi [Council of Chiefs], to ensure fair representation of all tribes. It should also ensure that consultations are held in relation to the adoption of the Bogosi Bill."[91]

As noted above, Article 27 also includes the right to effective participation in decision making as part of its substance and analysis.[92] The Botswana recommendation quoted immediately above would appear to extend the consultation requirements in Article 27 to the adoption of legislation. With respect to direct impacts on lands, in a formal case decided in 2009, the Committee went further than it has previously and emphasised that:

> the admissibility of measures which substantially compromise or interfere with the culturally significant economic activities of a minority or indigenous community depends on whether the

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[89] Thailand, 8/7/2005, CCPR/CO/84/THA, para. 24 (expressing "its concern about the structural discrimination by the State party against minority communities, in particular the Highlanders with regard to citizenship, land rights, freedom of movement and the protection of their way of life. … The Committee is also concerned about the construction of the Thai-Malaysian Gas Pipeline and other development projects which have been carried out with minimal consultation with the concerned communities").

[90] *See e.g.,* Botswana, CCPR/C/BWA/CO/1 para. 10, 12 and 21; and Zambia, 9/8/2007, CCPR/C/ZMB/CO/3, para. 13-4.

[91] *Id*. at para. 24 (observing that "The Committee is concerned that, despite recent amendments, the current rules regarding appointments to the Ntlo ya Dikgosi do not make provision for fair representation of all tribes. It also notes that the Bogosi Bill, which will repeal and replace the Chieftainship Act, has not been the subject of a full consultation with all interested parties (arts. 25, 26 and 27)").

[92] *See inter alia Mahuika et al. v. New Zealand* (547/1993), ICCPR, A/56/40 vol. II (27 October 2000) 11, at para. 9.5 (explaining that "In its case law under the Optional Protocol, the Committee has emphasised that the acceptability of measures that affect or interfere with the culturally significant economic activities of a minority depends on whether the members of the minority in question have had the opportunity to participate in the decision-making process in relation to these measures and whether they will continue to benefit from their traditional economy").

> members of the community in question have had the opportunity to participate in the decision-making process in relation to these measures and whether they will continue to benefit from their traditional economy. The Committee considers that participation in the decision-making process must be effective, which requires not mere consultation but the free, prior and informed consent of the members of the community.[93]

While this decision technically involved indigenous people, and there is no guarantee that the similar conclusion would be reached if the case were about forest peoples, the language employed ("… of a minority or …") allows for arguments to be made – and for jurisprudence to be sought – concerning the rights of similarly situated 'minority' peoples/communities. This would depend on whether the persons, community or people in question could be considered a minority (generally determined numerically, but also could be determined by reference to other indices). If so considered, the culturally constitutive, land based economic activities practised by many forest peoples would fall within the scope of this provision[94] (and likely trigger some form of protection for the land itself), and if the state-directed or -authorized activities substantially compromise or interfere with the same, the effective participation/FPIC criteria, among other things, should also apply. It is important to note that in the case of indigenous peoples, the Committee has continued to highlight FPIC, rather than the lesser consultation or participation standards, in its concluding observations and recommendations.[95]

As discussed further below, the Human Rights Committee has explained that the rights protected by Article 27 (among others) may also be read conjunctively with the right to self-determination and this may lead to more expansive interpretations of the rights in question.

C. Aggregating Individual Rights

All individuals have the full range of human rights. There is no bar under human rights law to a group of similarly situated and affected individuals bringing claims for violations of their rights together, and no reason that such rights cannot be considered in aggregate for the purposes of recognition, respect and protection thereof.[96] A community or even communities of similarly situated and affected individuals could all simultaneously assert individual rights jointly and/or seek protection for those rights jointly. Which rights are at issue and the feasibility of this approach (particularly the extent to which forest peoples' collective right to lands would be protected) would depend on the specific circumstances. Additionally, if it is economic, social and cultural rights that are at issue (e.g., the right to food or housing in relation to evictions), states are granted a wider margin than they are in relation to civil and political rights, unless the rights at issue are considered 'core rights' of the

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93 *Angela Poma Poma v. Peru*, CCPR/C/95/D/1457/2006, 24 April 2009, at para. 7.6.

94 *Inter alia Länsman v. Finland* (511/1992), ICCPR, A/50/40 vol. II (26 October 1994) 66 (CCPR/C/52/D/511/1992), at para. 9.2 (stating that "economic activities may come within the ambit of article 27, if they are an essential element of the culture of an ethnic community") and, at para. 9.3 (stating, "that the authors may have adapted their methods of reindeer herding over the years and practice it with the help of modern technology does not prevent them from invoking article 27 of the Covenant").

95 *See e.g.,* Togo,18/4/2011, CCPR/C/TGO/CO/4, at para. 21 (recommending that the "State party should take the necessary steps to guarantee the recognition of minorities and indigenous peoples. It should also ensure that indigenous peoples are able to exercise their right to free, prior and informed consent").

96 *See e.g*., *Ominayak v. Canada* (167/1984), ICCPR, A/45/40 vol. II (26 March 1990) 1 at para. 32.1 (stating that "There is … no objection to a group of individuals, who can claim to be similarly affected, collectively to submit a communication about alleged breaches of their rights").

various economic, social and cultural rights (in which case a very similar analysis could be used).[97] The right to food would appear to be a particularly important right in this context as would the right of peoples not to be deprived of their means of subsistence, a collective right that conforms to the core obligations of the individual right to food.

Aggregating the rights of individuals to property is the most straight forward approach. However, the regional systems are the only venues at present where this may be done explicitly, at least through litigation,[98] as, with the exception of the ICERD and CEDAW (the latter in relation to women only), the right to property as such is not specifically provided for in universal human rights instruments. The Inter-American Commission on Human Rights, for instance, has held that "from the standpoint of human rights, a small corn field deserves the same respect as the private property of a person that a bank account or a modern factory receives."[99] The same should also apply to a number of 'small corn fields' held communally. In the jurisprudence of the European Court of Human Rights, the right to property also extends to rights to lands and resources, including common lands and the economic resources therein, customarily owned and used by groups of persons. This principle was elaborated on by the Court in *Dogan v. Turkey*, which concerned the unregistered and customary property rights of members of a Kurdish community.[100]

As the two following examples illustrate, it is also possible to aggregate individual rights without an express reference to property rights, separately or in conjunction with other arguments, if the circumstances so warrant. The first, *Hopu and Bessert v. France,* decided by the Human Rights Committee, concerns the Polynesian traditional owners of land in Nuuroa on the Island of Tahiti. They were dispossessed of this land by order of court when it was awarded to a corporation. The company intended to construct a luxury hotel complex and had begun to clear the land for construction. The authors and others occupied the land in protest in 1992, maintaining that the land and the lagoon bordering it represented "an important place in their history, their culture and their life. … encompasses the site of a pre-European burial ground and that the lagoon remains a traditional fishing ground and provides the means of subsistence for some thirty families living next to the lagoon."[101] Mainly because France had registered a reservation that precluded the application of Article 27 of the ICCPR, the victims alleged that hotel construction arbitrarily interfered with their privacy and their family lives, in violation of articles 17 and 23 of the ICCPR.

While acknowledging that this case would best be resolved under Article 27[102] – which was not possible due to France's reservation – the Committee decided that "that cultural traditions should be taken into account

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[97] *See General Comment No. 3, The nature of States parties obligations (Art. 2, par.1),* 12/14/1990, http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/94bdbaf59b43a424c12563ed0052b664?Opendocument.

[98] *See* Article 1 of Protocol I to the European Convention on Human Rights, Article XXIII, American Declaration on the Rights and Duties of Man, Article 21 of the American Convention on Human Rights, Article 14 of the African Charter of Human and Peoples' Rights, Article 26(1) of the 1995 Commonwealth of Independent States Convention on Human Rights and Fundamental Freedoms, and Article 31 of the Arab Charter of Human Rights.

[99] *Fourth Report on the Human Rights Situation in Guatemala*, IACHR, 12 March 1993, at p. 36.

[100] *Dogan and others v. Turkey*, Euro. CT.H.R., Judgment of 29 June 2004 (rectified on 18 November 2004), para. 23-4, 137.

[101] *Hopu and Bessert v. France.* (Communication No 549/1993) CCPR/C/60/D/549/1993/Rev.1, 29 December 1997, at para. 2.3.

[102] *See id*. *Individual opinion by Committee members David Kretzmer and Thomas Buergenthal, cosigned by Nisuke Ando and Lord Colville (dissenting*), at para. 3 (explaining that "The authors' claim is that the State party has failed to protect

when defining the term 'family' in a specific situation" and that it "transpires from the authors' claims that they consider the relationship to their ancestors to be an essential element of their identity and to play an important role in their family life."[103] It therefore concluded that "the construction of a hotel complex on the authors' ancestral burial grounds did interfere with their right to family and privacy. The State party has not shown that this interference was reasonable in the circumstances, and nothing in the information before the Committee shows that the State party duly took into account the importance of the burial grounds for the authors, when it decided to lease the site for the building of a hotel complex."[104]

The second example concerns the demolition and forced eviction of a Roma community in Bulgaria. This community had been illegally occupying land owned by a municipality for 70 years prior to its eviction and cited violations of the rights of its members pursuant to Article 17 of the ICCPR. Finding violations of Article 17, the Committee explained that, under Article 17, "it is necessary for any interference with the home not only to be lawful, but also not to be arbitrary."[105] It further explained that, "although the State party's authorities are in principle entitled to remove the authors, who occupy municipal land unlawfully, their lack of property rights over the plot of municipal land in question was the only stated justification for the issuance of the eviction order … [and] … the State party has not identified any urgent reason for forcibly evicting the authors from their homes before providing them with adequate alternative accommodation."[106] It then ruled that "In the light of the long history of the authors' undisturbed presence in the Dobri Jeliazkov community, the Committee considers that, by not giving due consideration to the consequences of the authors' eviction from the Dobri Jeliazkov, such as the risk of their becoming homeless, in a situation in which satisfactory replacement housing is not immediately available to them, the State party would interfere arbitrarily with the authors' homes, and thereby violate the authors' rights under article 17 of the Covenant…."[107]

While neither of these examples is perfect from the perspective of forest peoples' collective rights, they do provide evidence of collectivised claims to certain aspects of property being enforced in relation to

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an ancestral burial ground, which plays on important role in their heritage. It would seem that this claim could raise the issue of whether such failure by a State party involves denial of the right of religious or ethnic minorities, in community with other members of their group, to enjoy their own culture or to practise their own religion"); and, at para. 5, "[t]he reference by the Committee to the authors' history, culture and life, is revealing. For it shows that the values that are being protected are not the family, or privacy, but cultural values. We share the concern of the Committee for these values. These values, however, are protected under article 27 of the Covenant and not the provisions relied on by the Committee").

[103] *Id*. at para. 10.3 (observing that "They also claim that members of their family are buried on the site. The Committee observes that the objectives of the Covenant require that the term 'family' be given a broad interpretation so as to include all those comprising the family as understood in the society in question").

[104] *Id*. (noting that "The State party has disputed the authors' claim only on the basis that they have failed to establish a kinship link between the remains discovered in the burial grounds and themselves. The Committee considers that the authors' failure to establish a direct kinship link cannot be held against them in the circumstances of the communication, where the burial grounds in question pre-date the arrival of European settlers and are recognized as including the forbears of the present Polynesian inhabitants of Tahiti").

[105] *Liliana Assenova Naidenova et al v. Bulgaria*, (Communication No. 2073/2011, 25 June 2011), 30 October 2012, at para. 14.3 (s*ee also* at para. 14.4, stating that "Even assuming that the authors' eviction and the demolition of their houses were permitted under the State party's law … the Committee notes, however, that the issue remains whether such interference would be arbitrary").

[106] *Id*. at para. 14.5.

[107] *Id*. at para. 14.7.

aggregations of individual rights (to non-interference with family and home, respectively).[108] As noted above, such claims may be formulated in relation to cultural rights, rights to food or water, rights to religious freedom and others, and this may be done in a way that reinforces collective property rights or at least aspects thereof. To some extent, this is the approach that has been adopted in the draft declaration on the rights of peasants discussed below.[109] Whether this is the right approach in any given situation where forest peoples seek protection for their rights will depend on the circumstances and what options may be available to them.

One final example concerns the right to participate in cultural life recognized in Article 15(1)(c) of the ICESCR. This is an individual right but may also be exercised in association with others "or as a community," thus providing a collective dimension in some instances.[110] The CESCR explains that the "right to take part in cultural life can be characterized as a freedom. In order for this right to be ensured, it requires from the State party both abstention (i.e., non-interference with the exercise of cultural practices and with access to cultural goods and services) and positive action (ensuring preconditions for participation, facilitation and promotion of cultural life, and access to and preservation of cultural goods)."[111] The ICESCR presently has 160 state parties.[112] Issues may be raised with the CESCR through a reporting procedure (applicable to all states parties) and a newly established formal complaints procedure (presently only applicable to 10 states).[113]

The CESCR explains that "Of all the cultural goods, one of special value is the productive intercultural kinship that arises where diverse groups, minorities and communities can freely share the same territory;"[114] and that recognition and protection of the right must be appropriate, meaning "the realization of a specific human right in a way that is pertinent and suitable to a given cultural modality or context, that is, respectful of the culture and cultural rights of individuals and communities, including minorities and indigenous peoples,"[115] and without discrimination.[116] It further explains that minorities in particular have the right "to conserve,

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[108] *See also G and E v. Norway*, Applications Nos 9278/81 and 9415/81 (1984) 35 ECHR Decisions and Reports 30, at 35 (aggregating individual rights and stating that under Article 8, which protects the right to respect for family and private life, "a minority group … [is] in principle, entitled to claim the right to respect for the particular lifestyle it may lead …").

[109] *See e.g.*, C. Golay, *Legal reflections on the rights of peasants and other people working in rural areas. Background paper prepared for the first session of the working group on the rights of peasants and other people working in rural areas* (15-19 July) (2013), p. 16-17 (arguing, at p. 16, that "an analysis of the human rights instruments adopted in the last 40 years demonstrates that, with few exceptions, all human rights can be described as individual rights that can be exercised collectively;" and, at p. 17, explaining that "the Advisory Committee's Declaration recognizes individual rights that can be exercised collectively, which is in conformity with UN practice"), http://www.ohchr.org/Documents/HRBodies/HRCouncil/WGPleasants/Golay.pdf.

[110] General comment No. 21, Right of everyone to take part in cultural life (art. 15, para. 1 (a), of the International Covenant on Economic, Social and Cultural Rights), E/C.12/GC 21, 21 December 2009, at para. 15(b), http://www2.ohchr.org/english/bodies/cescr/comments.htm.

[111] *Id*. at para. 6 (see also at para. 7, stating that "The decision by a person whether or not to exercise the right to take part in cultural life individually, or in association with others, is a cultural choice and, as such, should be recognized, respected and protected on the basis of equality").

[112] *See* http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-3&chapter=4&lang=en.

[113] *See* http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-3-a&chapter=4&lang=en.

[114] General comment No. 21, Right of everyone to take part in cultural life, at para. 16(a).

[115] *Id*. at para. 16(e).

[116] *Id*. at para. 21-4 (stating, at para. 22, that "In particular, no one shall be discriminated against because he or she chooses to belong, or not to belong, to a given cultural community or group, or to practise or not to practise a particular cultural activity. Likewise, no one shall be excluded from access to cultural practices, goods and services").

promote and develop their own culture"[117] and the following constitute 'core obligations' of states (meaning they are immediate obligations rather than subject to progressive realisation):

- To take part freely in an active and informed way, and without discrimination, in any important decision-making process that may have an impact on his or her way of life;[118]
- Respect and protect cultural heritage of all groups and communities, in particular the most disadvantaged and marginalized individuals and groups, in economic development and environmental policies and programmes;[119]
- To respect and protect the right of everyone to engage in their own cultural practices;[120] and
- To allow and encourage the participation of persons belonging to minority groups, indigenous peoples or to other communities in the design and implementation of laws and policies that affect them. In particular, States parties should obtain their free and informed prior consent when the preservation of their cultural resources, especially those associated with their way of life and cultural expression, are at risk.[121]

This provision would appear to provide an adequate basis for asserting the rights of forest peoples to traditional lands and to participate in decisions that may affect them, including possibly on the basis of FPIC. As with UNCERD, this will require presenting well documented examples to the CESCR and seeking (further) jurisprudence to elaborate on and contextualise these points. A review of the jurisprudence to date indicates that it has only been addressed in relation to indigenous peoples.[122] This, again, may be due to the fact that forest peoples are not engaging with the CESCR to the same extent as indigenous peoples.

Corporate activities:

In common with the African Commission and other bodies,[123] the CESCR "has also frequently observed that corporate activities can adversely affect the enjoyment of Covenant rights;" and that states have an

[117] *Id*. at para. 32.
[118] *Id*. at para. 49(e).
[119] *Id*. at para. 55(b).
[120] *Id*. at para. 55(c).
[121] *Id*. at para. 55(e).
[122] *See e.g.,* Russian Federation, E/C.12/RUS/CO/5, 22 May 2011, at para. 34 (stating that "The Committee is also concerned about the lack of adequate protection in the legal system of the State party of the right of indigenous peoples in the North, Siberia and the Far East, to their ancestral lands and to the traditional use of their natural resources. It is also concerned about the lack of adequate protection of their intellectual property rights and the lack of information on intellectual property rights. (art. 15)"); Argentina, E/C.12/ARG/CO/3, 14 December 2011, at para. 25 (stating that "The Committee regrets the insufficient information from the State party regarding the protection of the collective rights of indigenous peoples related to their traditional knowledge and cultural heritage in the State party, including ancestral lands, as an integral part of their cultural identity (art. 15)") and; Cameroon, E/C.12/CMR/CO/3, 23 January 2012, at para. 33 (recommending "that the State party take effective measures to protect the right of each group of indigenous people to its ancestral lands and the natural resources found there, and to ensure that national development programmes comply with the principle of participation and the protection of the distinctive cultural identity of each of these groups. In this regard, the Committee refers the State party to its general comment No. 21 (2009) on the right of everyone to take part in cultural life").
[123] *See e.g., Communication No. 155/96, The Social and Economic Rights Action Center and the Center for Economic and Social Rights / Nigeria*, at para. 58 and 69 (stating that "The intervention of multinational corporations may be a

obligation "to ensure that all economic, social and cultural rights laid down in the Covenant are fully respected and rights holders adequately protected in the context of corporate activities."[124] This includes obligations to respect[125] and protect economic, social and cultural rights in the context of corporate activities.[126]

The same is also the case in the Inter-American system and with respect to the rights of children, including those specifically guaranteed in the case of minority and indigenous children under the Convention on the Rights of the Child (ratified by 193 states).[127] The Committee on the Rights of the Child has increasingly called on states parties to the Convention to respect the rights of children in relation to business and corporate activities. In 2013, for instance, it observed in the case of Guyana that

> Noting that the state party's economy is heavily dependent on the extractive and timber industries, the Committee is concerned at the absence of a legislative framework regulating the prevention of, protection against and reparation of the adverse impact of such activities by foreign and national private and State-owned enterprises on human rights, including children´s rights. The Committee is especially concerned at the impact of these businesses on the living conditions of children and their families in the regions directly affected, on the health hazards and environmental degradation arising therefrom as well as on child labour.[128]

The associated recommendation deals with the adoption of legislative and other measures to ensure that corporate activities do not affect human rights, including measures to implement the *UN Framework on Business and Human Rights*.[129] Similar recommendations have been made to a considerable number of other

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potentially positive force for development if the State and the people concerned are ever mindful of the common good and the sacred rights of individuals and communities").

[124] *Statement on the obligations of States Parties regarding the corporate sector and economic, social and cultural rights*, E/C.12/2011/1, 20 May 2011, at para. 1, http://www2.ohchr.org/english/bodies/cescr/docs/E.C.12.2011.1-ENG.doc.

[125] *Id*. at para . 4 (stating that "**Respecting rights** requires States Parties to guarantee conformity of their laws and policies regarding corporate activities with economic, social and cultural rights set forth in the Covenant. As part of this obligation, States Parties shall ensure that companies demonstrate due diligence to make certain that they do not impede the enjoyment of the Covenant rights by those who depend on or are negatively affected by their activities").

[126] *Id*. at para. 5 (stating that "**Protecting rights** means that States Parties effectively safeguard rights holders against infringements of their economic, social and cultural rights involving corporate actors, by establishing appropriate laws, regulations, as well as monitoring, investigation and accountability procedures to set and enforce standards for the performance of corporations. As the Committee has repeatedly explained, non-compliance with this obligation can come through action or inaction. It is of utmost importance that States Parties ensure access to effective remedies to victims of corporate abuses of economic, social and cultural rights, through judicial, administrative, legislative or other appropriate means").

[127] *See* http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11&chapter=4&lang=en.

[128] Guyana, CRC/C/GUY/CO/2-4, 5 February 2013, at para. 23.

[129] *Id*. at para. 24 (recommending that Guyana: (a) Establish the necessary regulatory framework and policies for business, in particular with regard to the extractive industry (gold and bauxite) and timber and fisheries projects –whether large or small scale-, to ensure that they respect the rights of children and promote the adoption of effective corporate responsibility models; (b) Ensure that prior to the negotiation and conclusion of free trade agreements, human rights assessments, including on child rights, are conducted and measures adopted to prevent and prosecute violations, including by ensuring appropriate remedies; and, (c)Comply with international and domestic standards on business and human rights with a view to protecting local communities, particularly children, from any adverse effects resulting from business operations, in line with the UN "Protect, Respect and Remedy" Framework and the Business and Human Rights Guiding Principles that were adopted by the Human Rights Council in 2008 and 2011, respectively").

states, including Liberia, where the Committee observed that it "regrets that multinational companies in the country, notably those operating in the rubber and steel producing industries, are operating in the absence of clear regulatory frameworks to ensure that international human rights, labour, environment and other standards are adhered to in order to protect workers and families and communities affected by their activities."[130] It further observed that "issues related to relocation affecting families and communities in mining areas, such as compensation for private properties to be left behind, new lands for housing, farming, and settlements, and access to other natural resources for income and subsistence, are not discussed with or communicated to the persons concerned, nor are they disclosed to the public."[131]

These issues are being further elaborated in the Human Rights Council's Working Group on the issue of human rights and transnational corporations and other business enterprises. This provides an important avenue for raising concerns about the treatment of forest peoples' rights in relation to private sector activities as well as the related human rights obligations of states.[132]

D. The African Charter and Peoples' Rights

In principle, in Africa there is no need to use the term 'indigenous' as an adjective of 'peoples' because the African Charter protects the "rights of peoples" in numerous articles: to equality and equal rights (art. 19); to self-determination (art. 20); to freely dispose of wealth and natural resources (art. 21); to economic, social and cultural development (art. 22); to national and international peace and security (art. 23) and to a general satisfactory environment (art. 24). The African Commission (and possibly also one day, the African Court) of Human and Peoples' Rights has applied these provisions to peoples whom it did not classify as indigenous (Ogoni,[133] ex-slaves in Mauritania,[134] all people of Southern Cameroon,[135] and Katangese, for instance).[136] While

[130] Liberia, CRC/C/CO/LBR/2-4, 11 December 2012, at para. 28.

[131] *Id*. (and recommending at para. 29, that "the State Party establish and implement regulations to ensure that the national and transnational business sector complies with international and national human rights, labour, environment and other standards, particularly with regard to child rights; … [and] Require[s] assessments, consultations and disclosure by companies on plans to address environmental and health pollution, as well as on the human rights impact of measures such as relocation of communities or establishment of production quotas…").

[132] *See* http://www.ohchr.org/EN/Issues/Business/Pages/WGHRandtransnationalcorporationsandotherbusiness.aspx.

[133] *Communication* No. 155/96: *The Social and Economic Rights Action Center and the Center for Economic and Social Rights/Nigeria* (finding a violation of Article 21 and stating, at para. 58, that "the obligation to **respect** entails that the State should refrain from interfering in the enjoyment of all fundamental rights; it should respect right-holders, their freedoms, autonomy, resources, and liberty of their action. With respect to socio economic rights, this means that the State is obliged to respect the free use of resources owned or at the disposal of the individual alone or in any form of association with others, including the household or the family, for the purpose of rights-related needs. And with regard to a collective group, the resources belonging to it should be respected, as it has to use the same resources to satisfy its needs").

[134] Communication Nos. 54/91-61/91-96/93-98/93-164/97-196/97-210/98: *Malawi African Association, Amnesty International, Ms Sarr Diop, Union interafricaine des droits de l'Homme and RADDHO, Collectif des veuves et ayants-Droit, Association mauritanienne des droits de l'Homme / Mauritania* (finding a violation of Article 23 but not of Article 19).

[135] Communication No. 266/03: *Kevin Mgwanga Gunme et al / Cameroon* (finding violations of Article 19, among others), http://www.achpr.org/files/sessions/45th/comunications/266.03/achpr45_266_03_eng.pdf.

[136] Communication 75/92: *Katangese Peoples' Congress v Zaire* (brought to the African Commission in terms of article 20(1) of the African Charter for an assertion of the Katangese peoples' right to self-determination – claim accepted, but no violation found).

it may reassure the African Commission to apply international indigenous jurisprudence to certain groups in Africa – those it feels comfortable defining as indigenous – this is not a prerequisite to seeking protection for the rights of collectivities, provided they may be considered 'peoples'.[137] It is noteworthy in this respect that the Commission may feel more comfortable with peoples who self-identify as indigenous precisely because it can rely on international jurisprudence concerning indigenous *peoples'* rights, but again this is not a precondition.[138]

The term 'peoples' is (deliberately) not well defined in practice for the purposes of the African Charter. The African Commission has however provided some indication of what it understands the term to mean. In *Kevin Mgwanga Gunme et al/Cameroon*, decided on 27 May 2009, it stated that "the notion of 'people' is closely related to collective rights. Collective rights enumerated under Articles 19 to 24 of the Charter can be exercised by a people, bound together by their historical, traditional, racial, ethnic, cultural, linguistic, religious, ideological, geographical, economic identities and affinities, or other bonds."[139] It adds that "peoples' rights are equally important as are individual rights. They deserve, and must be given protection. The minimum that can be said of peoples' rights is that, each member of the group carries with him/her the individual rights into the group, on top of what the group enjoys in its collectivity, i.e. common rights which benefit the community such as the right to development, peace, security, a healthy environment, self-determination and the right to equitable share of their resources."[140] It elaborates further, finding that the "'people of Southern Cameroon' qualify to be referred to as a 'people' because they manifest numerous characteristics and affinities, which include a common history, linguistic tradition, territorial connection and political outlook. More importantly they identify themselves as a people with a separate and distinct identity. Identity is an innate characteristic within a people. It is up to other external people to recognise such existence, but not to deny it."[141]

Echoing the preceding, in the *Endorois* case, which was largely decided by reference to international indigenous/tribal rights jurisprudence, the Commission found, separate from the question of whether they were indigenous or not, that "the Endorois consider themselves to be a distinct people, sharing a common history, culture and religion. The African Commission is satisfied that the Endorois are a 'people', a status that entitles

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[137] *See e.g.,* Communication 276/03: *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council/Kenya* (February 2010), http://www.achpr.org/files/sessions/46th/comunications/276.03/achpr46_276_03_eng.pdf.

[138] *See* Communication No. 266/03: *Kevin Mgwanga Gunme et al / Cameroon*, at para. 175 (referring to the 'Report of the African Commission's Working Group on Indigenous People/Communities', which states that "it is surprising that the African Charter fails to define "peoples" unless it was trusted that its meaning could be discerned from the prevailing international instruments and norms").

[139] *Id*. para, 169-76, at para. 171.

[140] *Id*. at para. 176.

[141] *Id*. at para. 179 (referring to its reasoning at para 178, stating that "The Commission states that after thorough analysis of the arguments and literature, it finds that the people of Southern Cameroon can legitimately claim to be a 'people'. Besides the individual rights due to Southern Cameroon[ians], they have a distinct identity which attracts certain collective rights. The UNESCO Group of Experts report referred to hereinabove, states that for a collective of individuals to constitute a 'people' they need to manifest some, or all the identified attributes. The Commission agrees with the Respondent State that a "people" may manifest ethno-anthropological attributes. Ethno- anthropological attributes may be added to the characteristics of a 'people'. Such attributes are necessary only when determining indigenology of a 'people', but cannot be used as the only determinant factor to accord or deny the enjoyment or protection of peoples' rights. Was *[sic]* it the intention of the State Parties to rely on ethno-anthropological roots only to determine 'peoples' rights,' they would have said so in the African Charter? As it is, the African Charter guarantees equal protection to people on the continent, including other racial groups whose ethno-anthropological roots are not African").

them to benefit from provisions of the African Charter that protect collective rights."[142] The Commission made the same determination in the case of the Ogiek of the Mau Forest in Kenya (defining the Ogiek as an "indigenous minority ethnic group"), where it found, *inter alia*, violations of Articles 21 and 22 of the African Charter.[143] In the same case, the African Court of Human and Peoples' Rights, in a 2013 provisional measures order, also found that there was "a risk of irreparable harm" to the Ogiek in relation to potential violations of their rights, *inter alia*, under Article 22 of the Charter.[144] It would thus appear that many forest peoples in Africa would qualify as 'peoples' for the purposes of holding and exercising the collective rights recognized in the African Charter.

A question remains, however, about the extent to which the African Commission will address collective property rights based on custom, at least without applying the 'indigenous' label as it did in the *Endorois and Ogiek* cases. Communication 260/02: *Bakweri Land Claims Committee/Cameroon* concerns the precise issues discussed herein: the failure to recognize and respect the territorial rights of the Bakweri people (neither self-identifying or otherwise defined as indigenous) and was filed pursuant to a joint resolution adopted by their traditional authorities.[145] Unfortunately, it was declared inadmissible for failure to exhaust domestic remedies. That said, the African Commission seemed to have no other objection to addressing the alleged violations of both the right to property and the right to freely dispose of natural wealth and resources in that case.

Groups seeking protection for collective, customary tenure systems who may or may not be considered a people may also do so using the (aggregated) individual right to property (probably best in conjunction with the non-discrimination norm and right to culture) recognised in Article 14 of the Charter. The African Commission has endorsed the principle that property is autonomously defined in international law, and thus need not conform to national law definitions, and that 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 owner(s) deem fit."[146] Other rights are

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[142] Communication 276/03: *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council*, at para. 162.

[143] Af. Ct. Hum. & Peoples' Rights, *In the Matter of the African Commission on Human and Peoples Rights vs. Kenya, Application No. 006/2012, Order of Provisional Measures*, 15 March 2013, para. 4.

[144] *Id*. para. 20 (referring to the Commission's application, which alleged that the "eviction notices of the Government of Kenya will have far reaching implications on the political, economic, and social survival of the Ogiek Community as their eviction will lead to the destruction of their means of survival, their livelihoods, culture, religion and identity…").

[145] Communication 260/02: *Bakweri Land Claims Committee/Cameroon,* at para. 2 (stating that "The complaint follows the Presidential Decree No. 94/125 of 14th July 1994 where the Government of Cameroon listed the Cameroon Development Corporation (CDC), which will allegedly result in the alienation, to private purchasers, of approximately 400 square miles (104,000 hectares) of lands in the Fako division traditionally owned, occupied or used by the Bakweri. The Complainant alleges that the transfer would extinguish the Bakweri title rights and interests in two-thirds of the minority group's total land area"), http://caselaw.ihrda.org/doc/260.02/view/.

[146] Communication 276/03: *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council*, at para. 186 (citing is prior jurisprudence). It also endorsed, at para. 188-89, the judgment of the European Court of Human Rights in *Dogan v. Turkey* (stating that "Although the applicants were unable to demonstrate registered title of lands from which they had been forcibly evicted by the Turkish authorities, the European Court of Human Rights observed that: '*[T]he notion 'possessions' in Article 1 has an autonomous meaning which is certainly not limited to ownership of physical goods: certain other rights and interests constituting assets can also be regarded as 'property rights', and thus as 'possessions' for the purposes of this provision.'* Although they did not have registered property, they either had their own houses constructed on the land of their ascendants or lived in the

also relevant and may be read conjunctively. In the *Ogoni* case, for instance, the African Commission found Nigeria in violation of the right to housing and protection against forced eviction – a "right enjoyed by the Ogonis as a collective right" – the right to health and the right to food.[147] It found that "Without touching on the duty to improve food production and to guarantee access, the minimum core of the right to food requires that the Nigerian Government should not destroy or contaminate food sources. It should not allow private parties to destroy or contaminate food sources, and prevent peoples' efforts to feed themselves."[148]

There are thus two (possible) main avenues for raising collective property claims in a non-indigenous context in the African system and there is no reason that arguments along both lines cannot be made simultaneously. Bear in mind however, that property rights are generally subject to some form of subordination clause that allows for activities in the public interest (provided a series of criteria are satisfied) and are not necessarily the most secure of rights. This can be tempered by aggregating property rights with other rights, such as culture, non-discrimination and various economic, social and cultural rights. It should be noted also that, pursuant to Articles 60 and 61 of the African Charter, UN and regional jurisprudence and standards, such as those discussed above, may be utilized by the African Commission and Court when those bodies assess these issues in cases or reports.[149]

E. Self-Determination

The African Charter and the UNDRIP both explicitly recognize the right to self-determination of, respectively, peoples and indigenous peoples. Similar language is found in common Article 1 of the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights. While the Covenant's supervising bodies have applied Article 1 to indigenous peoples[150] in the past they have rarely broached the subject beyond either the indigenous or the colonial context, except in a 1984 General Comment

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houses owned by their fathers and cultivate the land belonging to the latter. The Court further noted that the applicants had unchallenged rights over the common land in the village, such as the pasture, grazing and the forest land, and that they earned their living from stockbreeding and tree-felling").

147 Ogoni Case, at para. 62-3.

148 *Id*. at para. 65.

149 Article 60, for instance, provides that "The Commission shall draw inspiration from international law on human and peoples' rights, particularly from the provisions of various African instruments on human and peoples' rights, the Charter of the United Nations, the Charter of the Organization of African Unity, the Universal Declaration of Human Rights, other instruments adopted by the United Nations and by African countries in the field of human and peoples' rights as well as from the provisions of various instruments adopted within the Specialized Agencies of the United Nations of which the parties to the present Charter are members."

150 *See e.g., Concluding observations of the Human Rights Committee: Canada. 07/04/99,* at para. 8, UN Doc. CCPR/C/79/Add.105 (stating that "the right to self-determination requires, inter alia, that all peoples must be able to freely dispose of their natural wealth and resources and that they may not be deprived of their own means of subsistence (article 1(2)). … The Committee also recommends that the practice of extinguishing inherent aboriginal rights be abandoned as incompatible with article 1 of the Covenant"); *Concluding observations of the Human Rights Committee: Mexico.* UN Doc. CCPR/C/79/Add.109 (1999), para. 19; *Concluding observations of the Human Rights Committee: Australia. 28/07/2000. CCPR/CO/69/AUS,* para. 8; Concluding Observations of the Human Rights Committee: Canada, 20/04/2006. UN Doc. CCPR/C/CAN/CO/5; *Concluding Observations of the Human Rights Committee: Brazil, 01/12/2005.* UN Doc. CCPR/C/BRA/CO/2; and, *Concluding Observations of the Human Rights Committee: Norway, 25/04/2006*. UN Doc. CCPR/C/NOR/CO/5..

(intended to express non-binding guidance to state parties).[151] Where this has come up it tends to equate self-determination with the institutions of the state and the rights of individuals to participate therein among other individual rights (this was certainly CERD's approach in its 1996 General Recommendation on Self-determination).[152] The general comment in question however indicates that the Human Rights Committee considers that Article 1 applies to peoples within independent states and thus in principle there is no problem making such arguments in relation to forest peoples. Also, many of the component rights of self-determination may be asserted, and protection sought in relation to the specific standards relating to these component rights, with respect to one or more of the categories delineated above, without specifically invoking the right to self-determination.

There are, however, serious political obstacles to overcome in solely relying on the right to self-determination as a basis for rights and there would likely be considerable reluctance to begin applying the self-determination norm to new contexts, at least in the absence of some form of demonstrable political support by states.[153] The same is also the case for extending international recognition and protection of collective rights more generally, at least in political settings. This issue has already been prominently raised in relation to nascent efforts to draft a UN declaration on the rights of peasants (see below), where a number of states expressed strong objections to further recognition of collective rights when the corresponding resolution was adopted by the UN Human Rights Council.[154] The same objections were raised – and overcome – in the drafting of the UNDRIP and significantly contributed to the length of the negotiations. The United States of America was one the most vociferous opponents, as it is in connection with the declaration on peasants' rights, and it can be expected that its opposition will continue given that it will have the same, if not greater, concerns as it did with the UNDRIP: in large part, the continued access of US corporate interests to resources.

The objections of states however should not hinder efforts to set standards on forest peoples and others' rights at the UN or elsewhere, but it does reinforce the conclusion that seeking jurisprudence on these issues should also be done simultaneously and as a way of mitigating those objections. The Human Rights Committee's jurisprudence, for instance, does allow for reading minority and other rights (specifically, the right to participate in government and non-discrimination) conjunctively with the right to self-determination, and this provides a basis for seeking to elevate the content of and to collectivise rights in some instances.[155] Moreover, it

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[151] Human Rights *Committee, General Comment No. 12, The Right to Self-Determination*, Twenty-first session (1984).

[152] *General Recommendation XXI on the right to self-determination*, 1996, para. 5 (among others, making an explicit link between self-determination and respect for human rights and recommending that states should be "sensitive towards the rights of persons belonging to ethnic groups, particularly their right to lead lives of dignity, to preserve their culture, to share equitably in the fruits of national growth and to play their part in the Government of the country of which they are citizens;" and that states vest "persons belonging to ethnic or linguistic groups comprised of their citizens … with the right to engage in activities which are particularly relevant to the preservation of the identity of such persons or groups").

[153] *See* W. Kymlicka, *Beyond the Indigenous/Minority Dichotomy? in* REFLECTIONS ON THE UN DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES, (S. Allen and A. Xanthaki, eds., Hart Publishing, 2011) (discussing the interaction between indigenous rights and minority rights and the reluctance of states to recognise similar rights frameworks for non-indigenous, sub-state nationalities), http://www.cridaq.uqam.ca/IMG/pdf/xanthaki-wk_1-_Kymlica_-.pdf.

[154] *See e.g*., C. Golay, Legal reflections on the rights of peasants and other people working in rural areas, *supra*, p. 16.

[155] *Apirana Mahuika et al. vs. New Zealand* (Com. No. 547/1993, 15/11/2000)), UN Doc. CCPR/C/70/D/547/1993 (2000), at para. 3 ("When declaring the authors' remaining claims admissible in so far as they might raise issues under articles 14(1) and 27 in conjunction with article 1, the Committee noted that only the consideration of the merits of the case

has indicated that it is possible to do so in at least one case involving a non-indigenous group (although it failed to pronounce on the possible substance of the rights in that case),[156] and has done so explicitly in the case of indigenous peoples. Reading Articles 1 and 27 together, in *Apirana Mahuika et al v New Zealand*, the Human Rights Committee set forth a test to assess whether indigenous peoples' right to freely dispose of their natural wealth and resources (as set forth in Article 1(2)) is satisfied, stating that

> With the Settlement, Maori were given access to a great percentage of quota, and thus effective possession of fisheries was returned to them. In regard to commercial fisheries, the effect of the Settlement was that Maori authority and traditional methods of control as recognised in the Treaty [of Waitangi] were replaced by a new control structure, in an entity in which Maori share not only the role of safeguarding their interests in fisheries but also the effective control.[157]

The test to be employed therefore seems to be whether indigenous peoples enjoy 'effective possession' and 'effective control' over their natural resources (this view was endorsed in 2007 by the Inter-American Court of Human Rights in *Saramaka People*[158] and the Court has elaborated on various aspects of the right to self-determination in other cases, as has the Inter-American Commission).[159] In *Mahuika*, the resource in question was commercial fisheries and thus the Committee also holds the view that indigenous peoples' resource rights are not limited only to subsistence resources *per se*. Whether the Committee would reach the same conclusion in the case of forest peoples remains to be seen; nonetheless, provided the forest people in question is deemed a people and a minority, the logic employed to resolve the issue may not be very different from that used in *Mahuika*. A consideration to bear in mind is that the Committee has previously applied Article 1 to indigenous peoples in a number of instances and feels justified in doing so even more since the UNDRIP was adopted in 2007; the same is not (yet) the case for forest peoples.

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would enable the Committee to determine the relevance of article 1 to the authors' claims under article 27"); and, at para. 9.2 ("The Committee observes that the Optional Protocol provides a procedure under which individuals can claim that their individual rights have been violated. These rights are set out in part III of the Covenant, articles 6 to 27, inclusive. As shown by the Committee's jurisprudence, there is no objection to a group of individuals, who claim to be commonly affected, to submit a communication about alleged breaches of these rights. Furthermore, the provisions of article 1 may be relevant in the interpretation of other rights protected by the Covenant, in particular article 27").

[156] *Diergaardt et al. v. Namibia* (760/1997), ICCPR, A/55/40 vol. II (25 July 2000) 140, at para. 10.3 (stating that "the provisions of Article 1 may be relevant to the interpretation of other rights protected by the Covenant, in particular Article 25, 26 and 27").

[157] *Id.* at para. 9.7.

[158] Saramaka People 2007, at para. 194 (where the Court directly related the right to self-determination to indigenous/tribal peoples' property rights and ordered that recognition of the Saramaka people's territorial rights must include recognition of "their right to manage, distribute, and effectively control such territory, in accordance with their customary laws and traditional collective land tenure system").

[159] *See e.g.*, *Case of the Río Negro Massacres v. Guatemala Merits, Reparations and Costs*, Judgment, 2012 Inter-Am. Ct. H.R. (ser. C) No. 250 (4 Sept. 2012); *Xákmok Kásek Indigenous Community v. Paraguay, Merits, Reparations and Costs*, Judgment, 2010 Inter-Am. Ct. H.R. (ser. C) No. 214 (29 March 2006); and *Kichwa Indigenous People of Sarayaku. Merits and reparations*, Judgment, 2012 Inter-Am. Ct. H.R. (ser. C) No. 245 (June 27, 2012). *See also* Inter-Am. Com. H. R., *Indigenous and Tribal Peoples' Rights over their Ancestral Lands and Natural Resources,* OEA/Ser.L/V/II. Doc. 56/09 (30 December 2009) at para. 165 (acknowledging that for indigenous peoples there "is a direct relation between self-determination and land and resource rights").

While declaring itself competent to address the issue,[160] the African Commission has adopted a restrictive reading of the right to self-determination in Article 20 of the Charter, in large part because of its concern that it may be used to justify secession (in fact, more than one of the cases where the right was invoked also raised secession issues).[161] Finding violations of other articles of the Charter, it stated in 2009, for instance, that "in order for such violations to constitute the basis for the exercise of the right to self determination under the African Charter, they must meet the test set out in the Katanga case, that is, there must be: *'concrete evidence of violations of human rights to the point that the territorial integrity of the State Party should be called to question, coupled with the denial of the people, their right to participate in the government as guaranteed by Article 13.1;'*"[162] and, the "Commission holds the view that when a Complainant seeks to invoke Article 20 of the African Charter, it must satisfy the Commission that the two conditions under Article 20.2 namely oppression and domination have been met."[163]

The Commission's views and reasoning are confusing however and, with the exception of ruling out secession, are not particularly helpful in predicting what it may do with a self-determination claim related to governance issues (as well as highlighting the need to carefully argue such claims). For instance, it admits that "secession is not the sole avenue open to Southern Cameroonians to exercise the right to self-determination" and "that autonomy within a sovereign state, in the context of self-government, confederacy, or federation, while preserving territorial integrity of a State party, can be exercised under the Charter."[164] At the same time, it then says that "Such forms of governance cannot be imposed on a State Party or a people by the African Commission."[165] While recognizing that self-determination may be exercised in different ways, the latter would appear to more than suggest that the Commission is at the very least reluctant to get involved in determining the modalities of exercising self-determination in any specific instance. Note, however, that the African Charter divides the governance, development, equality and resource sovereignty aspects of self-determination into four articles – and the Commission has and will deal explicitly with issues raised in relation to the three latter points. This means that various aspects of self-determination may be addressed in the African system without necessarily touching on the Commission's sensitivities in relation to Article 20.

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[160] *See* Communication No. 266/03: *Kevin Mgwanga Gunme et al / Cameroon*, at para. 181 (stating that "The Commission is aware that post-colonial Africa has witnessed numerous cases of domination of one group of people over others, either on the basis of race, religion, or ethnicity, without such domination constituting colonialism in the classical sense. Civil wars and internal conflicts on the continent are testimony to that fact. It is incumbent on State Parties, therefore, whenever faced with allegations of the nature contained in the present communication, to address them rather than ignore them under the guise of sovereignty and territorial integrity. Mechanisms such as the African Commission were established to resolve disputes in an amicable and peaceful manner. If such mechanisms are utilised in good faith, they can spare the continent valuable human and material resources, otherwise lost due to conflicts fighting against ethnic, religious domination or economic marginalization").

[161] *Id*. at para. 190 (stating that "The Commission notes that the Republic of Cameroon is a party to the Constitutive Act (and was a State party to the OAU Charter). It is a party to the African Charter on Human and Peoples' Rights as well. The Commission is obliged to uphold the territorial integrity of the Respondent State. As a consequence, the Commission cannot envisage, condone or encourage secession, as a form of self-determination for the Southern Cameroons. That will jeopardise the territorial integrity of the Republic of Cameroon").

[162] *Id*. at para. 194 (emphasis original).

[163] *Id*. at para. 197 (stating further, at para. 199, that "Going by the Katanga decision, the right to self-determination cannot be exercised, in the absence of proof of massive violation of human rights under the Charter").

[164] *Id*. at para. 191.

[165] *Id*. at para. 199.

F. Peasants' Rights?

In a resolution on the right to food adopted in 2010, the UN Human Rights Council requested that its Advisory Committee undertake a "study on ways and means to further advance the rights of people working in rural areas, including women, in particular smallholders engaged in the production of food and/or other agricultural products, including from directly working the land, traditional fishing, hunting and herding activities…."[166] After receiving comments from states, international organisations, civil society and others, a final report was presented in February 2012 and acknowledged by the Council in its resolution 19/7 of 3 April 2012.[167]

While this study is interesting in a number of respects (e.g., it recommends that the "right to land should be recognized in international human rights law"), its annex containing a proposed 'Declaration on the rights of peasants and other people working in rural areas' is most noteworthy. Draft Article 4, for instance, directly addresses land issues, providing, in part, that "Peasants have the right to own land, individually or collectively, for their housing and farming;" "[p]easants and their families have the right to toil on their own land, and to produce agricultural products, to rear livestock, to hunt and gather, and to fish in their territories" and that; "[p]easants have the right to security of tenure…."[168] Leaving aside the question of the exceedingly broad scope of this proposed declaration, the language used does recognise a right to own land collectively and to security of tenure over that land as well as rights in broader areas (referred to somewhat unhelpfully as territories).[169] It does not however answer the question of how to determine what may be "their own land" and makes no explicit reference to customary tenure systems, such as those employed by forest peoples, as a basis for rights.[170]

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[166] UN Human Rights Council, *Resolution 13/4, The Right to Food*, A/HRC/RES/13/4, 14 April 2010, at para. 44. *See generally* http://www.ohchr.org/EN/HRBodies/HRC/AdvisoryCommittee/Food/Pages/ACRightToFood.aspx.

[167] Resolution 19/7, *inter alia*, at para. 8, "Stresses the need to guarantee fair and non-discriminatory access to land rights for smallholders, traditional farmers and their organizations, including, in particular, rural women and vulnerable groups."

[168] *Final study of the Human Rights Council Advisory Committee on the advancement of the rights of peasants and other people working in rural areas*, UN Doc. A/HRC/19/75, 24 February 2012, Annex.

[169] The scope of the proposed declaration is set out in Article 1, which provides, in part, that "A peasant is a man or woman of the land, who has a direct and special relationship with the land and nature through the production of food or other agricultural products" and "[t]he term peasant can apply to any person engaged in agriculture, cattle-raising, pastoralism, handicrafts-related to agriculture or a related occupation in a rural area. This includes indigenous people working on the land." *See also* M. Edelman, *What is a peasant? What are peasantries? A briefing paper on issues of definition. Prepared for the first session of the Intergovernmental Working Group on a United Nations Declaration on the Rights of Peasants and Other People Working in Rural Areas*, Geneva (15-19 July) (2013), http://www.ohchr.org/Documents/HRBodies/HRCouncil/WGPleasants/Edelman.pdf.

[170] *See* however C. Golay, Legal reflections on the rights of peasants and other people working in rural areas, *supra*, p. 18 (explaining that Article 4 in part is based on the FAO Voluntary Guidelines on the responsible governance of tenure of land, fisheries and forests in the context of national food security, adopted by the FAO Committee on World Food Security on 11 May 2012. He further explains that the "main objective of these Guidelines is to promote secure tenure rights and equitable access to land, fisheries and forests in order to reduce poverty and realize the right to food. Two central elements of the Guidelines are the need to identify, record and respect legitimate tenure rights, whether formally recorded or not, and to protect tenure rights holders against forced evictions (guidelines 3.1.1 and 3.1.2). It also provides that special protection should be ensured to smallholders and to indigenous peoples and other communities with customary tenure systems (guidelines 7.3)").

The Human Rights Council decided in October 2012 to "to establish an open-ended intergovernmental working group with the mandate of negotiating, finalizing and submitting to the Human Rights Council a draft United Nations declaration on the rights of peasants and other people working in rural areas, on the basis of the draft submitted by the Advisory Committee, and without prejudging relevant past, present and future views and proposals."[171] The first session of this working group was held 15-19 July 2013.[172] The relevance for the current discussion is that this working group provides a space in which forest peoples (and others) may advocate for the recognition of their customary tenure systems and the various aspects of their collective rights to their lands and territories in accordance with those tenure systems. This may go far towards providing a platform to further elaborate on these rights in other fora, to reinforce existing jurisprudence and to fill any gaps therein. This advocacy could also focus on some of the challenges thrown up by the broad treatment of 'peasants' rights', including how to address potential conflicts between, for instance, the rights of forest peoples (and indigenous peoples) and migrants, settlers and colonists who have occupied and used the formers' lands and who would be also considered rights-holders under the proposed declaration.

III. Some General Considerations

This final section will briefly address a number of general considerations that are relevant to this discussion. This includes issues of legal personality, such as who or what could be considered, from a rights perspective, to be the appropriate agent(s) to exercise this personality and via which modalities. Some consideration will also be given to how to address ostensibly conflicting rights (for example, where it appears that indigenous peoples' rights may conflict with rights that may be vested in others).

First, the right to legal personality[173] is a critically important, yet often ignored, issue when thinking about rights and their exercise – it has been described as the "right to have rights."[174] This is especially important when thinking about the vesting and exercise of collective rights (including for the purposes of self-governance, management systems and participation in external affairs). In *Sawhoyamaxa*, the Inter-American Court explained that states have to use all means at their disposal, including legal and administrative measures, to ensure that the right to juridical personality is respected, and that states have special obligations to ensure

[171] UN Human Rights Council, *Resolution 21/19, Promotion and protection of the human rights of peasants and other people working in rural areas*, A/HRC/RES/21/19, 11 October 2012, at para. 1 (adopted by a vote of 23 to 9 with 15 abstentions. The nine opposing states were: Austria, Belgium, Czech Republic, Hungary, Italy, Poland, Romania, Spain and the United States of America).

[172] *See* http://www.ohchr.org/EN/HRBodies/HRC/RuralAreas/Pages/FirstSession.aspx.

[173] The right to recognition as a person before the law is a widely recognized human right at the universal and regional levels, including in Article 6 of the Universal Declaration of Human Rights, Article 16 of the International Covenant on Civil and Political Rights, Article 3 of the American Convention on Human Rights, and Article 5 of the African Charter on Human and People's Rights.

[174] Yakye Axa 2005, para. 78-83 (where the Inter-American Court observed, at para. 82-3, that "juridical personality, for its part, is the legal mechanism that confers on [indigenous peoples] the necessary status to enjoy certain fundamental rights, as for example the rights to communal property and to demand protection each time they are vulnerable"). The Court clarified that recognition of juridical personality only makes operative the pre-existing rights that indigenous peoples have exercised historically; indigenous peoples' political, social, economic, cultural and religious rights and forms of organisation, as well as the right to reclaim their traditional lands, belong to the people themselves irrespective of whether the state formally recognizes their personality before the law.

respect for this right in connection with persons in situations of vulnerability, marginalization and discrimination, and with due regard for the principle of equality before the law.[175]

In *Saramaka*, the Court extended this right to the Saramaka people, as a people. It ruled that the right to collective juridical personality is "one of the special measures owed to indigenous and tribal groups in order to ensure that they are able to use and enjoy their territory in accordance with their own traditions."[176] It further explicated and ordered that the state must recognize the Saramaka people's collective legal personality in law and through judicial and administrative measures, all of which guarantee them "the use and enjoyment of their territory in accordance with their communal property system, as well as the rights to access to justice and equality before the law."[177] With respect to how the collective juridical personality of indigenous and tribal peoples is to be exercised, the Court explained that this "is a question that must be resolved by the [people concerned] in accordance with their own traditional customs and norms, not by the State or this Court in this particular case."[178]

While this jurisprudence has been developed in the indigenous/tribal context, the basic principles would apply to any group of persons or collective entity: without personality rights can neither vest nor be enforced. Therefore, it is important to think about this question in conjunction with other substantive rights as well as formulating arguments for how these rights would be exercised pursuant to collective personality (bearing in mind that the choice of modalities is a prerogative vested in the people themselves). Given that forest peoples, as part of their collective tenure system, likely have traditional institutions and laws that apply to the exercise of personality, some form of mapping of these institutions and procedures would be very helpful in substantiating rights as well as the modalities of their exercise. Where such institutions may not exist or where they may have been usurped by the state in one way or another, additional efforts may be required to explain the mechanisms by which forest peoples intend to exercise their collective rights and personality.

Second, as noted above, international human rights law contains a variety of mechanisms for balancing rights as well as allowing the state to 'restrict' the exercise and enjoyment of rights under certain circumstances. The right to freedom of movement, for instance, is not absolute and must be exercised in a manner that respects the rights of others.[179] The subordination of property rights pursuant to the public interest – provided certain preconditions have been satisfied – is another prominent example. Also, in some instances, the rights of forest peoples could conflict with the rights of indigenous peoples. If this is the case, effort must be expended on analyzing the nature and extent of the conflict and the mechanisms for resolving them. This may mean that one group's rights are prioritized over another's or that measures to accommodate the conflicting rights are in place. These measures may be provided for by custom and this would be a logical starting point for assessing these issues.

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[175] Sawhoyamaxa 2006, at para. 189.

[176] Saramaka People, *supra*, at para. 172. *See also* Saramaka People, Interpretation of the Judgment 2008, para. 54.

[177] Saramaka People, *id*. at para. 174.

[178] *Id*. at para. 164.

[179] *See e.g., General Comment No. 27: Freedom of movement (Art.12), 11/02/1999. CCPR/C/21/Rev.1/Add.9*, at para. 16 (stating that "The application of restrictions in any individual case must be based on clear legal grounds and meet the test of necessity and the requirements of proportionality. … On the other hand, the conditions could be met by restrictions on access to military zones on national security grounds, or limitations on the freedom to settle in areas inhabited by indigenous or minorities communities").

Third, it is a general principle of international law that states may not invoke their domestic law to excuse non-compliance with their international obligations and this applies also in the case of the obligations that have accepted when ratifying human rights instruments. This is important to bear in mind given that states often have sectoral legislation that affects the recognition or exercise of forest peoples' rights (declaring areas to be state forests or state lands, for instance). Such designations by the state do not *per se* affect their obligations to recognize, respect and protect the property, cultural and other rights of forest peoples. Discussing proposed regulations under Indonesia's *Forests Law*, for example, the UNCERD stated in 2009 that those regulations were discriminatory because they failed to recognise "proprietary rights to indigenous peoples in forests."[180]

Finally, this paper has been drafted in part to address the challenges thrown up when NGOs and others simplistically transfer the indigenous rights framework to all 'local communities' or other entities. As noted, this is not only inappropriate but also often does harm to indigenous advocacy in various fora (mining companies, for example, often acquiesce to FPIC for indigenous peoples but become much more hostile when NGOs seek to extend FPIC to all local communities). While there is some overlap with the principles that are part of the indigenous rights framework and jurisprudence, this paper explains that rights arguments may be asserted for forest peoples without direct or exclusive reference to the indigenous rights framework and that there is a strong likelihood that claims presented by forest peoples may succeed independently under extant law. While the indigenous rights jurisprudence may be referenced in formulating arguments on behalf of forest peoples, it is best to extract the general principles from that jurisprudence and then seek to apply them to the specific factual situations raised in cases brought by forest peoples rather than trying to explicitly and directly duplicate the indigenous rights framework. This is possible given the overlapping (and sometimes imprecise) use of the terms 'minority', 'ethnic groups' and 'peoples' as well as the rights that vest in those categories (independent of the use of the 'indigenous' descriptor). This approach would both contribute to the development of specific norms and jurisprudence on the rights of forest peoples while not directly affecting the body of law that applies to indigenous peoples and their non-legal advocacy and initiatives.

[180] *See* http://www2.ohchr.org/english/bodies/cerd/docs/early_warning/Indonesia130309.pdf.