

# Indigenous peoples

Koen De Feyter\*

## I. Introduction

Debates on the emergence and implementation of the right to development have not focused on indigenous issues. The growing recognition of indigenous rights, particularly in the context of development projects affecting their access to land and way of life, came about separately from United Nations discussions on the right to development.

This chapter is not mainly concerned with how indigenous peoples can make use or benefit from the right to development. Such an approach would certainly be valid, but the emphasis here is on what developments in indigenous rights (may) mean for the further elaboration of the right to development as a right applicable to all individuals and peoples.

The text briefly introduces the current state of play on the right to development in the Human Rights Council. It then discusses both the lack of attention to indigenous rights in the Declaration on the Right to Development and the inclusion of the right to development in instruments codifying indigenous rights. This is followed by some thoughts on the implications of the African Commission on Human and Peoples' Rights decision in the *Endorois* case for further discussions on the right to development.

## II. Core norm of the high-level task force on the implementation of the right to development

In 2010, the high-level task force on the implementation of the right to development defined what it called the "core norm" of the right to development as "the right of peoples and individuals to the constant improvement of their well-being and to a national and global enabling environment conducive to just, equitable, participatory and human-centred development respectful of all human rights" (A/HRC/15/WG.2/TF/2/Add.2 and Corr.1, annex).

The high-level task force identified three attributes of the core norm: comprehensive and human-centred development policy; participatory human rights processes; and social justice in development. For each of the attributes, the high-level task force drew up a table (*ibid.*) of criteria, sub-criteria and indicators. The high-level task force aimed at striking a balance between the national and international dimensions of the right to development, i.e., between elements of the right that require adjustments in domestic development policies (aimed at States acting individually within their own jurisdiction) and elements pertaining to duties of international cooperation in order to achieve greater justice in the global political economy (aimed at States acting extraterritorially and collectively) (A/HRC/15/WG.2/TF/2/Add.1 and Corr.1, paras. 81-82 and A/HRC/15/WG.2/TF/2/Add.2 and Corr.1, paras. 16-18). In the table, duty bearers are not indicated for each of the criteria and sub-criteria, although most of the indicators allow identifying

\* Professor of International Law, Law and Development Research Group, University of Antwerp, Belgium.

whether the international community or the domestic State is primarily responsible. Nevertheless, when the high-level task force presented its report to the Working Group on the Right to Development, the members of the Non-Aligned Movement expressed disagreement with “the [high-level task force report’s] overemphasis on national responsibilities, in neglect of the basic notion of international cooperation”.<sup>1</sup>

The high-level task force table contains few explicit references to indigenous peoples. Under the heading “comprehensive and human-centred development policy”, the setting up of consultative processes for respecting the rights of indigenous peoples over natural resources is included as an indicator of a policy aimed at the sustainable use of natural resources. Under “participatory human rights processes”, free, informed, prior consent by indigenous communities to the exploitation of natural resources on their traditional lands appears as an indicator of the non-discrimination criterion. Under the “social justice in development” heading, no indicators refer specifically to indigenous peoples, although in this section, as elsewhere in the table, references to vulnerable populations or marginalized groups may be taken to include indigenous peoples.

The consolidated findings of the high-level task force do not focus on indigenous rights or issues. This continues a trend in United Nations debates on the right to development. The impact of domestic or international investment and development policies on indigenous peoples has never been central to diplomatic negotiations between developing and developed countries on the right to development. As is evident from the responses to the report of the high-level task force on its sixth session, in 2010 (A/HRC/15/WG.2/2 and addenda and corrigenda), those negotiations deal primarily with reconciling very different views on issues such as the international versus the domestic responsibility for the implementation of the right to development, and the individual or collective dimension of the right. From this perspective, the first finding of a violation of the right to development by an international body, the *Endorois* decision of the African Commission on Human and Peoples’ Rights discussed below, in a purely domestic case brought on behalf of an indigenous community against the Government of a developing country, presents negotiators in Geneva from both North and South with an additional challenge.

<sup>1</sup> Submission in follow-up to Human Rights Council resolution 25/15 on the right to development by Egypt on behalf of the Non-Aligned Movement, available at [www.ohchr.org/Documents/Issues/Development/Session12/NAM.pdf](http://www.ohchr.org/Documents/Issues/Development/Session12/NAM.pdf).

### III. Declaration on the Right to Development

During the drafting process of the Declaration on the Right to Development, indigenous issues were not at the forefront. The Commission on Human Rights initiated work on the right to development by inviting the Secretary-General, in cooperation with the United Nations Educational, Scientific and Cultural Organization (UNESCO) and other specialized agencies, to undertake a study on the right to development in 1977.<sup>2</sup> The Declaration was adopted in 1986. International law on indigenous rights primarily came about subsequent to the adoption of the Declaration on the Right to Development.<sup>3</sup>

In his 1979 report on the international dimensions of the right to development as a human right in relation with other human rights based on international cooperation, including the right to peace, taking into account the requirement of the New International Economic Order and the fundamental human needs, the Secretary-General does not take into account indigenous issues. It states that “minority groups and their members have a right to share in the development of the whole community without discrimination” (E/CN.4/1334, para. 9), but it does not identify subnational groups as holders of the right to development, nor does it recognize a right of such groups to decide their own development priorities.

The Declaration on the Right to Development does not mention either indigenous peoples or minorities. According to the Declaration, the right to development is a human right of every human person and all peoples. There is no indication in the text or in the *travaux préparatoires* that the drafters intended to include indigenous peoples as peoples, and thus as holders of the right to development. The preamble to the Declaration describes development as a process aimed “at the constant improvement of the well-being of the entire population (emphasis added) and of all individuals”. Similarly, article 2 declares that States have the right to formulate development policies aiming at the constant improvement of the well-being of the entire population and of all individuals, on the basis of their participation in development and in the fair distribution of the benefits thereof. Article 8 of the Declaration emphasizes the need to ensure that

<sup>2</sup> Commission on Human Rights resolution 4 (XXXIII). The resolution was introduced by Iran and adopted without a vote.

<sup>3</sup> With the exception of the International Labour Organization (ILO) Indigenous and Tribal Populations Convention, 1957 (No. 107), which is premised on the integration of such populations into the life of their respective countries.

women have an active role in the development process and stresses the need to eradicate social injustice and to encourage popular participation. However, it does not refer to communities within States. Such communities may not share the mainstream development paradigm.

In the Declaration on the Right to Development “people” was meant to equal “the entire population” of States. The reference in article 1 of the Declaration to the right to self-determination corroborates this view. According to the second paragraph of the article, the right to development implies the full realization of the right to self-determination, which at the time was understood as a right of the populations of the developing countries to exercise sovereignty over their natural wealth and resources, free from external intervention.

Developed and developing countries held radically different views on the right to development during the drafting process. Neither group was, however, concerned with indigenous peoples.

Developing States favoured a collective right to development owned by the populations of developing countries. A people could enforce the right to development through the Government of its own State which in a post-colonial context was finally able to fully represent its people in international relations; the Government could also claim and receive development aid. One of the most influential proponents of the right to development in developing countries, Mohammed Bedjaoui, wrote at the time that the best way to guarantee an individual’s right to development consisted not of granting the individual a claim against the home State, but of setting the State free from international operations which drained its wealth abroad: “In laying claim to development, the individual would undermine the State at a time when the latter is engaged in the attempt to secure him that same development.”<sup>4</sup>

Developed States could not disagree more. In their view, the right to development was about enabling individuals to claim development from their own Government. Developed States refused to accept extraterritorial legal obligations to contribute to the development of populations that were not (or were no longer) under their jurisdiction.

The Declaration as adopted is a compromise document, situating the human person as the central subject of development, but also recognizing a collective dimension of the right to development. This collective dimension is not, however, spelled out in any detail. Similarly, the primary responsibility for development lies with the jurisdictionally competent State (i.e., usually the State that has control over the territory), although some supportive efforts from the international community are equally expected. Indigenous issues drowned in the clash between North and South. The Declaration does not set any specific obligations for States on whose territories indigenous peoples reside. Nowhere is the need for a specific indigenous peoples’ development plan acknowledged.

#### IV. International Labour Organization Convention No. 169 and the United Nations Declaration on the Rights of Indigenous Peoples

At the global level, major steps towards the recognition of an indigenous right to development were taken when the ILO Indigenous and Tribal Peoples Convention, 1989 (No. 169) and the United Nations Declaration on the Rights of Indigenous Peoples were adopted. Both instruments include the right to development.

ILO Convention No. 169 has to date been ratified by 22 States<sup>5</sup> and remains the only international treaty open to ratification on indigenous peoples’ rights. ILO Convention No. 169 was drafted with a view to ensuring equal enjoyment of rights by indigenous peoples, who were found to be excluded from national development paradigms and suffered discrimination rooted in historical injustice. The Convention provides for State obligations to protect and recognize indigenous peoples’ rights to lands; to consult them in good faith with consent or agreement as the objective; and to promote indigenous peoples’ progressive control and management of programmes designed with a view to closing socioeconomic gaps they suffer from as a result of historical marginalization.

Like most ILO-drafted instruments, and given the tripartite nature of the Organization, ILO Convention No. 169 opts for a continuing dialogue between the

<sup>4</sup> M. Bedjaoui, “Some unorthodox reflections on ‘the right to development’”, in *International Law of Development: Comparative Perspective*, Francis G. Snyder and Peter Slinn, eds. (Professional Books, 1987), pp. 90-92.

<sup>5</sup> Argentina, Bolivia, Brazil, Central African Republic, Chile, Colombia, Costa Rica, Denmark, Dominica, Ecuador, Fiji, Guatemala, Honduras, Mexico, Nepal, Netherlands, Nicaragua, Norway, Paraguay, Peru, Spain and Venezuela (Bolivarian Republic of).

constituents (Government, workers and employers) and practical cooperation. Article 34 of ILO Convention No. 169 thus provides that the scope and the nature of State measures to be taken under the Convention “shall be determined in a flexible manner, having regard to the conditions characteristic of each country”.

The Convention enshrines two key principles, “consultation” and “participation”, which should enable indigenous peoples to retake control of their destiny. The principle of “consultation” aims at providing indigenous peoples with opportunities to have their opinions, perspectives, priorities and values instilled in national development programmes, whereas the principle of “participation” aims at making indigenous peoples the engineer of their own well-being through decision-making.

Article 6, dealing with political participation, is an example of a provision using the language of Government obligations rather than indigenous rights focusing on governmental obligations. The article includes a duty to consult the peoples concerned whenever consideration is given to measures which may affect them directly; a duty to ensure their participation “to at least the same extent as other sectors of the population” in decision-making in the relevant institutions; and a duty to assist them (including financially, when “appropriate”) in setting up their own institutions and initiatives.

The objective of the consultations is to achieve agreement or consent, but consent as such is not provided for as a requirement or as a veto right. The ILO supervisory bodies have clarified that a mere sharing of information with indigenous peoples cannot amount to consultation. The adequate implementation of the right to consultation thus implies a qualitative process of good faith negotiations and dialogues, through which agreement and consent can be achieved. This interpretation was confirmed by the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people in his 2009 report to the Human Rights Council (A/HRC/12/34).<sup>6</sup> Article 16 of the Convention,

which deals with relocation, provides that relocation should only take place as an exceptional measure, with the free and informed consent of the people. But the article does add that when consent cannot be obtained, relocation can nevertheless take place, “following appropriate procedures established by national laws and regulations, including public inquiries where appropriate, which provide the opportunity for effective representation of the peoples concerned”.

Article 7 of the Convention, which deals with development, is phrased in rights language. Indigenous peoples have the right to decide their own priorities for the process of development and to exercise control, to the extent possible, over their own economic, social and cultural development. In addition, they shall participate in the formulation, implementation and evaluation of plans and programmes for national and regional development which may affect them directly. The remaining paragraphs of the article are formulated as governmental obligations: overall economic development plans of countries in which indigenous people live shall have the improvement of their conditions of life as a priority; studies shall be carried out, whenever appropriate, to evaluate their impact on indigenous peoples; measures shall be taken to protect and preserve the environment or territories they inhabit.

Some States, such as India and Japan, felt that article 7 went too far. Defending the text, the International Labour Office clarified that the indigenous peoples’ right to set their own priorities for development did not deprive the Government of decision-making power.<sup>7</sup> An argument can be made that article 7 should today be read in the light of the right to self-determination as formulated in the United Nations Declaration, providing that indigenous peoples are entitled to autonomy or self-governance.

Article 7 (and the ILO Convention as a whole) remains limited to identifying obligations of the State on whose territory the relevant indigenous people reside. The Convention remains silent on the international dimension of the right to development, e.g., the Convention does not call for the withdrawal of support by donor States or international organizations to projects that do not take into account the requirements formulated in articles 6 and 7. The *Guide to ILO Convention No. 169* sensibly argues that both Governments and international develop-

<sup>6</sup> In his report, the Special Rapporteur reads the ILO Convention and the United Nations Declaration together: ‘The Declaration establishes that, in general, consultations with indigenous peoples are to be carried out ‘in good faith ... in order to obtain their free, prior and informed consent’ (art. 19). This provision of the Declaration should not be regarded as according indigenous peoples a general ‘veto power’ over decisions that may affect them, but rather as establishing consent as the objective of consultations with indigenous peoples. In this regard, ILO Convention No. 169 provides that consultations are to take place ‘with the objective of achieving agreement or consent on the proposed measure’ (para. 46).

<sup>7</sup> International Labour Conference, seventy-sixth session, 1989, report IV (2A), p. 24.

ment agencies have responsibilities for including indigenous peoples in development processes, but that this appears to be based on the practice of donors, rather than on any legal obligation contained in the Convention.<sup>8</sup>

The General Assembly adopted the United Nations Declaration on the Rights of Indigenous Peoples by its resolution 61/295.<sup>9</sup> The United Nations Working Group on Indigenous Populations worked on the text for two decades, building on the growing recognition of indigenous rights in regional and domestic legal instruments. The Working Group on the Right to Development played little or no role in the process. The Declaration is not a treaty, but, in its own words, contains minimum standards for the “survival, dignity and well-being of the indigenous peoples of the world” (art. 43). The Declaration includes a right to development that is specific to indigenous peoples and recognizes their distinctness as peoples with their own histories, territories and beliefs, as well as their notions of poverty, well-being and development.

The preamble to the Declaration justifies the formulation of a specific indigenous peoples’ right to development by referring to historic injustices that indigenous peoples have suffered as a result of, *inter alia*, the colonization and dispossession of their lands, territories and resources. A right to development appears as such in article 23:

Indigenous peoples have the right to determine and develop priorities and strategies for exercising their right to development. In particular, indigenous peoples have the right to be actively involved in developing and determining health, housing and other economic and social programmes affecting them and, as far as possible, to administer such programmes through their own institutions.

Article 20 adds that indigenous peoples have the right to be secure in the enjoyment of their own means of subsistence and development. When they are deprived of these means, they are entitled to just and fair redress.

According to the Declaration, the context in which the indigenous right to development is to be exercised is one of autonomy or self-government within the State in which the indigenous peoples reside. Consequently, the State is under a duty to obtain the free, prior and informed consent of the representative institution of the indigenous people before adopting and implementing legislative and administrative measures that may affect them (art. 20). This duty applies to the development or use of indigenous lands (art. 32), particularly in connection with the development, utilization or exploitation of mineral, water or other resources. As noted, according to the Special Rapporteur on the rights of indigenous peoples, the Declaration does not accord indigenous peoples a general “veto power” over decisions that may affect them, but establishes consent as the objective of consultations with indigenous peoples. In two situations, the State is clearly under an obligation to obtain the consent of the indigenous peoples concerned, namely when the project will result in the relocation of a group from its traditional lands, and in cases involving the storage or disposal of toxic waste within indigenous lands (A/HRC/12/34, paras. 46-47).

The indigenous right to development appears in the Declaration as a purely collective right, held by indigenous peoples only. It further differs from the general right to development in requiring indigenous peoples’ free, prior and informed consent for projects affecting their lands and resources, a standard that goes beyond the “active, free and meaningful participation” requirement under the general right to development. The view reflected in the Declaration is that the State does not enjoy the sole prerogative to define development; indigenous peoples have a right to say no to a project that is based on a concept of development that the group does not share.

The United Nations Declaration on the Rights of Indigenous Peoples also envisages an international dimension of the indigenous right to development. This is briefly discussed in articles 39-42. According to these provisions, indigenous peoples have a right to financial and technical assistance “from States and through international cooperation”. They have the right to access conflict-resolution procedures for the resolution of disputes with States and other parties. The United Nations system has a specific responsibility in contributing to the application of the Declaration.

<sup>8</sup> International Labour Organization, *Indigenous & Tribal Peoples’ Rights in Practice: A Guide to ILO Convention No. 169* (Geneva, 2009), p. 119.

<sup>9</sup> The vote was 144 States in favour, 4 against (Australia, Canada, New Zealand and the United States of America), with 11 abstentions (Azerbaijan, Bangladesh, Bhutan, Burundi, Colombia, Georgia, Kenya, Nigeria, the Russian Federation, Samoa and Ukraine). According to the website of the United Nations Permanent Forum on Indigenous Issues (<http://social.un.org/index/IndigenousPeoples/DeclarationontheRightsofIndigenousPeoples.aspx>), Australia, New Zealand, Canada and the United States have all reversed their positions and now endorse the Declaration. Colombia and Samoa have also reversed their positions and indicated their support for the Declaration.

## V. The *Endorois* case<sup>10</sup>

The African Charter on Human and Peoples' Rights provides for the right to development, but does not include language on indigenous rights. Article 22 of the African Charter reads:

1. All peoples shall have the right to their economic, social and cultural development with due regard to their freedom and identity and in the equal enjoyment of the common heritage of mankind.
2. States shall have the duty, individually or collectively, to ensure the exercise of the right to development.

In the African Charter, the right to development appears as a purely collective right, held by peoples; it includes both a national and an international dimension.

The African Commission has been at pains to explain that the African Charter is an "innovative and unique" regional document compared to other regional instruments and "substantially departs" from the "narrow" formulations of other regional and universal human rights instruments, for instance by including group and people's rights.<sup>11</sup> Care should therefore be taken not to perceive of the decisions of the African Commission as a reflection of global human rights law. The African Commission's decisions reflect African human rights law. Regional human rights law may or may not translate into general international human rights law.

In May 2007, the African Commission on Human and Peoples' Rights adopted an advisory opinion on the United Nations Declaration on the Rights of Indigenous Peoples.<sup>12</sup> One of the issues discussed in the advisory opinion (which as a whole is supportive of the adoption by African States of the United Nations Declaration) was the issue of the definition of indigenous peoples in Africa. According to the Commission, "in Africa, the term indigenous populations does not mean 'first inhabitants' in reference to aboriginality as opposed to non-African communities or those hav-

ing come from elsewhere".<sup>13</sup> In the widely used working definition offered by José Martínez Cobo in the early 1980s,<sup>14</sup> indigenous peoples are different from minorities in that they have a historical continuity with pre-invasion and pre-colonial societies that developed on their territories. But according to the African Commission, Africa is different from other continents where native communities had been almost annihilated by non-native populations. In Africa, all Africans are native to the continent. In identifying Africa's indigenous communities, the following constitutive elements are to be taken into account:

- (a) Self-identification;
- (b) A special attachment to and use of their traditional land whereby their ancestral land and territory have a fundamental importance for their collective physical and cultural survival as peoples;
- (c) A state of subjugation, marginalization, dispossession, exclusion, or discrimination because these peoples have different cultures, ways of life or mode of production than the national hegemonic and dominant model.<sup>15</sup>

The *Endorois* case offered the African Commission the opportunity to clarify whether African indigenous peoples were peoples for the purposes of the African Charter. In case of an affirmative response, indigenous peoples would be able to claim the right to development and other collective rights under the African Charter.

The complaint was filed by the Centre for Minority Rights Development with the assistance of Minority Rights Group International and the Centre on Housing Rights and Evictions (which submitted an amicus curiae brief) on behalf of the Endorois community against the Government of Kenya. The complainants alleged violations resulting from the displacement of the Endorois community from their ancestral lands to make room for the establishment of a game reserve; the failure to adequately compensate them for the loss of their property; the disruption of the community's pastoral enterprise and violations of the right to practise their religion and culture; as well as their exclusion from the process and benefits of development. The complainants equally alleged that the Government of Kenya

<sup>10</sup> African Commission on Human and Peoples' Rights, *Centre for Minority Rights Development (Kenya) and Minority Rights Group on behalf of Endorois Welfare Council v. The Republic of Kenya*, communication 276/2003. The decision, adopted by the African Commission on Human and Peoples' Rights at its forty-sixth ordinary session, held in November 2009, is available at [www.achpr.org/english/Decision\\_Communication/Kenya/Comm.%20276-03.pdf](http://www.achpr.org/english/Decision_Communication/Kenya/Comm.%20276-03.pdf).

<sup>11</sup> *Ibid.*, para 149.

<sup>12</sup> *Advisory Opinion of the African Commission on Human and Peoples' Rights on the United Nations Declaration on the Rights of Indigenous Peoples*, adopted at its forty-first ordinary session, held in May 2007 in Accra, available at [www.achpr.org/english/Special%20Mechanisms/Indigenous/Advisory%20opinion\\_eng.pdf](http://www.achpr.org/english/Special%20Mechanisms/Indigenous/Advisory%20opinion_eng.pdf).

<sup>13</sup> *Ibid.*, para 13.

<sup>14</sup> See E/CN.4/Sub.2/1982/2/Add.6, available at [www.un.org/esa/socdev/unpfii/documents/MCS\\_v\\_en.pdf](http://www.un.org/esa/socdev/unpfii/documents/MCS_v_en.pdf).

<sup>15</sup> *Advisory Opinion* (see footnote 12), para. 12.

forcibly removed the Endorois from their ancestral lands without proper prior consultations or adequate and effective compensation.

In its decision, the African Commission assesses at length whether the Endorois are a people. In the course of the assessment, the African Commission makes it very clear that in the context of the African Charter, peoples are not to be equated with entire populations of States. The Commission recognizes that there is a need to protect “marginalized and vulnerable groups in Africa” who have not been accommodated by dominating development paradigms, leading to mainstream development policies that violated their human rights.<sup>16</sup>

On the basis of a review of factual evidence, the Commission found that the Endorois are both a people (a collective of individuals able to claim the collective rights under the African Charter) and an indigenous people (in the African sense, as described above):

The African Commission is thus aware that there is an emerging consensus on some objective features that a collective of individuals should manifest to be considered as “peoples”, viz: a common historical tradition, racial or ethnic identity, cultural homogeneity, linguistic unity, religious and ideological affinities, territorial connection, and a common economic life or other bonds, identities and affinities they collectively enjoy—especially rights enumerated under Articles 19 to 24 of the African Charter—or suffer collectively from the deprivation of such rights. What is clear is that all attempts to define the concept of indigenous peoples recognize the linkages between peoples, their land, and culture and that such a group expresses its desire to be identified as a people or have the consciousness that they are a people.<sup>17</sup>

The decision of the African Commission was therefore as follows:

From all the evidence (both oral and written and video testimony) submitted to the African Commission, the African Commission agrees that the Endorois are an indigenous community and that they fulfil the criterion of “distinctiveness”. The African Commission agrees 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 them to benefit from provisions of the African Charter that protect collective rights. The African Commission is of the view that the alleged violations of the African Charter are those that go to the heart of indigenous rights—the right to preserve one’s identity through identification with ancestral lands.<sup>18</sup>

The decision appears to imply that under the African Charter indigenous peoples are a sub-category of the peoples that can claim collective rights. Other peo-

ples can claim these rights too. These other peoples may not share all the features required of an African indigenous community, but because they are marginalized and vulnerable, they deserve the protection the African Charter offers. The “*Southern Cameroon*” case<sup>19</sup> is particularly informative in this respect. The people of south Cameroon are Anglophone, while north Cameroonians are Francophone. The linguistic difference is a direct result of the history of decolonization. In the dispute, the complainants alleged a host of violations under the African Charter, seeking to demonstrate that Southern Cameroonians were systematically discriminated against by the Government. They also claimed a violation of the right to development. The Commission found that the people of south Cameroon are a people in the sense of the African Charter, even if they are not ethno-anthropologically different from the people living in the northern part of the country. In the African Commission’s view:

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.<sup>20</sup>

The people of south Cameroon were not an African indigenous community, but they were nevertheless 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.”<sup>21</sup>

In conclusion, indigenous peoples are considered as peoples under the African Charter, but the two terms are not synonymous. Other peoples sharing common characteristics and self-identifying as a people also hold collective rights. This raises a further issue, namely whether the scope of the collective rights under the African Charter differs depending on whether a people is indigenous or not.

In the *Endorois* case, the complainants argued that the Endorois’s right to development was violated

<sup>19</sup> African Commission on Human and Peoples’ Rights, *Kevin Mgwanga Gunme et al. v. Cameroon*, communication 266/2003. The decision was adopted by the African Commission at its forty-fifth ordinary session, held in 2009, and is available at [www.achpr.org/english/Decision\\_Communication/Cameroon/Comm.%20266-03.pdf](http://www.achpr.org/english/Decision_Communication/Cameroon/Comm.%20266-03.pdf).

<sup>20</sup> *Ibid.*, para. 178. Note that the criterion of “ethno-anthropological attributes” is not explicitly used in the *Endorois* decision in determining that the community is indigenous.

<sup>21</sup> *Ibid.*, para 179. Note that the language of article 22 of the African Charter on Human and Peoples’ Rights refers to the need to ensure that development respects the *identity* of a people (emphasis added).

<sup>16</sup> *Endorois* case (see footnote 10), para.148.

<sup>17</sup> *Ibid.*, para. 151.

<sup>18</sup> *Ibid.*, para. 162.

as a result of the State's failure to adequately involve them in the development process and to ensure the continued improvement of the Endorois community's well-being.<sup>22</sup> The terminology used in the case is reminiscent of article 2, paragraph 3, of the Declaration on the Right to Development. The claimants argued that the lack of choice between whether to stay or to leave the Endorois's traditional area contradicted the guarantees of the right to development.<sup>23</sup> In terms of benefit-sharing, they argued that the State did not embrace a rights-based approach to economic growth.<sup>24</sup> The complainants thus hoped to convince the African Commission to interpret article 22 of the African Charter in the light of international standards.

In its decision dealing with the alleged violation of article 22 on the right to development,<sup>25</sup> the African Commission took note of a considerable number of sources. These included the reports of the Independent Expert on the right to development, Arjun Sengupta; work done by the Working Group on Indigenous Populations of the Sub-Commission on the Promotion and Protection of Human Rights; the results of the African Commission's Working Group of Experts on Indigenous Populations/Communities; the Declaration on the Right to Development; the case law of the Inter-American Commission and Court of Human Rights dealing with indigenous issues; and recommendations of the United Nations Committee on the Elimination of Racial Discrimination. None of these sources are binding on the Government of Kenya. The African Commission used these authorities (whose work is primarily of a "soft law" nature) indirectly to give meaning to article 22 of the African Charter. It is also notable that the African Commission amalgamates sources on the right to development and sources on indigenous rights, as the Endorois are considered both a people and an indigenous people. The Commission's extensive use of its interpretive powers is, in any case, striking.

On the issue of inadequate involvement of the Endorois in the development process, the African Commission found that the forced evictions did not allow the Endorois to benefit from the establishment of the game reserve as was required by the right to development as expressed in the African Charter. Consultations had been inadequate and did not

meet the standard of effective participation. The State failed to provide adequate assistance at the post-dispossession settlement. The State did not obtain the prior, informed consent of all the Endorois before designating their land as a game reserve.<sup>26</sup> In relation to benefit-sharing, the African Commission held that the State was required to ensure mutually acceptable benefit-sharing, understood as "a form of reasonable equitable compensation resulting from the exploitation of traditionally owned lands and of those natural resources necessary for the survival of the Endorois community".<sup>27</sup> In conclusion, the African Commission found that:

The Respondent State ... is obligated to ensure that the Endorois are not left out of the development process or benefits. The African Commission agrees that the failure to provide adequate compensation and benefits, or provide suitable land for grazing indicates that the Respondent State did not adequately provide for the Endorois in the development process. *It finds against the Respondent State that the Endorois community has suffered a violation of Article 22 of the Charter.*<sup>28</sup>

Would the African Commission have arrived at the same decision on the right to development if the Endorois had not been an indigenous people? Any response is speculative. The text of the African Charter does not distinguish between different kinds of peoples. It is only by interpreting article 22 in the light of general international law that a distinction between indigenous peoples and other peoples can be brought in. When a non-indigenous people alleges a violation of the right to development, the authorities cited above that refer to indigenous rights are irrelevant. In international documents, the requirement of free, prior and informed consent applies only to indigenous peoples. For peoples generally, the lesser, but still significant standard of article 2, paragraph 3, of the Declaration on the Right to Development applies, i.e., the requirement of "active, free and meaningful participation" in decision-making. The latter standard requires adequate and informed consultation, but not consent.

The "Southern Cameroon" case may again offer useful insights. In this case, the African Commission dealt summarily with the complaint brought by the non-indigenous people of south Cameroon on the

<sup>22</sup> *Endorois case* (see footnote 10), para. 125.

<sup>23</sup> For a similar approach to the issue of choice in factual circumstances close to those of the *Endorois case*, see World Bank Inspection Panel, India: Ecodevelopment Project, eligibility report (21 October 1998), available at <http://siteresources.worldbank.org/EXTINSPECTIONPANEL/Resources/EcoDevelopmentReport.pdf>.

<sup>24</sup> *Endorois case* (see footnote 10), para. 135.

<sup>25</sup> *Ibid.*, paras. 269-298.

<sup>26</sup> *Ibid.*, para. 291: "[T]he African Commission is of the view that [in] any development or investment projects that would have a major impact within the Endorois territory, the State has a duty not only to consult with the community, but also to obtain their free, prior, and informed consent, according to their customs and traditions."

<sup>27</sup> *Ibid.*, para. 296.

<sup>28</sup> *Ibid.*, para. 298 (Commission's emphasis).

right to development. The African Commission spent a mere paragraph on dismissing the complaint, stating:

The Commission is cognizant of the fact that the realisation of the right to development is a big challenge to the Respondent State, as it is for State Parties to the Charter, which are developing countries with scarce resources. The Respondent State gave explanations and statistical data showing its allocation of development resources in various socio-economic sectors. The Respondent State is under obligation to invest its resources in the best way possible to attain the progressive realisation of the right to development, and other economic, social and cultural rights. This may not reach all parts of its territory to the satisfaction of all individuals and peoples, hence generating grievances. This alone cannot be a basis for the finding of a violation. The Commission does not find a violation of Article 22.<sup>29</sup>

On the other hand, the African Commission found a violation of article 19 of the African Charter on equality of peoples, owing to the relocation of business enterprises and the location of economic projects in Francophone Cameroon, which generated negative effects on the economic life of Southern Cameroon. In the light of the *Endorois* decision, it is difficult to understand why the African Commission failed to apply the “active, free and meaningful participation” standard to the people of south Cameroon. Elsewhere in its decision, the African Commission found that there was some representation of the people of south Cameroon in national political institutions, but that grievances raised were not accommodated properly by the State. That had led to civil unrest, prompting the Commission to call for a comprehensive national dialogue. An appropriate investigation of the “active, free and meaningful participation” standard under article 22 could well have led to a different decision on the right to development.

The *Endorois* decision may be praised for going beyond the Declaration on the Right to Development in placing not the individual but the survival of an (African) indigenous group at the centre of development.<sup>30</sup> It remains to be seen, however, how the African Commission will deal with claims by other peoples based on the right to development in the future.

Finally, the *Endorois* case involved a purely domestic situation, involving Kenyan actors only. The international dimension of the right to development was irrelevant to the facts. Article 22 of the African Charter includes a duty of States collectively to ensure the right to development. The scope of this duty

deserves to be tested before the African Commission, e.g., in a case of an indigenous people divided by international borders. It would in principle be even more significant to address the responsibility of donor countries or foreign companies in an African indigenous rights case (for instance, on the exploitation of natural resources). The obvious limitation in such an instance is that only States parties to the African Charter can be held to account before the Charter’s monitoring bodies.

## VI. Final observations

The *Endorois* decision is of particular importance from an indigenous rights perspective. The decision puts to rest any lingering doubts about whether African indigenous communities can avail themselves of the protection offered to peoples under the African Charter on Human and Peoples’ Rights. From a global perspective, a second regional forum, after the Inter-American Court of Human Rights, has opened up to the consideration of indigenous rights claims. The *Endorois* decision also demonstrates that the right to development, at least as it appears in the African Charter and in the context of the Charter’s monitoring procedure, is justiciable. On the other hand, the African Commission’s findings in the *Endorois* case with respect to compensation (i.e., the State’s obligation to recognize the rights of ownership of the community, to provide access to and restore its land and to pay compensation) could arguably have been arrived at even if the complainants had not raised the right to development issue.

The wider question addressed in this chapter is the interaction between indigenous rights and the right to development. This interaction can be looked at from both directions. One aspect is the potential that the general right to development holds for indigenous peoples. Another question is whether progress in the recognition of an indigenous right to development can contribute to the further clarification and implementation of the general right to development.

The potential of the general right to development (as included in the Declaration of the Right to Development) to indigenous peoples should not be overestimated. The indigenous right to development (i.e., the right to development as it appears in the United Nations Declaration on the Rights of Indigenous Peoples) is premised on self-determined development, based on indigenous peoples’ own decision-making structures, and the requirement to obtain their free,

<sup>29</sup> “Southern Cameroon” case (see footnote 19), para. 206.

<sup>30</sup> J. Gilbert, “Indigenous peoples’ human rights in Africa: the pragmatic revolution of the African Commission on Human and Peoples’ Rights,” *International and Comparative Law Quarterly*, vol. 60, Issue 1 (2011), p. 268.

prior and informed consent on projects involving the use of their lands and the exploitation of natural resources. This goes far beyond what is required by the text of the general right to development as formulated in the Declaration on the Right to Development.

One aspect of the general right to development, however, which is potentially of interest to indigenous peoples is the international dimension of the right. The United Nations Declaration on the Rights of Indigenous Peoples addresses international cooperation (including development cooperation) in articles 29, 41 and 42, but offers little detail. The criteria developed by the high-level task force on the implementation of the right to development on “States acting collectively” could assist indigenous peoples faced with the adverse effects of global economic and financial policies.

Do new developments in the area of indigenous rights impact on the general right to development?

At the time of the drafting of the Declaration on the Right to Development, only two holders of the right to development were considered, namely the individual and the entire populations of States. Indigenous rights have evolved to the extent that the concept of “people” in the Declaration on the Right to Development is to be understood today as including indigenous peoples.

In addition, an argument can be made that in cognizance of developments at the African Commission on Human and Peoples’ Rights and at the Inter-American Court of Human Rights,<sup>31</sup> the concept

<sup>31</sup> See, for example, Inter-American Court of Human Rights, *Saramaka People v. Suriname*, judgement of 28 November 2007, para. 78 ff, available at [www.forestpeoples.org/sites/fpp/files/publication/2010/09/surinameiachrsaramakajudgmentnov07eng.pdf](http://www.forestpeoples.org/sites/fpp/files/publication/2010/09/surinameiachrsaramakajudgmentnov07eng.pdf).

of “people” in the Declaration should not be limited to indigenous peoples only.

Although adoption of this position may require some diplomatic shifting of positions, from a legal perspective, the result can be achieved through the use of evolutionary interpretation techniques. Evolutionary interpretation is a methodology used frequently by all regional human rights courts. The International Court of Justice recently endorsed the practice.<sup>32</sup> In a dispute between Costa Rica and Nicaragua, the Court ruled that:

[T]here are situations in which the parties’ intent upon conclusion of the treaty was, or may be presumed to have been, to give the terms used—or some of them—a meaning or content capable of evolving, not one fixed once and for all, so as to make allowance for, among other things, developments in international law. In such instances it is indeed in order to respect the parties’ common intention at the time the treaty was concluded, not to depart from it, that account should be taken of the meaning acquired by the terms in question upon each occasion on which the treaty is to be applied.<sup>33</sup>

The evolution in international law with the adoption of the United Nations Declaration on the Rights of Indigenous Peoples has resulted in a broader understanding of indigenous peoples as rights holders when it comes to the “right to development”. Regional developments in the African and Inter-American cases have also led to a broader understanding than was the case at the time of drafting the Declaration on the Right to Development. The understanding of the right to development has therefore clearly evolved under international law to include indigenous and other peoples.

<sup>32</sup> International Court of Justice, *Dispute regarding Navigational and Related Rights (Costa Rica v. Nicaragua)*, Judgment, I.C.J. Reports 2009, p. 213, available from [www.icj-cij.org](http://www.icj-cij.org).

<sup>33</sup> *Ibid.*, para. 64.