

Strategies of
resistance:
testing the limits
of the law

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In November 2011, the African Wildlife Foundation (AWF), in partnership with The Nature Conservancy (TNC) (two US-based charities), presented the Kenyan government with a gift of land, bought by the charities for US\$ 4 million from a private land-owner (reportedly the former president, Daniel arap Moi) for the establishment of the country's newest national park. The 6,900 hectare property, to be named Laikipia National Park, is said to provide a critical link between neighbouring protected areas, allowing elephants, big cats, and other species to safely navigate a wildlife corridor that spans Central Laikipia.

'Together, African Wildlife Foundation, The Nature Conservancy, and Kenya Wildlife Service are conserving an ecosystem that is vital to this region, while also enhancing the economic livelihood of Kenyans living around the park. Laikipia's protection will stimulate local commerce, particularly tourism,' said Patrick Bergin, chief executive of AWF.

'People are at the core of our conservation work in Kenya, and it's the people of Kenya who are gaining ownership of a significant piece of land,' said David Banks, Africa director for TNC.

The Samburu of Laikipia District, semi-nomadic pastoralists who were forcibly and violently evicted after the initial purchase of the land by AWF and TNC, might well be forgiven for questioning *whose* livelihoods are intended to be enhanced by the creation of the national park and *which* people are at the core of TNC's conservation work.

The Yanacocha gold mine is the largest gold mine in South America, located north-east of the Peruvian capital Lima. The mine is operated by Minera Yanacocha, a joint venture owned primarily by Newmont Mining Corporation of Denver, Colorado with funding from the International Finance Corporation, the private investment arm of the World Bank Group. The development of the mine, which started in 1993, has been mired in controversy and, in turn, acted as an important rallying point for the Peruvian indigenous movement.

Recent plans to expand the mine further

with a US\$ 4.8 billion project, which includes moving all the water from neighbouring lagoons into separate reservoirs, have ensured that the controversy will continue. The plans have been met with violent protests, the declaration of a 60-day state of emergency, a ministerial resignation and a march on the capital as different groups from across Peru unite forces to demand protection of their right to water.

Two different countries, two different continents, two different industries, a single issue: the fragility of the rights of indigenous peoples, not only to their lands and its resources, but to their very identity and survival as a distinct people in the face of a single prevailing development paradigm, which essentially prioritizes economic interests over other factors.

Despite a wave of standard setting and progressive jurisprudence at the international, regional and domestic level in the area of indigenous peoples' rights over the last 20-odd years, the reality for many of the world's approximately 300 million indigenous peoples is that their way of life and very existence as distinct peoples remains under constant threat. This chapter examines some of that growing body of legal standards and jurisprudence regarding states' obligations, both internationally and across the three regions of Latin America, Africa and Asia. The focus of the chapter is on the rights of indigenous peoples' to their lands and their natural resources rather than on minorities more generally. There remains no single, comprehensive definition of indigenous peoples, something which at times has been exploited by governments opposed to recognizing such peoples and their rights. Nevertheless, one of the common factors used to describe indigenous peoples is their distinctive relationship with their traditionally occupied lands and the natural resources of those lands, not simply as a means of livelihood and economic survival but also for their cultural and spiritual significance and ultimately as the basis of their very identity.

It is the particularity of this relationship with their lands and resources, the growing recognition of the distinctiveness and value of such a relationship, as well as its vulnerability in the face of development aggression, and an increasing openness in some quarters to address

historical injustices (see Box 1) that has led to the heightened standard-setting and jurisprudence in relation to indigenous peoples' property rights.

Second, the term 'indigenous peoples' is used here in its broadest sense so that, as in the approach adopted by the African Commission on Human and Peoples' Rights (ACHPR), it is not limited to a 'narrow/aboriginal/pre-Colombian understanding of indigenous peoples'. Equally, following the approach of the Inter-American Court of Human Rights (IACtHR), one might refer to indigenous *and* tribal communities so that, for example, descendants of African slaves forcibly brought to South America with European colonizers, and who continue to form a distinct social, cultural and economic group with a special relationship with their territory, benefit from these standards as well.

Nonetheless, the focus on indigenous and tribal peoples is not to deny that there is a legitimate debate to be had as to whether some of the recently adopted standards in relation to their property rights, modified or not, should not equally apply to others whose relationship with the land is not necessarily an issue of identity and cultural survival yet who similarly find themselves paying a heavy price for others' development. For example, in Cambodia, where more than half of the country's arable landmass has been granted as concessions to private companies for agro-industrial and mining projects, indiscriminately affecting both minority communities, such as Cham Muslims, and indigenous peoples, it can be difficult to see why non-indigenous and non-tribal communities should not be entitled under human rights law to have a greater role in participating in decisions directly affecting them and their livelihoods. To the extent that much of the emerging protection for indigenous peoples has been carved out of what was previously viewed as an individual right to property, there is the potential for human rights standards to continue to evolve so as to provide protection to other groups and collectives.

Finally, by way of introduction, this chapter refers to indigenous peoples collectively and does not provide a particular gender focus. This is primarily because the human rights standards, legislation and case law being examined do not, on the whole, touch upon the double discrimination

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Addressing historical injustices in New Zealand

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The Maori, the original inhabitants of New Zealand or Aotearoa, make up roughly 15 per cent of New Zealand's population of just over 4 million. Relations between Maori and the government are based on the Treaty of Waitangi, signed in 1840 between the British Crown and a number of Maori tribes or *iwi*, and considered as one of New Zealand's founding instruments. Under the Treaty, the Maori were to retain possession of their lands and resources. In line with this, indigenous or native title was recognized under the common law of New Zealand as early as 1847 (*R v. Symonds*) and through legislation in the Native Rights Act 1865. However, such early recognition of native title did not last and subsequent actions by successive governments resulted in the individualization of Maori land and its subsequent sale, such that most land in New Zealand had already passed out of Maori ownership by 1900 in acts which are now widely recognized as being in breach of the Treaty.

For Maoris with their concept of *turangawaewae* ('a place to stand'), indicating the close connection between land and tribal and personal identity, such dispossession was not simply about alienation of their land but a loss of self-governance and of cultural identity which continues to be reflected in the inequalities experienced by Maori in comparison with non-Maori across a broad range of social indicators.

Beginning in 1975, with the establishment of the Waitangi Tribunal to hear claims brought by Maori against the government for breaches of the Treaty, notable steps have been taken to address these historical

injustices and to reach settlements of Maori land claims (albeit that the Tribunal's jurisdiction was only extended in 1985 to cover grievances dating back to 1840). Other steps include the adoption of the Ture Whenua Maori Act 1993 (or Maori Land Act), which, as well as establishing a Maori Land Court, preserves the capacity of Maori to hold land collectively and recognizes that Maori land is a *taonga* (treasure) of special significance to Maori people. There has also been the development of the Treaty settlement process, including the establishment in 1995 of a designated body, the Office of



Treaty Settlements, to oversee the process under which numerous Maori groups have negotiated settlements to their historical claims, while others continue to go through the process.

Despite such positive steps the settlement process is not without its critics. Common concerns are the fact that the recommendations of the Waitangi Tribunal are not binding and are frequently ignored by the government; that the negotiation procedure is inherently unbalanced in favour of the government, which determines the framework and the procedure of negotiations; and that no independent oversight exists. Additionally, many Maori consider that the value of the settlements represents only a very small percentage of the value of the total loss.

In addition, even as the New Zealand government was trying to negotiate settlements to certain claims, the Foreshore and Seabed Act 2004 vested the ownership of the public foreshore and seabed in the New Zealand government, extinguishing any Maori customary title over that area overnight, even as it preserved private, individual title. Following widespread criticism of this legislation, it was repealed and replaced in 2011 with the Marine and Coastal Area (Takutai Moana) Act which, *inter alia*, restored any customary interests in the common marine and coastal area that were extinguished by the earlier Act and restored the courts' ability to determine and legally recognize customary rights and title in the foreshore and seabed. Both pieces of legislation are ultimately testimony to the continuing vulnerability of Maori's indigenous rights. ■

Left: A Maori youth on the beach at Waitangi, New Zealand, with a huge Tino Rangatiratanga flag during the official Treaty of Waitangi celebrations. The Tino Rangatiratanga flag expresses self-determination and is a well-recognized symbol of Maori sovereignty. It is often seen at Maori protest movement gatherings. Jocelyn Carlin/Panos.

that indigenous women face and the differential impact that violations of the community's right to property might have on them. While some of the UN treaty bodies, particularly the Committee on the Elimination of Discrimination Against Women (CEDAW), are beginning to expressly examine the situation of indigenous women in their concluding observations on state parties' reports, such observations generally focus on issues of literacy/education and health.

Standard setting

International

The main international human rights treaties adopted by the international community under the auspices of the UN after the Second World War were, on their face, silent on the issue of indigenous peoples. Instead, it was the International Labour Organization (ILO), with its historical concerns over the use of 'native labour' in colonial countries which emerged as an early actor in the field of the rights of indigenous peoples. However, ILO Convention No. 107 exemplifies the thinking that still prevailed at the time of its adoption in 1957. While the Convention provided for the recognition of indigenous peoples' collective rights of ownership over traditionally occupied lands, this was within the wider framework of a policy of integration which viewed indigenous societies as temporary ones which would inevitably disappear under the tide of modernization.

ILO Convention No. 169 (ILO 169), adopted in 1989, marked a fundamental shift away from an assimilationist orientation towards one which valued indigenous peoples' difference and afforded them rights to ensure the continuation of their communities and those differences. For example, Article 7(1) provides that '[t]he peoples concerned shall have the right to decide their own priorities for the process of development as it affects their lives, beliefs, institutions and spiritual well-being and the lands they occupy or otherwise use'. It remains the case that ILO 169, the only international treaty specifically on indigenous peoples and, consequently, binding on those states that have signed up to it, has only been ratified by 22 countries, the majority of which are in Latin America, with Nepal (2007) representing the only Asian signatory

and the Central African Republic (2010) the only African signatory. Nevertheless, its reach, as an interpretative and comparative tool, extends considerably further than those 22 countries through its being invoked by regional human rights tribunals and by domestic courts even in relation to countries which are not signatories.

The adoption of ILO 169 has been followed by increasing attention within the UN human rights system to indigenous peoples and how they benefit from protection under existing human rights treaties. For example, in 1994 the UN Human Rights Committee (HRC) produced General Comment no. 23 in which it provided its interpretation of Article 27 of the International Covenant on Civil and Political Rights (ICCPR). General Comment no. 23 expressly refers to how the protection of those belonging to minorities to enjoy their own culture, as provided for in Article 27, extends to culture as manifested 'in a particular way of life associated with the use of land resources, especially in the case of indigenous peoples'. This interpretation is significant given that the ICCPR, unlike the Universal Declaration on Human Rights, contains no right to property.

In an early communication brought to the HRC in respect of Article 27 (*Lansman v. Finland*, communication no. 511/1992, adopted 1994) a group of Sami reindeer-herders complained to the HRC regarding the Finnish government's granting of a contract for stone-quarrying on the side of a mountain that they considered sacred and the consequent transporting of the stone through a complex system of reindeer fences on territory whose ownership was in dispute between the state and the Sami. They claimed that their right to enjoy their own culture, based on reindeer husbandry, had been violated by the granting of the concession and the consequent economic activity. In dismissing the complaint, the HRC considered that the quarrying was not so substantial as to deny the complainants the ability to carry out their traditional reindeer-herding and emphasized the fact that they had been consulted prior to the granting of the quarrying permit.

A more recent decision of the HRC, *Poma v. Peru* (communication no. 1457/2006, adopted 2009), concerning the diversion of

water from a region of the Andes to the coast that impacted on Aymara pasture land and their traditional raising of llamas, illustrates the development of legal standards in this field in the ensuing years. In finding a violation of Article 27, on the basis that the interference with the culturally significant activity of llama-raising was substantial, the HRC stated that for such substantial interference to be acceptable required that the community had the opportunity to participate in the decision-making process which, in contrast to the earlier *Lansman* decision:

'requires not mere consultation but the free, prior and informed consent of the members of the community. In addition, the measures must respect the principle of proportionality so as not to endanger the very survival of the community and its members.'

While the complaint was brought by an indigenous woman, given that Article 27 refers to individuals belonging to minorities, there is no reason why the free, prior and informed consent standard set out in *Poma Poma* should not apply equally to non-indigenous minorities who find a culturally significant activity being impacted on by development affecting their land.

The decisions of the HRC, albeit not binding, are important and should be read in conjunction with the increased attention being given to indigenous peoples' property rights by other UN treaty bodies. For example, the Commission on the Elimination of Racial Discrimination (CERD)'s General Recommendation no. 23 on Indigenous Peoples (1997) calls upon states 'to recognize and protect the rights of indigenous peoples to own, develop, control and use their communal lands, territories and resources'. There is also the General Comment no. 21 of the Committee on Economic, Social and Cultural Rights (CESCR), adopted in 2009, relating to Article 15(1)(a) of the International Covenant on Economic, Social and Cultural Rights (ICESCR), which provides for the right of everyone to take part in cultural life. The General Comment expressly considers this right in relation to indigenous peoples and their relationship with their lands, territories and resources, and identifies as a core obligation the obtaining of communities'

'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'.

Activity around indigenous peoples' rights within the UN culminated with the adoption in 2007, after two decades in the making, of the UN Declaration on the Rights of Indigenous Peoples (UNDRIP). In many ways the declaration takes ILO 169 as a starting point and then builds on it considerably. Of particular note is the repeated reference not simply to participation or consultation but to the need to obtain indigenous peoples' 'free, prior and informed consent' prior to certain actions being taken. This includes the requirement under Article 32 to obtain indigenous peoples' free, prior and informed consent to 'the approval of *any* project affecting their lands or territories and other resources, particularly in connection with the development, utilisation or exploration of mineral, water or other resources' (emphasis added).

The declaration was adopted with overwhelming support (143 states in favour, 4 against and 11 abstentions) and has already found its way into certain domestic legislation (notably, Bolivia). The votes against the declaration are telling, coming as they did from wealthy Western states with notable indigenous populations (Australia, Canada, New Zealand and the United States) and even those states that voted in favour, as well as those that have subsequently come on board, qualified their votes with references to the political nature of the document or to it being subject to their existing legal and constitutional framework. As a declaration rather than a convention, the UNDRIP is strictly non-binding. Nevertheless, it is clear from its provisions in relation to the rights of indigenous peoples to the lands, territories and resources that they have traditionally used and occupied, taken in conjunction with ILO 169 and the General Comments of the HRC, CERD and CESCR referred to above, that rights to land and natural resources are an integral part of indigenous peoples' rights in international human rights law.

Regional

Americas

Many of the countries in the Americas (though

certainly not all) have been at the forefront of affording constitutional and legislative recognition to their indigenous populations and to certain accompanying rights. For example, the constitutions of Bolivia and Ecuador provide for their being plurinational states; Colombia's 1993 law recognizes collective rights to territory and its 1998 decree provides for prior consent in respect of the exploitation of natural resources on the lands of indigenous peoples and Afro-Colombian communities; and Peru's 2011 legislation on prior consultation with indigenous peoples. The judiciaries in these countries have also, to varying degrees, been active. Indeed, Colombia's Constitutional Court is described as having established 'a world-class model of jurisprudence' in the protection of the rights of indigenous peoples and the Afro-Colombian community; a decision in May 2011 declared legislation reforming the country's mining code as unconstitutional due to the lack of prior consultation with indigenous peoples. Another example of judicial activism in the region is provided by the Supreme Court of Belize (see case study).

There has also been considerable activity with regard to the recognition and protection of indigenous peoples' rights at the inter-governmental level under the auspices of the Organization of American States (OAS). In 1989, the General Assembly of the OAS asked the Inter-American Commission on Human Rights (IACHR) to prepare a legal instrument on the rights of indigenous populations. While admittedly the declaration remains in draft form some 15 years after its inception, no other region is even beginning to attempt to engage in a similar process. Shortly after the first steps towards a regional instrument on indigenous peoples' rights were taken, the IACHR established in 1990 the Office of the Rapporteur on the rights of indigenous peoples.

Perhaps though the most significant developments in the region, including in their potential to impact beyond the region itself, have been the decisions of the IACHR and the IACtHR in respect of petitions brought before them by or on behalf of indigenous communities. The extent of the jurisprudence on indigenous peoples' rights and specifically their collective

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The Maya of the Toledo district in Belize

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The Toledo district in southern Belize is home to approximately 14,000 Mopan- and Q'eqchi'-speaking Maya people, descendants of Maya subgroups that inhabited the territory at least as far back as the seventeenth and eighteenth centuries when Europeans arrived. In 1998, following the granting of a number of oil and logging concessions on their traditional lands without their involvement, and a failure to obtain any timely remedy from the local courts, a petition was lodged on behalf of the Maya with the Inter-American Commission on Human Rights (IACHR) alleging a violation of the right to property and the right to non-discrimination under the American Declaration on Human Rights.

In a decision of 2004, the IACHR upheld the communities' complaint finding that Belize had failed 'to provide [the Maya] with the protections necessary to exercise their right to property fully and equally with other members of the Belizean population'. The Commission went on to recommend that Belize, *inter alia*: (i) adopt legislative and administrative measures, in fully informed

rights to their ancestral territories and related natural resources coming from these two bodies is reflective, on the one hand, of the preparedness in the region to at least recognize the existence of indigenous peoples and the justiciability of the issues facing them. But, on the other hand, it is reflective of states' failure to offer meaningful protection at the local level, even where their domestic laws make provision for the same.

The first case in which the IACtHR adjudicated upon indigenous peoples' collective right to property illustrates this dichotomy.

consultations with the Maya, to delimit, demarcate and title their territories; and (ii) until such measures are carried out, abstain from any acts that might lead the state or third parties to affect the existence, value, use or enjoyment of those territories.

Despite a constitutional amendment in 2001, which inserted into the Constitution's preamble a reference to the people of Belize requiring 'policies of state which protect ... the identity, dignity and social and cultural values of Belizeans, including Belize's indigenous peoples ... with respect for international law and treaty obligations in the dealings among nations', no attempt was made to implement the IACHR's recommendations by Belize. Consequently, in a renewed attempt to enforce their rights, a further case was brought in 2007 before the domestic courts by two of the communities concerned, alleging the violation of provisions of the Belize Constitution regarding the right to equality, to property and to life from the failure to recognize the communities' traditional communal property rights and the granting of logging and oil concessions. In an important judgment, in which regard is shown to the IACHR decision, the Supreme Court explores in detail the history of the Maya of the Toledo district, their customs and their relationship with their lands, as well as providing a useful synthesis of some of the key cases on native or indigenous title in common law jurisdictions ranging from Malaysia to Canada, and that such title was not extinguished merely by settlement by the British Crown.

Notably, the judgment considers at some length Belize's obligations under international law (matters which 'weighed heavily with [the court]

... in interpreting the fundamental human rights provisions of the Constitution'). This exploration includes not only Belize's binding treaty obligations but also includes ILO Convention No. 169 (to which Belize is not a party), whose provisions on indigenous peoples right to land in Article 14 are described as 'resonat[ing] with the general principles of international law regarding indigenous peoples', and the UN Declaration on the Rights of Indigenous Peoples. While this declaration is not binding, the Court notes that Belize voted in favour of it, that it was passed by an overwhelming majority of the General Assembly and embodies general principles of international law relating to indigenous peoples and their lands and resources resulting in it 'being of such force that the defendants representing the government will not disregard it'.

As with the IACHR, the Court concluded that the Maya communities' interest in their lands based on Maya customary land tenure was protected by the right to property and that such right, as well as the right to equality, had been violated by the granting of concessions to third parties to utilize the property and resources located on their land. The Court similarly ordered the delimiting, demarcating and titling of the land, and that the government abstain from any action which would affect the property unless such action had the informed consent of the communities. Five years on, the communities are still waiting for implementation of this domestic decision, even as US Capital Energy continues its oil exploration in the area. ■

In *Mayagna (Sumo) Awas Tingni Community v. Nicaragua* (2001), the Awas Tingni community (one of numerous Mayagna or Sumo communities inhabiting the isolated Atlantic Coast region of Nicaragua) challenged Nicaragua's failure to demarcate their communal lands and the granting of a timber concession in an area which potentially belonged to the community without consulting them. Despite the fact the American Convention on Human Rights made no express reference to indigenous peoples nor to communal property, the Court, through

what it itself described as 'an evolutionary interpretation', found that Article 21, until that point regarded as protecting a classic, individual private right to property, protected the right to property 'in a sense which includes ... the rights of members of the indigenous communities within the framework of communal property'.

This was a ground-breaking development. Yet, the reason why the Awas Tigni community had to take their case to the regional level was not because Nicaragua's Constitution and legislation made no provision for indigenous peoples

and their property rights. Indeed, Nicaragua's 1995 Constitution contains several enlightened provisions on the country's indigenous peoples, their communal form of land-ownership and their enjoyment of their natural resources. Instead, as found by the IACtHR, there was no established procedure for the titling of indigenous lands and therefore for making the constitutional and other legislative provisions effective in practice.

The more recent case of *Saramaka v. Suriname* (2007), concerning the Saramaka people, whose roots are traceable to African slaves forcibly brought to the land now known as Suriname by European colonizers during the seventeenth century, builds considerably on the *Awes Tingni* case with which it shares similar facts. As well as directly addressing the question of ownership of natural resources, the Court established clear steps that need to be followed if an indigenous community's property rights are to be lawfully restricted by development on their land (all derived from Article 21 of the American Convention). The IACtHR set out three additional safeguards to ensure that any restriction does not endanger the very survival of the indigenous group and its members: effective participation of the community; benefit-sharing; and the carrying out of prior environmental and social impact assessments. The Court further provided a valuable blueprint as to what effective participation and the duty to actively consult involves in practice, including such matters as the need for early notice to be provided of any proposed development; the community being alerted to possible environmental and health risks; and account being taken of the community's traditional decision-making process.

Unfortunately, even as the Court's decision is being invoked by domestic courts, for example in Peru, and other regional tribunals (the ACHPR's in its landmark *Endorois* decision, described below), the Saramaka have yet to benefit fully from the judgment as the vested interests of those in power mean that the implementation process continues to be stalled.

Africa

Given the unique nature of the African Charter on Human and Peoples' Rights, with its

provision for all three generations of rights (civil and political, economic, social and cultural and environmental) and its specific provision for group rights, it might have been expected that African countries and the ACHPR would have been at the forefront of the protection and development of indigenous peoples' rights. Until relatively recently, the opposite has been the case. Recognition of particular ethnic groups as having specific rights has been resisted by many African states on the basis that it would create tensions between different ethnic groups and instability in newly sovereign countries.

In support of such resistance, many states have exploited the lack of any agreed definition of who indigenous peoples are, and argued that all Africans are indigenous in the sense of being pre-colonial. The uneasy relationship between African countries and their indigenous peoples is well exemplified by the concerns raised over and amendments proposed to the UNDRIP at the eleventh hour by the African Group.

Given this general attitude of African countries to their indigenous peoples, it is not surprising that domestically, few of them provide for recognition of indigenous peoples and their property rights, and when they do such laws are generally not enforced. For example, in Botswana, home to over 40 tribal groups, the Tribal Territories Act divides the land between the 8 dominant Tswana tribes and makes no provision for the rights of other tribes. By contrast, the Constitution of Ethiopia, as well as recognizing the right of 'every people' in Ethiopia to self-determination (Article 39.1), specifically recognizes pastoralists' right not to be displaced from their own land (Article 40.5). However, such provisions have proved of scant comfort to the country's Nuer population, involuntarily displaced by the government's villagization programme which is purportedly aimed at ensuring that they are housed in villages with adequate infrastructure and services but which, in reality, appears aimed at freeing up their traditional lands for investment by outsiders for commercial agriculture.

South Africa stands out as one country in the region which is trying to come to terms with its past both at a constitutional and legislative level and in judicial decisions. In the landmark

decision of *Richtersveld v. Alexkor* (2003), its Constitutional Court first examined an indigenous community's land rights prior to annexation by the British Crown with reference to indigenous law rather than common law. Having identified that right as one of communal ownership, including ownership of minerals and precious stones below the surface, the Court went on to hold that this right was not terminated merely by the Crown's annexation of the territory. Instead, the community's rights of ownership remained intact until the discovery of diamonds led to their eviction in the 1920s and the subsequent passing of the Precious Stones Act which did not recognize non-registered owners. Given the racially discriminatory nature of this dispossession, the community was entitled to restitution under the Restitution of Land Rights Act 1994.

The ACHPR itself, after a slow start, has shown increasing willingness to engage with issues of indigenous peoples and their rights. In 2000, it set up the Working Group on Indigenous Populations/Communities in Africa whose work has included the production of an influential report in 2003 examining the human rights situation of indigenous peoples on the continent, as well as exploring possible criteria for identifying indigenous peoples in the African context.

Unlike its counterpart in the Americas, the ACHPR has had very few cases presented to it regarding indigenous peoples and their rights to property. The first was the 2002 case of *The Social and Economic Action Rights Centre v. Nigeria* concerning Shell's oil exploration activities in Ogoniland, in conjunction with a state oil company, with devastating effects on the lives and welfare of the Ogoni people of the region. While a landmark decision established the justiciability of economic, social and cultural rights, it represented a missed opportunity to examine indigenous peoples and their property rights.

That task was left to the 2010 decision of *Centre for Minority Rights Development (Kenya) and Minority Rights Group International (on behalf of the Endorois Welfare Council) v. Kenya*. The Endorois are a semi-nomadic pastoralist community of approximately 60,000 people who

have lived for centuries in the Lake Bogoria area of Kenya. In the 1970s, the land which they had traditionally occupied was designated as a Game Reserve. The Endorois were evicted from their lands and their access to Lake Bogoria, with its cultural and religious significance, was curtailed. Having failed to find redress at the domestic level, the Endorois took their case to the ACHPR, claiming violations of their right to property, their freedom to practise their religion, their right to culture, their right to natural resources and their right to development. All of these claims were robustly upheld by the ACHPR in the first decision to recognize that Article 14 of the African Charter (the right to property) protects the right of ownership (and not mere access) of indigenous peoples to the lands they have traditionally possessed.

In a decision which is testimony to the cross-fertilization between regional human rights bodies, the ACHPR drew extensively on the jurisprudence of the IACtHR. First though, it addressed directly the question of who indigenous peoples are within Africa, setting the issue in its current context:

'while the terms "peoples" and "indigenous community" arouse emotive debates, some marginalized and vulnerable groups in Africa are suffering from particular problems. [The ACHPR] is aware that many of these groups have not been accommodated by dominating development paradigms and in many cases they are being victimized by mainstream development policies and thinking and their basic human rights violated.'

Additionally, while drawing very much upon decisions such as *Saramaka v. Suriname*, the ACHPR broadened the protection afforded by the IACtHR in several regards. In particular, the right to natural resources contained in a community's traditional lands was not limited to those to which they had some particular attachment, and the requirement for consent by the community, as distinct from mere consultation, appears to apply to any development or investment project that would restrict their property rights and not only those major projects that would have a profound impact on such rights.



Further, in the first decision to adjudicate upon the right to development, the ACHPR rejected Kenya's contention that 'the task of communities within a participatory democracy is to contribute to the well-being of society at large and not only to care selfishly for one's own community at the risk of others'. Instead, the ACHPR emphasized the right to a particular process of development which involves the community on an equal footing and increases their choices and well-being and results in the empowerment of its members.

As in the case of the Saramaka, Endorois are, some two years on, still waiting for

implementation of the ACHPR decision.

The Ogiek, a forest-dwelling community, have similarly brought a case against Kenya before the ACHPR, in a sign that Kenya's 2010 Constitution, which specifically recognizes marginalized groups and provides for community land, including ancestral lands, has yet to bring about real changes on the ground. Due to the serious violations involved, in the first half of 2012 the ACHPR referred the case to the African Court on Human and Peoples' Rights. This will be the first opportunity for that body, whose decisions, unlike the ACHPR's, are

Left: Endorois people near Lake Bogoria, Kenya. This photo was taken during a MRG trip to Lake Bogoria. *Ishbel Matheson/MRG.*

binding, to adjudicate upon indigenous peoples' property rights.

Asia

Despite being home to the majority of the world's indigenous peoples, resistance to the very concept of indigenous peoples plus the lack of any independent regional human rights mechanism has meant that protection of indigenous peoples' property rights (as well as other rights) remains severely underdeveloped in the region. As in Africa, the debate around indigenous peoples has been caught up in questions of definition and concerns that affording rights to particular groups will undermine national unity. The debate has at times been highly politicized and, as with the wider human rights debate, charges have been made of Eurocentricism and Western domination.

At a domestic level, many states still refuse to recognize their indigenous populations. Thus, Bangladesh's 2011 amendment to its Constitution continued the non-recognition of indigenous peoples as such, making reference instead to tribes and ethnic groups, something strongly criticized by indigenous peoples and their representative organizations.

Some states have shown themselves more open, at least on the legislative books, to recognizing indigenous peoples and their rights. For example, the Philippines enacted the Indigenous Peoples' Rights Act (IPRA) back in 1997, the constitutionality of which has since been upheld by the country's courts. Nevertheless, the IPRA, which provides for the recognition of ancestral domains, the right to self-determination and the duties of consultation and obtaining free, prior and informed consent, has been heavily criticized. In particular, the IPRA is said to be undermined by the 1995 Mining Act, and the number of certificates of ancestral domain title or ancestral land title have been limited due to the unduly burdensome requirements on indigenous peoples to prove occupation of their lands since time immemorial.

It is a similar story in Cambodia, where the 2001 Land Law is progressive on its face, specifically including a chapter on 'immovable property of indigenous peoples', which enables indigenous communities to gain collective title to their land as well as prohibiting sale of indigenous land, even before formal titles are awarded. However, neither provision is enforced in practice.

Malaysia serves as an example of where shortcomings in legislative protection have been addressed through the courts. In a series of cases beginning in 1997 with *Adong bin Kuwau v. Kerajaan Negri Johor*, the courts have upheld indigenous peoples' native customary rights and made clear that they can only be extinguished by clear legislation or by an executive act with appropriate compensation. While Malaysia's indigenous people clearly have some faith in the judicial system (there are said to be over 200 cases currently before the Sarawak courts alone regarding indigenous communities' exercise of their customary rights), the results have been mixed, as the chapter on South East Asia demonstrates.

It remains to be seen what effect developments at an international level and in other regions will have within Asia. Perhaps encouragingly, an early draft of the Association of Southeast Asian Nations (ASEAN) human rights declaration (as of January 2012) includes a specific reference to indigenous peoples and ethnic groups and their right to the enjoyment, collectively and individually, of all human rights, as well as their right to consultation, and the obligation on states to obtain their free and informed consent prior to embarking on certain development projects. However, whether such provisions will be retained in the final draft remains to be seen.

Challenges

The foregoing section has provided a brief overview of the legal standards regarding indigenous peoples and their right to their traditionally occupied lands and their natural resources. Some of those standards are specialized, applying only to indigenous peoples, as in ILO 169. Others are derived from generally applicable standards (the right to property) but elaborated on by human rights tribunals to include specific requirements in their application to indigenous



Left: Portrait of a Waorani woman at Yasuni National Park, Ecuador. The Waorani are trying to protect their land against the threat of oil multinationals. *Julio Eschart/Panos.*

peoples. The standards are not written in stone and are continuing to evolve (for example, with regard to the extent of indigenous peoples' rights over natural resources on their lands, and when the doctrine of free, prior and informed consent applies) but the basic parameters of the rights of indigenous peoples to their properties and the corresponding obligations on states are now established.

The various decisions being made by tribunals at the domestic, regional and international level are important in terms of holding governments to account and in contributing to the ongoing evolution of such rights. Ultimately though, such cases are a means of last resort: to hold states to account for actions they should already be taking (recognizing and protecting in actual practice rights to property by delimiting, demarcating and titling ancestral lands) or refraining from (giving away mining and logging concessions, establishing of wildlife reserves) without the full participation of the local people. And, as shown, even where indigenous peoples' claims of violations of their rights have been upheld before domestic or regional tribunals, governments continue to drag their feet in implementing the decisions.

At the root of this implementation gap is a failure of states and other players, such as private companies, to take indigenous peoples and their rights seriously, and also a continuing refusal on the part of sovereign states to fully appreciate that, just as sovereignty has been ceded in some areas to external economic factors and international bodies, part of their internal sovereignty needs to be ceded. And, as such, states are not always the final arbiters of which development projects can take place, where or how, within their borders. The examples with which this chapter opened are not isolated incidents but just two of countless examples which illustrate this ongoing state of denial.

The incremental chipping away through litigation at widely held views by states as to the real position of indigenous peoples (irrespective of what domestic, regional or international

standards they have signed up to) has its place. However, indigenous peoples and their ways of life challenge the dominant development paradigm, which essentially remains about economic development and is premised on the notion of the greatest benefit for the greatest number. Unless and until a new development model prevails, indigenous peoples, whatever their rights in theory, will find themselves vulnerable to governments and third parties wanting to benefit from the resources found on or under their lands. This vulnerability is compounded by the fact that the demand for natural resources has reached unprecedented levels.

One initiative which seeks to modify the current development paradigm is Ecuador's Yasuni-ITT proposal. The Yasuni region is home to the Waorani indigenous people. It is an area of extreme biodiversity. It also contains Ecuador's largest oil reserves in the Ishpingo-Tambococha-Tiputini (ITT) oilfields. Negotiations have been taking place on a scheme whereby Ecuador would forgo oil development in the ITT region of Yasuni National Park if the international community compensates the country for at least half the revenue it would have generated from such oil exploration. Under this model, development still has a price tag, but it is not always the highest possible price and it is not about exploiting natural resources until they are depleted and then moving on to new terrain. From the perspective of indigenous peoples' rights, the project can, on its face, be criticized: the implication being that if Ecuador does not receive the requested funds it will go ahead and extract the oil despite the consequences for the Waorani. Nevertheless, it makes the case that biodiversity and cultural richness also have value.

It remains to be seen whether the Yasuni-ITT proposal is successful and how workable similar proposals in other areas might be. In fact, at the end of 2011, the future of the Yasuni-ITT proposal appeared to be in doubt. What is clear though is that, while immense progress has been achieved by and on behalf of indigenous peoples over the last few decades, there remains much to be done in implementing their rights on the ground. ■