COLLECTIVE RIGHTS IN THE INTER-AMERICAN AND AFRICAN HUMAN RIGHTS SYSTEMS

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ABSTRACT

This Article argues that the Article 60 power of the African Commission provides a structural advantage over the Inter-American Court in the interpretation and protection of collective rights because it enhances capacity for judicial dialogue and the incorporation of jurisprudence from other jurisdictions. The Article examines the capacity of the Inter-American and African human rights systems by examining two foundational cases. In Sawhoyamaxa Community v. Paraguay (2006)*, the Inter-American Court interpreted Article 21 of the American Convention to include a right to collective property within a framework that is prima facie focused on individual rights. In contrast, in* Endorois v. Kenya (2009)*, the African Commission was able to rely on the African Charter's explicit inclusion of collective peoples' rights. Moreover, the African Commission in* Endorois *draws on the jurisprudence of the Inter-American Court, citing* Sawhoyamaxa *and other collective rights case law from the Inter-American system. In doing so, the African Commission was not simply buttressing its argument, but using its Article 60 power to draw on non-African sources of international law in order to assist it in more clearly articulating the concept of collective rights that remained inchoate in the Charter.*

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I. INTRODUCTION

The emergence of third-generation human rights—that set of rights whose recognition has begun to crystalize in the beginning of the twenty-first century and which includes rights connected to the environment, future generations, and groups—presents a problem for regional human rights systems established in previous eras because these rights typically do not align with the conception of the right-holder as an individual. Just as current human rights systems developed jurisprudence for the analysis and articulation of civil and political, as well as socio-economic, rights, they now must establish a systematic approach to understanding collective rights or risk waning relevance. These systems, however, are often limited by the ethos of the time in which they were created. As a result, they struggle to analyze adequately the content of successive emergent norms. The establishment of a new system for each generation of rights would be impractical. Instead, the regional systems must be sufficiently adaptable to permit the evolution and accommodation of such norms.

This Article explores the challenge presented by third-generation rights through the examination of collective indigenous land rights in two regional systems, focusing on the ruling by the Inter-American Court of Human Rights (hereinafter Inter-American Court) in *Sawhoyamaxa Indigenous Community v. Paraguay*[1] (hereinafter *Sawhoyamaxa*) and the African Commission on Human and Peoples' Rights (hereinafter the African Commission or the Commission) case *Centre for Minority Rights Development and Minority Rights Group (on behalf of Endorois Welfare Council)*

1. Sawhoyamaxa Indigenous Cmty. v. Paraguay, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 146 (Mar. 29, 2006).

v. Kenya[2] (hereinafter *Endorois*). A close examination will indicate that the African system's greater capacity to analyze collective indigenous land rights compared to the Inter-American system results from structural differences in the two systems. Ultimately, the Article will argue that the African system is better positioned to develop a jurisprudence adequate for addressing collective rights because 1) the explicit recognition of such rights in the African Charter on Human and People's Rights (hereinafter the African Charter or the Charter) enables the Commission and the African Court of Human and People's Rights (hereinafter the African Court or Court) to focus on the content of the rights rather than their existence, and 2) Articles 60 and 61 of the African Charter direct the Commission and the Court to look not only inward at the African system, but also at the entirety of international law, therefore providing it with a greater breadth of resources when analyzing the content of collective rights. The latter characteristic of the African Charter provides the level of adaptability necessary to address emergent human rights norms.

Indigenous land rights are particularly useful for analyzing the recognition of emergent norms because they implicate notions of dignity, the human person, and property implicit in many foundational human rights documents. Moreover, the legacy of colonization in Africa and the Americas has led to an environment in which structures of government prioritize notions of property that do not necessarily align with conceptualizations that predate colonization and persist within traditional indigenous communities. This disjunction creates opportunities for human rights bodies to examine norms that do not fit neatly within the framework of their foundational documents. The African Charter[3] has a distinct advantage in this regard. Because it anticipates and incorporates collective rights, the African system is better equipped to analyze conflicts about indigenous land rights. In contrast, the American Convention on Human Rights[4] (hereinafter the Convention or the American Convention) fails to integrate the notion of collective rights into its framework and, as a result, the Inter-American Court struggles to adequately analyze indigenous land rights.

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2. Ctr. for Minority Rights Dev. (Kenya) & Minority Rights Grps. (on behalf of Endorois Welfare Council) v. Kenya (*Endorois*), No. 276/03, African Commission on Human and Peoples' Rights [Afr. Comm'n H.P.R.] (Feb. 4, 2010).

3. African Charter on Human and Peoples' Rights, June 27, 1981, 21 I.L.M. 58 [hereinafter AfCHPR].

4. American Convention on Human Rights, Nov. 22, 1969, 1144 U.N.T.S. 123 [hereinafter AmCHR].

An additional distinction between the two systems, and one with perhaps greater potency, is the extent to which their foundational documents permit and encourage the systems to engage in inter-regional judicial dialogue. In practice, both systems interact with other human rights mechanisms. They are influenced vertically by domestic, sub-regional, and international bodies, as well as horizontally by other regional systems. Yet, the African Charter's explicit direction to consider sources of law from outside of the system leads to a more conscientious and robust incorporation of external jurisprudence. Consequently, the African system is better able to analyze emerging norms and rights by drawing on the case law of other human rights mechanisms, including other regional systems, rather than developing the necessary jurisprudence from the ground up. This advantage makes the African system better suited for addressing violations of not only collective rights but also emerging norms generally.

This Article will proceed as follows: First, this introductory section will conclude with a brief explanation of the case selection. Second, the Article will provide an overview of the *Sawhoyamaxa* case from the Inter-American system including the factual background, relevant sections of the American Convention, rationale of the majority opinion, and analysis provided by two concurring opinions. Third, it will provide a similar overview of the *Endorois* case from the African system. Fourth, there will be a brief comparative assessment of the two cases with particular attention paid to their references to and citations of extra-regional jurisprudence. Fifth, the Article will analyze the extent to which the two systems were able to adequately examine and articulate the rights involved in the two cases. Particular attention will be paid in this section to their capacity to demarcate a group capable of holding a collective right as well as the suite of rights that can be connected to property within an indigenous context. Finally, a concluding section will reiterate this Article's thesis by drawing on the analysis provided in the preceding sections.

The case selection for this Article was primarily a matter of finding two cases that engaged the issue of indigenous land rights in sufficient detail to analyze the jurisprudence that underlies the decision. *Sawhoyamaxa* was selected for the Inter-American system and *Endorois* for the African system because they are seminal cases in the systems'

early attempts to grapple with collective rights.[5] Other cases have since built upon these two, most notably *Saramaka v. Suriname*[6] in the Americas and *African Commission [Ogiek Community] v. Kenya*[7] in Africa, thereby further developing the jurisprudence of their respective systems. However, *Sawhoyamaxa* and *Endorois* provide unique insight into how the systems approach a new and emerging issue. *Sawhoyamaxa* is also particularly useful for its concurring opinions, which demonstrate the extent to which the court struggled in its analysis. Similarly, the *Endorois* case serves as a good example of the African system's integration of extra-regional jurisprudence. Unfortunately, the two cases come from different mechanisms within their respective systems—*Sawhoyamaxa* from the Inter-American Court and *Endorois* from the African Commission on Human and People's Rights. This limitation is due primarily to the relative youth of the African system and the limited extent of case law from the African Court of Human and People's Rights. The African Court has only recently begun to address indigenous land rights. The one case that the African Court has addressed, however, seems to reinforce the Commission's approach and suggests that it is likely to apply the Commission's reasoning in future cases. Those cases will provide the opportunity to further test this Article's argument.

II. SAWHOYAMAXA INDIGENOUS COMMUNITY V. PARAGUAY

A. *Facts of the Case*

The Sawhoyamaxa community has lived in northern Paraguay for generations.[8] Over the course of Paraguayan history, from colonization

5. Of the three regional systems—Inter-American, African, and European—only the Inter-American and African have had occasion to address the issue of indigenous land rights and the challenge of analyzing it within a legal framework developed to view property rights as individual. Moreover, the European system is unlikely to be faced with this specific issue given the history of the continent and its role in the development of international legal norms. This is not to say, however, that the European system need not concern itself with the emergence of third generation rights within its jurisdiction.

6. Saramaka People v. Suriname, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 172 (Nov. 28, 2007).

7. Comm'n on Human and Peoples' Rights v. Republic of Kenya, No. 006/2012, Judgment, African Court on Human and Peoples' Rights [Afr. Ct. H.P.R.] (May 26, 2017), http://www.african-court.org/en/images/Cases/Judgment/Application%20006-2012%20-%20African%20Commission%20on%20Human%20and%20Peoples%E2%80%99%20Rights%20v.%20the%20Republic%20of%20Kenya..pdf.

8. Sawhoyamaxa Indigenous Cmty. v. Paraguay, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 146, ¶ 73(1) (Mar. 29, 2006). For a summary of the facts, see *Case*

to the modern state, the community has gradually lost access to its ancestral lands through partition and sale by the state to non-indigenous individuals.[9] The restricted access to these lands rendered the traditional livelihoods of the Sawhoyamaxa impossible, forcing the community to become sedentary and preventing the collection of resources from the area.[10] Moreover, the loss served as an affront to their cosmology, in which the natural environment they occupied formed an integral component of how they understood their own lives.[11] Within this cosmology, the land did not belong to any individual member of the community but rather constituted an element of the community's collective identity.[12] The parcel of land to which they were restricted by the time of the *Sawhoyamaxa* litigation was disconnected from this cosmology and did not provide the access to resources required to maintain their traditional way of life.[13] Furthermore, the Paraguayan state did not provide adequate social services to counteract the loss of their livelihood, exacerbating the violation and placing the health and safety of the Sawhoyamaxa at risk.[14] In fact, the deaths of at least thirty community members were linked to the substandard conditions in which they were forced to live.[15]

The Sawhoyamaxa sought redress from the Paraguayan government, but disputes over their legal status and extensive delays resulted in

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of the Sawhoyamaxa Indigenous Community v. Paraguay, ESCR-NET, https://www.escr-net.org/caselaw/2013/case-sawhoyamaxa-indigenous-community-v-paraguay (last visited Nov. 10, 2017).

9. *Sawhoyamaxa*, Inter-Am. Ct. H.R. (ser. C) No. 146, ¶¶ 73(1)-73(4) ("Over the years, and particularly after the Chaco War between Bolivia and Paraguay (1933-1936), the non-indigenous occupation of the Northern Chaco which had started by the end of the 19th century was extended. . . . Although the indigenous peoples continued occupying their traditional lands, the effect of the market economy activities into which they were incorporated turned out to be the restriction of their mobility, whereby they ended by becoming sedentary. . . . Since then, the lands of the Paraguayan Chaco have been transferred to private owners and gradually divided. This increased the restrictions for the indigenous population to access their traditional lands, thus bringing about significant changes in its subsistence activities.").

10. *Id.* ¶¶ 73(5)-73(6).

11. *Id.* ¶ 118.

12. *See id.*

13. *Id.*

14. *Id.* ¶ 73(67) ("Despite the fact that the Sawhoyamaxa Community was declared to be in a state of emergency, its members continue living in precarious conditions, without access even to the basic essential services.").

15. *Id.* ¶ 73(74) ("Within the context of the precarious living and health conditions described, the members of the Sawhoyamaxa Community, particularly the children and the elderly, are vulnerable to diseases and epidemics, and many died from tetanus, pneumonia, and measles, serious dehydration, cachexia, and enterocolitis or alleged traffic and occupational accidents without any state control.").

continued exposure to substandard living conditions.[16] In 2001, they petitioned the Inter-American Commission to review their case, which had been lingering in the Paraguayan courts for a decade.[17] The Inter-American Commission referred the case to the Inter-American Court, which unanimously ruled that violations of Articles 3, 4, 8, 19, 21, and 25 of the American Convention had occurred.[18]

B. *Violations of the American Convention*

1. Right to Property

The Court ruled that there had been a violation of the Sawhoyamaxa's right to property found in Article 21 of the Convention.[19] The language of the Article itself, however, does not explicitly indicate that the right to property should be applied as a collective right:

> *Everyone* has the right to the use and enjoyment of his property . . . . *No one* shall be deprived of *his* property except upon payment of just compensation, for reasons of public utility or social interest, and in the cases and according to the forms established by law.[20]

Interestingly, the Court situated the Sawhoyamaxa's collective right to property within the Convention's recognition of individuals' right to use and enjoy their property. It explained that the Sawhoyamaxa's collective understanding of property "does not necessarily conform to the classic concept of property but deserves equal protection under Article 21."[21] The Court argued that failing to recognize collective property under this article would effectively prevent property holders from using their land in a way that conforms to their cultural beliefs and would, as a result, render the article's protections "illusory for millions of *persons*."[22] In other words, the Court found a latent collective right to

16. *Id.* ¶ 73(67).

17. *Id.* ¶ 1.

18. *Id.* ¶ 248.

19. *Id.*

20. AmCHR, *supra* note 4, art. 21 (emphasis added). The article continues "Usury and any other form of exploitation of *man* by *man* shall be prohibited by law." *Id.* (emphasis added).

21. *Sawhoyamaxa*, Inter-Am. Ct. H.R. (ser. C) No. 146, ¶ 120 (emphasis added).

22. *Id.* ("Disregard for specific versions of use and enjoyment of property, springing from the culture, uses, customs, and beliefs of each people, would be tantamount to holding that there is only one way of using and disposing of property, which, in turn, would render protection under Article 21 of the Convention illusory for millions of persons.").

property rooted in the individual right by focusing on the individual's right to use the land in accordance with his cultural understandings and expectations.

2. Fair Trial and Judicial Protection

The Court also found violations of Articles 8 and 25 of the Convention, which protect the right to a fair trial and judicial protection.[23] The subjects of these articles are "every person" and "everyone," respectively.[24]

> *Every person* has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal, previously established by law, in the substantiation of any accusation of a criminal nature made against *him* or for the determination of *his* rights and obligations of a civil, labor, fiscal, or any other nature.[25]
>
> *Everyone* has the right to simple and prompt recourse, or any other effective recourse, to a competent court or tribunal for protection against acts that violate his fundamental rights recognized by the constitution or laws of the state concerned or by this Convention, even though such violation may have been committed by persons acting in the course of their official duties.[26]

Despite the seemingly individual focus of these Convention articles, the Inter-American Court identified a collective-level violation in the delay of the Paraguayan state to recognize the legal personality of the Sawhoyamaxa community.[27]

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23. *Id.* ¶ 248.

24. AmCHR, *supra* note 4, arts. 8, 25.

25. *Id.* art. 8(1) (emphasis added).

26. *Id.* art. 25 (emphasis added). The article continues, "2. The States Parties undertake: a. to ensure that any person claiming such remedy shall have his rights determined by the competent authority provided for by the legal system of the state; b. to develop the possibilities of judicial remedy; and c. to ensure that the competent authorities shall enforce such remedies when granted." *Id.*

27. *Sawhoyamaxa*, Inter-Am. Ct. H.R. (ser. C) No. 146, ¶¶ 87-89 ("The foregoing being considered, and taking into account that said proceedings are not complex and that the State has not justified said delay, the Court deems it to be out of proportion and a violation of the right to be heard in a reasonable time as provided for in Article 8(1) of the American Convention.").

Moreover, the Court drew on its own precedent in *Yakye Axa*[28] to distinguish between a legal entity with juridical personality that is capable of enforcing rights within a legal system and a community as the inherent holder of those rights. Similar to the way in which a group of individuals may operate as a partnership in the United States but must formally incorporate in order to have standing to bring some claims, so too indigenous groups in Paraguay must have formal recognition as such before they can petition the government. "'Recognition of legal personality allows indigenous communities to enforce their previously existing rights; the same rights enjoyed historically and not since their establishment as legal entities.'"[29] This understanding of the right to legal recognition indicates a utilitarian approach to the right, in which the right exists primarily to ensure the protection of other rights. If there is a collective understanding of property rights, then there also should be legal recognition of the group to which such rights belong so that the groups can seek redress when they are denied. Consequently, the Paraguayan government's delayed recognition of the community's legal personality violated the Sawhoyamaxa's right to a fair trial and judicial protection because it denied the Sawhoyamaxa standing before a court where their grievances could be heard.[30]

3. Additional Violations

In addition, the Court found violations of Article 4's protection of the right to life[31] and Article 3's right to recognition as a person before

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28. Indigenous Cmty. Yakye Axa v. Paraguay, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 125 (June 17, 2005).

29. *Sawhoyamaxa*, Inter-Am. Ct. H.R. (ser. C) No. 146, ¶ 94 (quoting *Yakye Axa*, Inter-Am. Ct. H.R. (ser. C) No. 125, ¶¶ 82-83).

30. *Id.* (quoting *Yakye Axa*, Inter-Am. Ct. H.R. (ser. C) No. 125, ¶ 83) ("Indigenous communities, under Paraguayan laws, are no longer just a factual reality to become legal entities with the capacity to fully enjoy legal rights vested not only in its individual memebers [sic], but in the community itself, that is endowed with its own singular existence. Legal personality is the legal mechanism granting them the necessary status to enjoy certain fundamental rights, such as the right to hold title to communal property and to demand protection against any breach thereof.").

31. *Id.* ¶ 248(3). Article 4 of the American Convention reads "(1) Every person has the right to have his life respected. This right shall be protected by law and, in general, from the moment of conception. No one shall be arbitrarily deprived of his life. (2) In countries that have not abolished the death penalty, it may be imposed only for the most serious crimes and pursuant to a final judgment rendered by a competent court and in accordance with a law establishing such punishment, enacted prior to the commission of the crime. The application of such punishment shall not be extended to crimes to which it does not presently apply. (3) The death penalty shall not be reestablished in states that have abolished it. (4) In no case shall capital punishment be

the law.[32] However, the Court indicated that these were violations of individual rights, stating that the right to life was violated "to the detriment of *members* of the Sawhoyamaxa community" and specifically naming those individuals whose right to recognition before the law was violated.[33] Whether the Court could have found a collective understanding of these rights within the Convention is an open question. Perhaps there is an argument to be made for the right of a community to exist as a necessary corollary to its individual members' right to life. Similarly, an argument could likely be made to understand the right to recognition before the law as a collective right. However, the Court did not take up the question of whether collective rights are embedded within Article 3 or 4 or the Convention generally.

C. *Majority Opinion*

Elements of the Court's opinion in *Sawhoyamaxa* suggest the Inter-American Court was concerned with more than those issues directly addressed within the text of its opinion. The unanimity of the decision indicates a desire to find a violation by the state, but the logic of its reasoning strikes the reader as forced and clumsy. The opinion relies heavily on the finding of a collective right within the Convention's individual right to use and enjoy property. Even the rights to fair trial and judicial protection ultimately connect to this individual property right. Likewise, the importance of recognizing the group's legal personality receives attention from the Court because it is a necessary prerequisite in protecting the inherent rights of the group, which are a direct consequence of the individual rights of the group's members. This reasoning, building the recognition of collective rights off of the individual right of its members to use and enjoy property in accordance with their customs and beliefs, suggests a property nexus for collective rights or, at the very least, a requirement that a collective right be essentially linked to an individual right. Yet, the significance of collective property within the cosmology of the Sawhoyamaxa seems incongruous

inflicted for political offenses or related common crimes. (5) Capital punishment shall not be imposed upon persons who, at the time the crime was committed, were under 18 years of age or over 70 years of age; nor shall it be applied to pregnant women. (6) Every person condemned to death shall have the right to apply for amnesty, pardon, or commutation of sentence, which may be granted in all cases. Capital punishment shall not be imposed while such a petition is pending decision by the competent authority." AmCHR, *supra* note 4, art. 4.

32. *Sawhoyamaxa*, Inter-Am. Ct. H.R. (ser. C) No. 146, ¶ 248(5). Article 3 of the American Convention reads "Every person has the right to recognition as a person before the law." AmCHR, *supra* note 4, art. 3.

33. *Sawhoyamaxa*, Inter-Am. Ct. H.R. (ser. C) No. 146, ¶ 248 (emphasis added).

with this logic. The Sawhoyamaxa do not view land as subject to individual ownership but rather as the responsibility *of* the group as a whole; consequently, the Court's reasoning does not fit comfortably within the Sawhoyamaxa worldview, which simply does not include the underlying right to individual property. The result is an opinion that lacks persuasive force and creates weak jurisprudence.

A second factor undercutting the Court's capacity to adequately analyze the circumstances in *Sawhoyamaxa* and further straining its logic is the limited precedent on which it could rely. The limited precedent is partially explained by the fact that the collective right to land is an emergent norm that the international human rights mechanisms, including the Inter-American system, are only beginning to address, and the scarcity of authority is further exacerbated by structural elements of the Court's mandate that restrict the sources of law on which it may rely.[34] The Court in *Sawhoyamaxa* drew primarily from a handful of its own cases,[35] all of which were recent and similarly indicated a desire to develop a jurisprudence for the protection of indigenous rights. But the inchoate nature of that jurisprudence is evident in the *Sawhoyamaxa* opinion. Of the thirty-one citations[36] in the paragraphs where the Court outlined the reasoning behind its recognition of collective rights to property, fair trial, and judicial protection,[37] fourteen of those citations refer to *Indigenous Community Yakye Axa v. Paraguay* (2005), and another five reference *Mayagna (Sumo) Awas Tingni Community v. Nicaragua* (2001). The remaining twelve citations include only one reference to a source outside of the Inter-American system: an International Labor Organization treaty on indigenous and tribal peoples that had been specifically ratified and incorporated into Paraguayan law.[38] This relatively narrow precedential basis[39] serves as the foundation of the Court's decision.

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34. For a discussion of this structural disadvantage, *see infra* section IV.

35. *See, e.g.*, Indigenous Cmty. Yakye Axa, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 125 (June 17, 2005); Mayagna (Sumo) Awas Tingni Cmty. v. Nicaragua, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 79 (Aug. 31, 2001).

36. Excluded from this count are references to Paraguayan laws at issue and testimony submitted as evidence.

37. *Sawhoyamaxa*, Inter-Am. Ct. H.R. (ser. C) No. 146, ¶¶ 87-89, 93-112, 127-144.

38. Int'l Labor Org. (ILO), *Convention concerning Indigenous and Tribal Peoples in Independent Countries*, No. 169 (Sept. 5, 1991), http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C169.

39. Most domestic and international courts are willing to engage precedent from outside of their immediate jurisdiction even if it only recognizes such precedent to be persuasive rather than binding. The Inter-American Court's sparse use of external sources suggests a hesitance to engage even in a narrow approach to judicial dialogue. *See, e.g.*, Melissa A. Waters, *Mediating Norms*

D. *Concurring Opinions*

The concurring opinions in *Sawhoyamaxa* further indicate the struggle the Inter-American Court faced in deciding how to justify its protection of collective rights. The simple fact that three judges felt compelled to author separate opinions in a unanimous decision demonstrates the limited persuasive force of the majority's reasoning. The separate opinions of Judges Sergio García-Ramírez and A.A. Cançado Trindade highlight the limitations of the Court's opinion.

García-Ramírez believes that the complexity of the Court's reasoning is unnecessary. As he sees it, "the approach in the Convention . . . does not imply the denial of, or exception against, collective rights."[40] Rather, individual rights are co-imbricated with collective rights; the two overlap and draw content and significance from their interaction. Consequently, the Convention implicitly recognizes both individual and collective rights, and the Court need not perform rhetorical acrobatics in order to establish a link.[41] Within this analysis, collective and individual rights are placed on equal footing in the Charter and warrant equal protection by the Court. Whereas the Court grounds the connection between the individual and the collective within the concept of property, García-Ramírez locates collective rights in the very notion of rights. Furthermore, he argues that the Court's rationale requires a notion of collective rights that is antithetical to the Sawhoyamaxa's cosmology.[42] It limits the notion of property to the conventional European-rooted understanding and ignores the indigenous conception's "unique characteristics, which correspond in some aspects to ordinary [western]

and Identity: The Role of Transnational Judicial Dialogue in Creating and Enforcing International Law, 93 GEO. L.J. 487 (2005).

40. *Sawhoyamaxa*, Inter-Am. Ct. H.R. (ser. C) No. 146, ¶ 11 (separate opinion by García-Ramírez, J.).

41. *Id.* ("[I]ndividual rights, which constitute human rights under the Pact of San José, originate from, and acquire existence, effectiveness and significance in, the context of collective rights. Therefore, it follows that protecting the former is a way of preserving the latter, and the opposite also stands: protecting collective rights, through the rules and instruments pertaining thereto, helps understand and furthers the preservation of individual rights. Thus there is no conflict at all, between these two 'ways of looking at the status of persons' that strictly complement each other.").

42. *Id.* ¶ 13 ("When property is mentioned in connection with the rights vested in . . . the communities as such over certain lands—to which they furthermore attach traditions, traditions and beliefs, spiritual relations that transcend the mere possession and economic enjoyment—the meaning labeled should not necessarily be confused with the absolute ownership that is characteristic of ordinary civil law. The property rights of the indigenous people are different—and so it must be recognized and protected—from this other form of ownership created by European law rooted in liberal ideology.").

ownership, but differ radically from it in others."[43] García-Ramírez warns that conflating these notions of property risks negating the cosmology of indigenous groups and "may prove extremely disadvantageous to the legitimate interests and lawful rights of the indigenous people."[44]

Cançado Trindade's separate opinion similarly criticizes the Court's narrow understanding of collective rights. He provides an overview of the history of colonization and the formation of international law without regard to the cosmologies of indigenous groups in the Americas and elsewhere.[45] As he sees it, the crux of the violation of the Sawhoyamaxa is not the action of the Paraguayan government per se but rather the marginalization of their interests and worldview from the legal framework under which they now live. "The breaches of the human rights of the indigenous peoples, and the reparations due them are to be found, in fact, at the roots of the historical process whereby the law of nations, *jus gentium*, was formed."[46] Consequently, the recognition of collective indigenous rights is not merely an outgrowth of individual rights; it is necessary as "a true ethical imperative to acquit an historical social debt."[47]

The separate opinions of García-Ramírez and Cançado Trindade provide alternative rationales for the protection of the Sawhoyamaxa's rights. One requires a broader interpretation of the rights enshrined in the Convention, and the other calls for a critical historical analysis of the philosophical foundations of the Convention itself. The Court, however, was unwilling to take such radical steps in *Sawhoyamaxa*, despite a desire to push the evolution of human rights forward, as evidenced by the unanimity of the decision and how strongly it reprimands the Paraguayan state.

III. Endorois v. Kenya

A. *Facts of the Case*

The Endorois people of western Kenya traditionally used the land surrounding Lake Bogoria for grazing livestock, gathering medicines,

43. *Id.* ¶ 16.

44. *Id.*

45. *Sawhoyamaxa*, Inter-Am. Ct. H.R. (ser. C) No. 146, ¶¶ 8-13 (separate opinion by Cançado Trindade, J.).

46. *Id.* ¶ 60.

47. *Id.* ¶ 59 (citing Anna Meijknect, Towards International Personality: The Position of Minorities and Indigenous People in International Law 228, 232-33 (2001)).

and observing religious ceremonies.[48] As pastoralists, their occupation and use of the land varied seasonally but remained consistent from year to year.[49] In the 1970s, the Kenyan government established game reserves on portions of the land traditionally used by the Endorois and restricted the community's access.[50] In the decades that followed, the Kenyan government permitted the land's use by third parties for tourism as well as ruby mining.[51] As a direct result, the community's ability to practice their pastoral customs and traditional religion were hindered.[52] Moreover, the development of these lands was an affront to the Endorois' culture and cosmology, which included a close connection to the lake as the source of their identity and the resting place of their ancestors.[53] The government claimed that the Endorois would share in the benefits of these development projects, but it failed to consult them prior to the undertakings and never provided the promised

48. Ctr. for Minority Rights Dev. (Kenya) & Minority Rights Grps. (on behalf of Endorois Welfare Council) v. Kenya, No. 276/03, African Commission on Human and Peoples' Rights [Afr. Comm'n H.P.R.], ¶ 3 (Feb. 4, 2010) (*Endorois*) ("The Complainants state that the Endorois are a community of approximately 60,000 people who, for centuries, have lived in the Lake Bogoria area. They claim that prior to the dispossession of Endorois land through the creation of the Lake Hannington Game Reserve in 1973, and a subsequent re-gazetting of the Lake Bogoria Game Reserve in 1978 by the Government of Kenya, the Endorois had established, and, for centuries, practised a sustainable way of life which was inextricably linked to their ancestral land."). *See Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v. Kenya*, ECSR-NET, https://www.escr-net.org/caselaw/2010/centre-minority-rights-development-kenya-and-minority-rights-group-international-behalf (last visited Nov. 10, 2017) (summarizing the facts of the case).

49. *Endorois*, No. 276/03, African Commission on Human and Peoples' Rights [Afr. Comm'n H.P.R.], ¶¶ 4, 6.

50. *Id.* ¶ 3. *See* quotation cited *supra* note 48.

51. *Endorois*, No. 276/03, African Commission on Human and Peoples' Rights [Afr. Comm'n H.P.R.], ¶ 14 ("The Complainants further allege that concessions for ruby mining on Endorois traditional land were granted in 2002 to a private company. This included the construction of a road in order to facilitate access for heavy mining machinery. The Complainants claim that these activities incur a high risk of polluting the waterways used by the Endorois community, both for their own personal consumption and for use by their livestock.").

52. *Id.*

53. *Id.* ¶ 79 ("The Complainants argue that the Endorois, as an indigenous group whose religion is intimately tied to the land, require special protection. Lake Bogoria, they argue, is of fundamental religious significance to all Endorois. The religious sites of the Endorois people are situated around the lake, where the Endorois pray, and religious ceremonies are regularly connected with the Lake. Ancestors are buried near the lake, and as stated above, they claim that Lake Bogoria is considered the spiritual home of all Endorois, living and dead. The lake, the Complainants argue, is therefore essential to the religious practices and beliefs of the Endorois.").

compensation.[54]

NGOs petitioned the African Commission on behalf of the Endorois community, and in 2010, the Commission found that the Kenyan state had violated the community's rights. Specifically, the Commission found violations of Articles 8, 14, 17, 21, and 22 of the African Charter.[55]

B. *Violations of the African Charter*

1. Right to Property

As in *Sawhoyamaxa*, the central issue in *Endorois* was the right to property. In the African System the right to property is protected under Article 14 of the African Charter, which reads:

> The right to property shall be guaranteed. It may only be encroached upon in the interest of public need or in the general interest of the community and in accordance with the provisions of appropriate laws.[56]

Notably, the African Charter avoids using a singular subject when articulating property rights, in contrast with the American Convention's use of *everyone*. This enables the African Commission to focus on the content of the collective right rather than arguing for its existence. Interestingly, however, the Commission draws significant inspiration from Inter-American cases when it explores the content of the collective right, including the post-*Sawhoyamaxa* opinion *Saramaka People v. Suriname*.

Like the Inter-American Court, the African Commission argues that the recognition of an indigenous community is necessary because legal personality and state recognition provide the means for a community to protect its property rights.[57] The African Commission goes further, however, by noting that indigenous notions of property may not fit neatly within the conventional Western concept of property and, as a

54. *Id.* ¶ 111 ("Compensation for the value of the land lost, together with revenue and employment opportunities from the game reserve, were promised by the Kenyan authorities, but these have never been received by the community.").

55. *Id.* at "Recommendations of the African Commission."

56. AfCHPR, *supra* note 3, art. 14.

57. *Endorois*, No. 276/03, African Commission on Human and Peoples' Rights [Afr. Comm'n H.P.R.], ¶¶ 192-94.

result, may require special protective measures.[58] Among these special measures is adequate security of title to ensure land can be used in accordance with the community's cultural practices. Again, referring to the Inter-American Court, the Commission states: "mere access or *de facto* ownership of land is not compatible with principles of international law. Only *de jure* ownership can guarantee indigenous peoples' effective protection."[59] Consequently, the trust land system that Kenya had in place to facilitate use by indigenous communities while retaining legal title failed to provide the community with sufficient security and "proved inadequate to protect their rights."[60] In this analysis, the African Commission has elucidated the content of a collective property right, deeming the right violated when a group receives the benefits of the land's resources without also retaining some level of control over the property.

2. Free Disposal of Wealth and Natural Resources

Closely linked to collective property rights is Article 21's right of peoples to dispose of their wealth and natural resources as they see fit:

> (1) All *peoples* shall freely dispose of their wealth and natural resources. This right shall be exercised in the exclusive interest of the people. In no case shall a *people* be deprived of it. (2) In case of spoliation, the dispossessed *people* shall have the right to the lawful recovery of its property as well as to an adequate compensation.[61]

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58. *Id.* ¶ 187 ("The African Commission is of the view that the first step in the protection of traditional African communities is the acknowledgment that the rights, interests and benefits of such communities in their traditional lands constitute 'property' under the Charter and that special measures may have to be taken to secure such 'property rights.'").

59. *Id.* ¶ 205 (citing Saramaka People v. Suriname, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 172, ¶ 110 (Nov. 28, 2007)).

60. *Id.* ¶ 199.

61. AfCHPR, *supra* note 3, art. 21 (emphasis added). The article continues "(3) The free disposal of wealth and natural resources shall be exercised without prejudice to the obligation of promoting international economic cooperation based on mutual respect, equitable exchange and the principles of international law. (4) State Parties to the present Charter shall individually and collectively exercise the right to free disposal of their wealth and natural resources with a view to strengthening African Unity and solidarity. (5) State Parties to the present Charter shall undertake to eliminate all forms of foreign exploitation particularly that practised by international monopolies so as to enable their peoples to fully benefit from the advantages derived from their national resources."

Use of the plural subject indicates the applicability of this Article to communities like the Endorois. The Commission explicitly connects Article 21 to Article 14 in order to analyze whether the spoliation caused by ruby mining fell within the public interest carve-out of Article 14.[62] The Commission was not distracted by whether such a right exists. Instead, it was able to focus on the scope of the right and how to analyze the wealth generated by ruby mining, which is not part of the Endorois's traditional culture.[63] In keeping with the Commission's previous decision in the *Ogoni* case, it finds that "the right to natural resources contained within their traditional lands vested in the indigenous people," who therefore can claim protection under Article 21.[64] The Commission then continues by asking whether the exception found in Article 14 would mitigate the Endorois claim under Article 21.[65] The Commission lays out a two-prong test permitting the spoliation or dispossession of property if it is in the public interest and in accordance with law[66]—a test the Kenyan government failed to meet.[67] The Commission again took the opportunity to clarify the content of the collective right. Moreover, it did so with a test that is reminiscent of the European Court of Human Rights's decision in *Handyside v. United Kingdom*, which requires a state's restriction on free speech to be "proscribed by law" and "necessary in a democratic society."[68] Yet again, the Commission builds its own jurisprudence, this time in the area of exception to state responsibility, through judicial dialogue with other systems.

62. *Endorois*, No. 276/03, African Commission on Human and Peoples' Rights [Afr. Comm'n H.P.R.], ¶ 267.

63. *Id.* ("The African Commission is aware that the Endorois do not have an attachment to ruby.").

64. *Id.* (citing Soc. & Econ. Rights Action Ctr. (SERAC) v. Nigeria, No. 155/96, African Commission on Human and Peoples' Rights [Afr. Comm'n H.P.R.], ¶¶ 56-58 (Oct. 27, 2001)) ("This decision made clear that a people inhabiting a specific region within a state can claim the protection of Article 21.").

65. *Id.*

66. *Id.* ("Article 14 of the African Charter indicates that the two-pronged test of 'in the interest of public need or in the general interest of the community' and 'in accordance with appropriate laws' should be satisfied.").

67. *Id.* ¶ 268 ("As far as the African Commission is aware, that [referring to the state's duty to evaluate whether a restriction on private property is necessary under Article 14] has not been done by the Respondent State.").

68. *See* Handyside v. United Kingdom, 24 Eur. Ct. H.R. (ser. A.), P 16 (1976).

3. Right to Development

The Commission also found violation of the Endorois' right to development, which it casts as a collective right similar to the use and disposal of wealth and natural resources. The right to development articulated in Article 22 of the Charter is cast as a collective right of peoples:

> 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.[69]

The Commission indicates that the right to development is both constitutive, in the sense that it is a right in itself, as well as an instrumental right, or one which is intended to ensure an outcome.[70] As such, the Commission describes the right's fulfillment as requiring "five main criteria: it must be equitable, non-discriminatory, participatory, accountable, and transparent, with equity and choice as important, overarching themes."[71] The very notion of economic, social, and cultural development entails the existence of a community with a collective interest and the participation of individual members in that community. It is insufficient for a state to merely provide the benefits of development efforts to a community; it must also involve the community in determining which benefits are to be sought and how.[72] The Commission cites a United Nations Independent Expert when it declares consultation a necessary aspect of Article 22.[73] "Development is . . . about providing people with the ability to choose where to live. . . . Freedom of choice must be present as a part of the right to development."[74] Because the Kenyan state did not consult adequately with the Endorois community, it violated Article 22 of the African Charter.

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69. AfCHPR, *supra* note 3, art. 22 (emphasis added). The article continues, "States shall have the duty, individually or collectively, to ensure the exercise of the right to development." *Id.*

70. *Endorois*, No. 276/03, African Commission on Human and Peoples' Rights [Afr. Comm'n H.P.R.], ¶ 277.

71. *Id.*

72. *Id.* ¶ 278.

73. *Id.* (citing Arjun Sengupta, *The Right to Development as a Human Right*, 36 ECON. & POL. WEEKLY 2527, 2533 (2001)).

74. *Id.*

4. Additional Violations

The Commission also found violations of the Charter's protections for the freedom of conscience and right to participate in cultural life—Articles 8 and 17, respectively.[75] Both violations grew out of the Kenyan state's restricting the Endorois's ability to freely use and enjoy their land. The Endorois's traditional religious practices require access to ancestral lands and Lake Bogoria in particular.[76] Because they were unable to access these lands, the Kenyan state had effectively violated their rights under Articles 8 and 17.

The language of these Articles indicates the recognition of both collective and individual rights: "Freedom of conscience . . . shall be guaranteed . . . . *No one* may . . . be submitted to measures restricting the exercise of these freedoms"[77] (emphasis added); "[e]very *individual* may freely take part in the cultural life of *his* community."[78] The use of singular subjects would suggest that these are individual rights, yet exercising rights to religion and community necessarily impute an associated collective right. This is not, as the Inter-American Court reasoned, because the individuals must be permitted to exercise rights in accordance with their customs, but rather because the rights, particularly the right to community, become meaningless if they do not incorporate a collective right; an individual right to participate in a community makes no sense if there are not associated rights belonging to the community. This inherent interdependent relationship between the individual and the collective is foundational to a convention such as the African Charter that purports to protect both individual human rights and the rights of peoples. Consequently, the Commission's discussion of

75. AfCHPR, *supra* note 3, arts. 8, 17 (Article 8 reads: "Freedom of conscience, the profession and free practice of religion shall be guaranteed. No one may, subject to law and order, be submitted to measures restricting the exercise of these freedoms." Art 17 reads: "(1) Every individual shall have the right to education. (2) Every individual may freely take part in the cultural life of his community. (3) The promotion and protection of morals and traditional values recognized by the community shall be the duty of the State.").

76. *Endorois*, No. 276/03, African Commission on Human and Peoples' Rights [Afr. Comm'n H.P.R.], ¶ 166 ("The Endorois' cultural and religious practices are centred around Lake Bogoria and are of prime significance to all Endorois [sic]. During oral testimony, and indeed in the Complainants' written submission, this Commission's attention was drawn to the fact that religious sites are situated around Lake Bogoria, where the Endorois pray and where religious ceremonies regularly take place. It takes into cognisance that Endorois' ancestors are buried near the lake, and has already above, Lake Bogoria is considered the spiritual home of all Endorois, living and dead.").

77. AfCHPR, *supra* note 3, art. 8 (emphasis added).

78. *Id.* art. 17.

Articles 8 and 17 refers to the rights of the Endorois collectively, rather than its individual members.[79]

C. *Recommendations of the Commission*

Two characteristics of the African Commission's decision become prominent when read alongside the Inter-American Court's *Sawhoyamaxa* opinion. First, and perhaps most striking, is the breadth of sources upon which the Commission relies, incorporating its own jurisprudence alongside that of the Inter-American system and other human rights mechanisms. A review of the citations within the paragraphs on the merits in *Endorois* reveals twenty-nine references to cases or other sources within the African system, as well as thirty from the Inter-American system, five from the European system, and thirty-five from international bodies including the UN and ILO.[80] Contrast this with the single citation in *Sawhoyamaxa* to a source from outside the Inter-American system.[81]

Second, the depth of analysis provided by the *Endorois* opinion is striking. In addition to questions about the nature of a collective property right and the components of adequate consultation in development, the Commission provides a thorough discussion of the criteria for identifying a community capable of possessing collective rights. Recognizing that "'peoples' and 'indigenous' are contested terms"[82] and intentionally left undefined in the Charter,[83] the Commission applies the four criteria identified by its Working Group of Experts on Indigenous Populations/Communities: "the occupation and use of a specific territory; the voluntary perpetuation of cultural distinctiveness; self-identification as a distinct collectivity, as well as recognition by other groups; [and] experience of subjugation, marginalization, dispossession, exclusion, or discrimination."[84] Applying these guidelines to the Endorois community, the Commission is able to determine that they are the sort of group capable of possessing a collective right.

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79. *Endorois*, No. 276/03, African Commission on Human and Peoples' Rights [Afr. Comm'n H.P.R.], ¶¶ 173, 251.

80. *Id.* ¶¶ 144-298.

81. *See supra* note 38 (the one external source was an ILO treaty that had been incorporated in Paraguayan law).

82. *Endorois*, No. 276/03, African Commission on Human and Peoples' Rights [Afr. Comm'n H.P.R.], ¶ 147.

83. *Id.*

84. *Id.* ¶ 150.

Undoubtedly, the depth of this analysis was possible in part because of the specific facts of the case and the incorporation of external jurisprudence, but it likely also resulted from the fact that the members of the Commission were not distracted by the question of whether such collective rights exist in the first place. This latter influence is almost certainly attributable to the explicit inclusion of "peoples' rights" in the African Charter.[85]

IV. Comparative Analysis

There are many elements upon which to contrast the *Sawhoyamaxa* and *Endorois* decisions. One of the more notable distinctions is the depth of analysis the African Commission provides when considering both preliminary and substantive issues. As examples of this, one can examine the Inter-American Court's and the African Commission's approaches to two questions: 1) how does one identify a group capable of possessing a collective right and 2) how does the indivisible nature of rights appear within the context of collective rights? Ultimately, the differences between the Inter-American Court's and African Commission's approaches are the result of structural differences in their foundational documents. In light of these differences, the African Commission is better poised to analyze collective rights and develop a jurisprudence for emerging norms generally.

A. *Identifying Groups*

The *Sawhoyamaxa* and *Endorois* cases demonstrate the initial challenge of identifying a group that is capable of claiming collective rights. Although a preliminary matter within the context of a dispute, it is a crucial step. Only once a group, whether it be an indigenous community, labor union, corporation, or other collective, has been identified can that group be afforded the legal personality prerequisite to having its rights adjudicated.

The African Commission was able to articulate specific criteria for its decision to treat the Endorois as a collective unit.[86] The Inter-American Court did not take up this specific question. Rather it focused on the

85. The Commission does not defend or explain its recognition of collective rights, nor need it do so. The existence of collective rights is explicit in the Charter's name; to provide an argument for their existence would undermine the entirety of the African system, just as it would for any other human rights system to take up the question of whether human rights is a meaningful concept.

86. *Endorois*, No. 276/03, African Commission on Human and Peoples' Rights [Afr. Comm'n H.P.R.], ¶ 150. *See supra* text accompanying notes 82-85.

state's untimely delay in recognizing the Sawhoyamaxa's legal personality.[87] This may simply be an instance of applying judicial economy or prudence to avoid an unnecessary issue when the Paraguayan state did not dispute that the Sawhoyamaxa constituted an indigenous community.[88] Regardless of the motivations of the African Commission and Inter-American Court in addressing this issue, the former now has a more developed jurisprudence on the essential issue because of its decision to take it up.

B. *A Suite of Rights and the Property Hook*

These two cases demonstrate the indivisible and interdependent nature of human rights. Issues of land and property ultimately influence the ability of indigenous communities to exercise associated rights to life, religion, culture, education, and non-discrimination. As a result, the cases point to a suite of rights that cluster around the access of indigenous communities to traditional land. The Inter-American Court relied upon this interdependence to recognize collective rights, while the African Commission was able to disaggregate the distinct rights from one another while remaining cognizant of their interdependent nature.

The Inter-American Court rationalized its recognition of collective rights using the specific individual right to property.[89] Because of the unique nature of property within the cosmology of the Sawhoyamaxa, the Court could frame multiple issues as violations of a collective right, even if it chose not to treat all violations as such. [90] The Inter-American Court is positioned to grow this suite of rights so long as there remains

87. Sawhoyamaxa Indigenous Cmty. v. Paraguay, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 146, ¶ 112 (Mar. 29, 2006) ("The Court considers that the land claim legal proceedings instituted by the members of the Sawhoyamaxa Community did not observe the reasonable time principle and proved to be completely ineffective, all of which is in violation of Articles 8 and 25 of the American Convention, in the light of Articles 1(1) and 2 thereof.").

88. *Id.* ¶ 76.

89. See discussion *supra* sections II.B.1 and II.C examining the Court's reasoning that found the right to collective property based on the individual right to use and enjoy property in accordance with that individual's customs.

90. DWIGHT NEWMAN, COMMUNITY AND COLLECTIVE RIGHTS 79 (2011) (citing Mayagna (Sumo) Awas Tingni Cmty. v. Nicaragua, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 79 (Aug. 31, 2001), a case also cited by both *Sawhoyamaxa* and *Endorois*) ("Where there is a different cultural relation to property, and a community relationship to at least certain land is part of a fundamental cultural framework, there has been a readiness [of the Inter-American Court] to recognizes that a collective right to that land is necessary to the fulfillment of individual interests protected by the right to property.").

a property hook. The open question is whether the Inter-American system could accommodate a collective rights claim that did not have a property dispute at its core (or even its periphery). If the answer is no, then collective rights appear to be simply a subset of property rights within the Inter-American system. Yet, such a conclusion is unsettling. It neither comports with the specific cosmology of the Sawhoyamaxa people and other indigenous groups, nor aligns generally with the human rights project's tendency to prioritize human dignity over property.

In contrast, the African Commission is capable of recognizing the same suite of rights without requiring a property hook. For example, in the African Commission's discussion of the right to development in *Endorois*, it focuses on the need for meaningful consultation as well as the opportunity to benefit from development efforts. Although the specific context of this case involved land use, the Commission's analysis emphasized equity and choice as hallmarks of the Charter's right to development.[91] This analysis does not seem to require a property hook and comports with a notion of development that extends beyond economic considerations to include the social and cultural as well.

C. *The African Advantage*

The greater capacity of the African Commission to analyze indigenous land claims, as demonstrated in the *Endorois* case, results, at least in part, from the tools it has at its disposal. Among these are the Charter's 1) explicit recognition of collective rights and 2) incorporation of extra-regional sources of international law. Combined, these elements provide the African system with a structural advantage in the analysis of collective rights.

Recognition of the concept of collective rights in the African system is made explicit in the title of its core document: *The African Charter on Human and Peoples' Rights*. In addition, the Charter's language indicates the collective nature of certain rights. For example, Article 20 begins: "All peoples shall have the right to existence."[92] In contrast, Article 6

91. Ctr. for Minority Rights Dev. (Kenya) & Minority Rights Grps. (on behalf of Endorois Welfare Council) v. Kenya, No. 276/03, African Commission on Human and Peoples' Rights [Afr. Comm'n H.P.R.], ¶ 277 (Feb. 4, 2010). *See supra* text accompanying notes 69-74.

92. AfCHPR, *supra* note 3, art. 20. Article 20 continues: "They shall have the unquestionable and inalienable right to self-determination. They shall freely determine their political status and shall pursue their economic and social development according to the policy they have freely chosen. (2) Colonized or oppressed peoples shall have the right to free themselves from the bonds of domination by resorting to any means recognized by the international community.

states: "Every individual shall have the right to liberty and to the security of his person."[93] In the latter article, the Charter's language indicates that the right belongs to an individual, whereas, in the former, the language suggests that the right is that of a group. Other articles are less precise in their language. Article 14 reads: "The right to property shall be guaranteed,"[94] which enables the Commission to apply the right to both individuals and groups. The cataloging of rights in this way—as individual, collective, or mixed—is an advantage of the African system. It increases judicial economy because the Commission can proceed to analyzing the substance of these rights. In addition, it negates the necessity of finding a property hook like that used by the Inter-American Court. For example, Article 20's protection of a people's right to exist[95] remains effective even for a nomadic community that may not have ties to a particular piece of traditional property. It is unclear whether the Inter-American system could protect the rights of such a group, even the suite of rights identified in *Sawhoyamaxa*, if it did not first identify a property right.

But the advantages of the African system extend beyond the judicial economy of explicitly recognizing collective rights. Articles 60 and 61 of the Charter invite the Commission to "draw inspiration from international law on human and peoples' rights"[96] and "also take into consideration, as subsidiary measures to determine the principles of law, other general or special international conventions."[97] This language not only permits, but also encourages the Commission to draw inspiration from

(3) All peoples shall have the right to the assistance of the State Parties to the present Charter in their liberation struggle against foreign domination, be it political, economic or cultural."

93. *Id.* art. 6. Article 6 continues: "No one may be deprived of his freedom except for reasons and conditions previously laid down by law. In particular, no one may be arbitrarily arrested or detained."

94. *Id.* art. 14.

95. *See supra* text accompanying note 92.

96. AfCHPR, *supra* note 3, art. 60 ("The Commission shall draw inspiration from international law on human and peoples' rights, particularly from the provisions of various African instruments on Human and Peoples' Rights, the Charter of the United Nations, the Charter of the Organization of African Unity, the Universal Declaration of Human Rights, other instruments adopted by the United Nations and by African countries in the field of Human and Peoples' Rights, as well as from the provisions of various instruments adopted within the Specialized Agencies of the United Nations of which the Parties to the present Charter are members.").

97. *Id.* art. 61 ("The Commission shall also take into consideration, as subsidiary measures to determine the principles of law, other general or special international conventions, laying down rules expressly recognized by Member States of the Organization of African Unity, African practices consistent with international norms on Human and Peoples' Rights, customs generally accepted as law, general principles of law recognized by African States as well as legal precedents and doctrine.").

external sources of law in order to analyze the Charter's provisions and develop a robust African jurisprudence. It places the Commission on the shoulders of giants and enables it to see farther. As a result of this structural advantage, *Endorois* was able to draw from the case law of the European and Inter-American systems, including *Sawhoyamaxa*.[98] The decision therefore accelerated the development of collective rights protection in the African system. Ultimately, the incorporation of extra-regional sources of law creates the potential for the Commission to leapfrog the jurisprudence of other systems. Other human rights systems engage in similar judicial dialogue. However, as demonstrated by *Sawhoyamaxa* and *Endorois*, the African system is unique in the robustness of the incorporation. Furthermore, the African Commission is not limited to judicial dialogue around the issue of collective rights and may engage with external sources of law as it develops jurisprudence in other areas as well. Both the potency and scope of the dialogue it encourages are notable.

Whether the African Court will prove as capable as the Commission in its handling of collective rights cases remains an open question. As a nascent institution, the Court has had only one opportunity to explore the issue of indigenous land rights. However, when faced with that opportunity in a recent case involving the Ogiek community in Kenya, the African Court's reasoning closely mirrored that of the Commission.[99] *African Commission v. Republic of Kenya* (hereinafter *Ogiek*) involved the displacement of the Ogiek people from their traditional lands in the Mau forest based on the ostensible need for environmental preservation.[100] In *Ogiek*, the African Court was explicit about its reliance on external sources, citing Articles 60 and 61 of the Charter and drawing from the African Commission's Working Group on Indigenous Populations, as well as the United Nations Special Rapporteur on Minorities in order to articulate factors for identification of an indigenous group.[101] Similarly, the Court relied upon the United Nations

98. Ctr. for Minority Rights Dev. (Kenya) & Minority Rights Grps. (on behalf of Endorois Welfare Council) v. Kenya, No. 276/03, African Commission on Human and Peoples' Rights [Afr. Comm'n H.P.R.], ¶¶ 197, 235 n.130, 260, 265 n.148 (Feb. 4, 2010).

99. Comm'n on Human & Peoples' Rights v. Republic of Kenya, No. 006/2012, Judgment, African Court on Human and Peoples' Rights [Afr. Ct. H.P.R.] (May 26, 2017), http://www.african-court.org/en/images/Cases/Judgment/Application%20006-2012%20-%20African%20Commission%20on%20Human%20and%20Peoples%E2%80%99%20Rights%20v.%20the%20Republic%20of%20Kenya..pdf.

100. *Id.* ¶¶ 6-8.

101. *Id.* ¶¶ 105-08 (articulating four primary factors: "priority in time, . . . voluntary perpetuation of cultural distinctiveness, . . . self-identification, . . . and an experience of subjugation. . . . These

General Assembly Declaration on the Rights of Indigenous People,[102] as well as decisions from the Inter-American system, when identifying the suite of rights to which an indigenous group is entitled and finding violations of Articles 1 (state obligations), 2 (non-discrimination), 8 (free practice of religion), 14 (property), 17(cultural life), 21 (use of wealth and natural resources), and 22 (economic, social, and cultural development) of the African Charter.[103]

Additionally, cases concerning other rights have indicated the African Court's intention to exploit the same structural advantages as the Commission. In its first decision, *Tanganyika Law Society v. Tanzania*,[104] the Court examined the prohibition against independent candidates for political office in Tanzania. The Court characterizes the right to political participation in Article 13 as an individual right that is "not meant to be enjoyed only in association with some other individuals or group of individuals such as political parties."[105] This distinction suggests a tacit recognition of the Charter's protection of individual, as well as collective, rights. Moreover, the Court eagerly incorporates extra-regional sources of law into its jurisprudence, directly referring to Article 60 of the Charter in doing so.[106] It goes on to declare that limitations placed on political participation by the state "ought to be in consonance with international standards."[107] In the Court's analysis of preliminary matters as well as the merits of the case, the *Tanganyika* opinion relies heavily on the jurisprudence of the African Commission as well as both the European and Inter-American Courts.[108] The Court has signaled that the Charter's structural advantages will continue to be exploited for the development of the regional jurisprudence.

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criteria generally reflect the current normative standards to identify indigenous populations in international law.").

102. *Id.* ¶ 126.

103. *Id.* ¶ 227; *see* AfCHPR, *supra* note 3, arts. 1, 2, 8, 14, 17, 21, 22.

104. Tanganyika Law Soc. v. Tanzania, Merits, Reparations and Costs, Judgment, No. 009/2011, African Court on Human and Peoples' Rights [Afr. Ct. H.P.R.] (June 14, 2013), http://www.worldcourts.com/acthpr/eng/decisions/2013.06.14_Tanganyika_Law_Society_v_Tanzania.pdf.

105. *Id.* ¶ 98.

106. *Id.* ¶ 107.3 ("The Court agrees with this General Comment, as it is an authoritative statement of interpretation of Article 25 of the ICCPR, which reflects the spirit of Article 13 of the Charter and which, in accordance with Article 60 of the Charter, is an *'instrument adopted by the United Nations on human and peoples' rights'* that the Court can *'draw inspiration from'* in its interpretation of the Charter." (emphasis in original)).

107. *Id.* ¶ 180.

108. *See id.*

V. Conclusion

Structural elements of the Charter place the African system at a comparative advantage in the analysis of collective rights and development of a jurisprudence to support them. Because the Charter reconfigures the nature of rights ownership and encourages the use of extra-regional sources of international human rights law, the African system is positioned to serve as the vanguard of third generation rights. There will undoubtedly be challenges of state compliance, enforcement, and other impediments to the promotion of emerging rights. However, the act of judicial dialogue facilitates the presentation of an argument for and understanding of those rights that maximizes a ruling's persuasive thrust. It is not a panacea, but it enhances the African system's legitimacy and increases the likelihood of state compliance as a result.

In contrast, the Inter-American and European systems' engagement in extra-regional judicial dialogue is less robust. They prioritize jurisprudence from within their own systems and tend to engage external legal precedent only at the periphery of their analysis. Perhaps this was less problematic at the time the systems were established because the normative scope of international human rights law was then more limited, or perhaps it reflects the limited external jurisprudence available for them to engage at the time. Regardless of the reason, contemporary human rights systems that ignore or minimize the robust jurisprudential resources available from across the regional and international systems are poorly positioned to incorporate emergent norms and successive generations of rights. Consequently, the human rights project should look to Africa as it moves forward.