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Reconciling the Tension between Indigenous Peoples' Right to Culture through Land Use and the State's Right to Development: An Examination of the African and Inter-American Human Rights Systems

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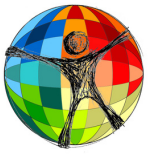

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ABSTRACT

Culturally distinct from the societies in which they live, Indigenous peoples retain the unique ways of life associated with the first inhabitants of their geographical territory. The territory they occupy thus tends to play a significant role in their way of life—their access to means of sustenance, the preservation of their common language and traditions, as well as the overall link to their dignity as human beings. On the other hand, the state is always in pursuit of development through projects in tourism, transportation, water, and energy. In the successful advancement of such state development projects, land happens to be an essential element.

The competing interests in land therefore create a tension between Indigenous' peoples' right to culture through land use and the state's right to development (RTD). This paper focuses on Indigenous peoples' right to culture through their use of land—the protections afforded to this right in international and regional laws and the tension that occurs in cases where the state's RTD is also at play. It examines and compares the ways in which tribunals in Africa and America have ruled on cases characterised by the tension between Indigenous peoples' right to culture through land use and the state's RTD. Finally, this paper attempts to find a way to balance a state's RTD and a minority group's cultural rights by drawing on insight from Canada's James Bay and Northern Quebec Agreement to make a recommendation on how these rights can be reconciled in land cases.

CONTENTS

LIST OF ABBREVIATIONS

IACHR: Inter-American Commission on Human Rights

IACtHR: Inter-American Court of Human Rights

ICCPR: *International Covenant on Civil and Political Rights*

ICESCR: *International Covenant on Economic, Social and Cultural Rights*

JBNQA: James Bay and Northern Quebec Agreement

RTD: Right to Development

UN: United Nations

UNDRIP: *United Nations Declaration on the Rights of Indigenous Peoples*

1. INTRODUCTION

Over the last century, the international community, states, and societies all around the world have sought to strengthen their human rights recognition and protection frameworks. This has led to an increase in the recognition of a plethora of human rights which consequently entered the global human rights protection framework established by international and regional bodies. As a result of this development, there has also been a rise in situations where the protection or enforcement of one human right clashes with the protection or enforcement of another right. Such an occurrence has been prominent in situations where the state's right to development (RTD) conflicts with an Indigenous group's right to culture, particularly in the context of land cases. Thus, we observe a situation where a state wants to exercise its right to national development [1] through various projects in tourism, transportation, mining, and energy among others. Such projects tend to be land intensive and therefore require the state to have access to and utilize land which might be inhabited by Indigenous peoples. These Indigenous peoples, who usually form part of a minority group within a state, also have a strong connection to

[1] In this paper, the state's 'RTD' and the state's 'right to national development' are used interchangeably.

their land. For many Indigenous peoples across the globe, land is directly connected to the preservation of their culture. Accordingly, a geographical area occupied by an Indigenous group tends to play a big role in the lives of members of the Indigenous community who tend to speak the same language, share the same cultural practices and traditions and engage in the same lifestyle. The competing interests in land therefore create a tension between Indigenous peoples' right to culture through land use and the state's RTD.

Drawing on this tension, this paper seeks to answer the question: "where lies the balance between safeguarding Indigenous peoples' right to culture and advancing the state's RTD in land cases?" The paper first establishes context by giving a brief overview of the history and definition of the relevant terms which are the RTD, Indigenous peoples and cultural rights. It then looks at the protections afforded to RTD and cultural rights in the African and Inter- American human rights systems. In doing this, the paper also analyses the reasonings of the African Commission on Human and Peoples' Rights (the 'African Commission') and the Inter-American Court of Human Rights (IACtHR) in their interpretation of these conflicting rights in the landmark decisions of the *Endorois*[2] and the *Saramaka* peoples[3] cases respectively. In conclusion, this paper attempts to find a way to balance a state's RTD and a minority group's cultural rights by making a recommendation on how these rights can be reconciled in land cases. It ultimately achieves this by drawing on insight from Canada's James Bay and Northern Quebec Agreement.

[2] See *Centre for Minority Rights Development (on behalf of the Endorois Community) v Republic of Kenya* (2010), African Commission on Human and Peoples' Rights 276/2003 [*Endorois*].

[3] See *Saramaka People v Suriname* (2007), Inter-Am Ct HR (Ser C) No 185 [*Saramaka*].

2. HISTORICAL OVERVIEW AND DEFINITIONS

2.1 The Right to Development

The concept of the right to development (RTD) entered the global human rights conversation in the 1950s and 60s after the influx of recently decolonised developing countries into the UN.[4] Although the concept's roots can be found in the *Universal Declaration on Human Rights*[5], the *United Nations Charter*[6] and the two International Human Rights Covenants namely the *International Covenant on Civil and Political Rights* (ICCPR)[7] and the *International Covenant on Economic, Social and Cultural Rights* (ICESCR)[8], the RTD was first formally proclaimed in writing in 1981 in Article 22 of the *African Charter on Human and Peoples' Rights*[9]. Five years later, the United Nations (UN) General Assembly adopted RTD into the international human rights framework through the Declaration on the Right to Development (the 'Declaration')[10] thereby formally recognising on a global level the right of a group to economic, political, social and cultural progress and improved standards of life.

According to article 1.1 of the Declaration, the RTD is "an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realized." RTD is therefore an all-encompassing right which,

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[4] See Felix Kirchmeier, "The Right to Development-where do we stand? State of the debate on the Right to Development" (2006) Occasional Papers Geneva at 4.

[5] UNGA Res 217A (III), UNGAOR, 3rd Sess, Supp No 13, UN Doc A/810 (1948).

[6] 24 October 1945, 1 UNTS XVI.

[7] 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976) [ICCPR].

[8] 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976) [ICESCR].

[9] 27 June 1981, CAB/LEG/67/3 rev 5, 21 ILM 58 (entered into force 21 October 1986).

[10] UNGA Res A/RES/41/128, 41st Session (1986) [DRD].

according to the UN Human Rights Office of the High Commissioner, includes full sovereignty over natural resources, self-determination, popular participation in development, equality of opportunity and the creation of favourable conditions for the enjoyment of other civil, political, economic, social and cultural rights. [11] Despite the celebrated goal of RTD being the improvement of the wellbeing of every 'human person' who is identified by the Declaration as the main subject and beneficiary of development[12], this rights-based approach to development has come under a lot of criticism and has been the subject of academic and legal debates at the international level.

The main criticism of the RTD has been in the international political sphere in relation to the implementation of the right. With the focus being on a rights-based approach to development, RTD's goal is the development of individuals and peoples on national and global levels.[13] Thus, the RTD applies not only to human persons but also to groups of persons who in turn make up a state. The effect of this interpretation of RTD implies that the obligation to fulfil the RTD is on states as regard to individual persons within it, and on the international community as regards to the states that form it. The international community is therefore required to "promote fair development policies and effective international cooperation."[14] This two-sided application of the RTD has led to its politicization. On one end, developing countries put pressure on developed countries and international organisations to strengthen their policies in order to fulfil the international community's obligations to the RTD.[15] On the other end, developed countries call on the developing countries to alter their domestic frameworks to fulfil the RTD for its citizens. [16] Developed countries have also been unenthusiastic in discussing the RTD due to the tendency of the right being tagged as a 'right

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[11] See "Milestone events in the right to development", online: *United Nations Human Rights Office of the High Commissioner* <www.ohchr.org/EN/Issues/Development/Pages/Backgroundrtd.aspx>.

[12] See *ibid*.

[13] See Kirchmeier, *supra* note 4 at 10.

[14] See *ibid*.

[15] See *ibid*.

[16] See *ibid*.

to development assistance' on the part of developing countries.[17] This has led to a general lack of political commitment and consensus regarding the nature of the RTD and its relationship with human rights and development.

Although states as duty-bearers have the obligation to realise the RTD on a national level[18], the RTD in addition to making individuals bearers of the RTD[19], also makes 'peoples' right-bearers[20] thereby extending the application of the right to groups which could include a state as a whole.[21] Consequently, on an individual level, the RTD can be linked to the concept of capabilities whereby the guarantee of an individual's RTD allows him/her to have more capabilities to secure access to basic needs in the form of education, employment, health and food. As a matter of fact, the African Commission in the *Endorois* case, quoting Arjun Sengupta, noted that:

> "Development is a right to a process that expands the capabilities or freedom of individuals to improve their wellbeing and to realize what they value.[22] … Since development is understood as an improvement in well-being (as measured by capabilities), the right to development ensures the provision of resources essential for survival and well-being."[23]

Considering the RTD from a group/peoples' right perspective, the state as a collective of peoples has the right to formulate and implement development policies for the benefit of its citizens. Therefore, by exercising its RTD, the state enhances its peoples' capabilities by expanding the availability of

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[17] See *ibid*.

[18] See DRD, *supra* note 10, arts 2(3) & 3.

[19] See *ibid*, art 2.

[20] See *ibid*, art 1(1).

[21] See Laure-Hélène Piron, "The Right to Development: A Review of the Current State of the Debate for the Department for International Development" (2002) at 12, online (pdf): <www.odi.org.uk/pppg/publications/papers_reports/dfid/issues/rights01/right_to_de vpdf> .

[22] See *Endorois*, *supra* note 2 at para 234; Arjun Sengupta, "Third Report of the Independent Expert on the Right to Development" (2001) E/CN.4/2001/WG.18/2.

[23] *Ibid* at para 236.

opportunities for individuals to secure their needs. In this sense, and for the purposes of this paper, the state's RTD can be defined as: the state's inherent right to progress as a nation in all spheres including social, political, cultural, educational, scientific, and economic. Taking into consideration the importance and far-reaching scope of the state's RTD, it is not surprising that in some circumstances this right conflicts with other group rights and particularly the cultural rights of groups within the state. One of such groups is Indigenous peoples who are the focus of this paper.

2.2 Indigenous peoples

Even though *Indigenous peoples* can be identified as peoples belonging to ethnic groups that are native to a territory that has been colonised by another group, there is no official definition of *Indigenous peoples* in the international legal framework. In fact, The African Commission's Working Group of Experts on Indigenous Populations has noted that a "strict definition of Indigenous peoples is neither necessary nor desirable."[24] And due to the extensive diversity of Indigenous peoples, they have also declined the adoption of a precise definition because the effect of such definition might exclude some peoples who ought to qualify as Indigenous.[25]

The UN system has however developed certain characteristics that can be attributed to Indigenous peoples. These characteristics include their strong connection to land and natural resources, distinct traditions, language, culture and beliefs, distinct

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[24] Amanda Barratt & Ashimizo Afadameh-Adeyemi, "Indigenous peoples and the right to culture: The potential significance for African Indigenous communities of the Committee on Economic, Social and Cultural Rights' General Comment 21" (2011) 11:2 AHRLJ 560 at 563; African Commissions' Working Group of Experts on Indigenous Populations/Communities, Report of the African Commissions' Working Group of Experts on Indigenous Populations /Communities (2005) at 87, online (pdf): <www.iwgia.org/images/publications/African_Commission_book.pdf>.

[25] See Barratt & Afadameh-Adeyemi (See *ibid*); Report of the Open-Ended Inter-Sessional Ad Hoc Working Group on a Permanent Forum for Indigenous Peoples in the United Nations System, E/CN.4/1999/83, 55th session (1999) at para 56, online: <www.unhchr.ch/huridocda/huridoca.nsf/(Symbol)/E.CN.4.1999.83.En?Opendocument>.

social, economic, and political frameworks, and their tendency to be part of the non-dominant group of the state in which they live.[26]

The African Commission's Working Group of Experts on Indigenous Populations/Communities has also set out four criteria for identifying Indigenous peoples: the occupation and use of a specific territory; the voluntary perpetuation of cultural distinctiveness; self-identification[27] as a distinct collective, as well as recognition by other groups and an experience of subjugation, marginalisation, dispossession, exclusion or discrimination.[28]

For the purposes of this paper, I will not use any particular definition of *Indigenous peoples*. I will rather rely on the various characteristics of Indigenous peoples as established by the UN and the African Commission's Working Group.

It is important to acknowledge that Indigenous peoples in Africa and the Americas amongst other places face discrimination and human rights violations primarily due to their unique cultural identities.[29] Although these human rights concerns can occur on the individual–minority Indigenous group level and the majority group–minority Indigenous group level, a considerable aspect of these violations occurs on the dominant state–minority Indigenous group level.

2.3 Cultural rights

Historically, cultural rights, also referred to as "the right to culture" or the "right to take part in culture" have not received as much attention as other rights in the international human rights

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[26] See United Nations Permanent Forum on Indigenous Issues, Indigenous peoples, Indigenous Voices fact sheet (last visited 6 July 2022), online (pdf): <www.un.org/esa/socdev/unpfii/documents/5session_factsheet1.pdf>.

[27] It is also relevant to note that the criterion of self-identification has been generally emphasised when identifying Indigenous peoples. Thus, it was stated in the General Recommendation VIII of the Committee on the Elimination of Racial Discrimination that membership in a group "shall, if no justification exists to the contrary, be based upon self-identification by the individual concerned": See Committee on the Elimination of Racial Discrimination, General Recommendation 8, Membership of Racial or Ethnic Groups Based on Self-Identification, UN Doc A/45/18, 38th session (1991) at 79.

[28] See African Commissions' Working Group of Experts on Indigenous Populations/Communities, *supra* note 24 at 89.

[29] See Barratt & Afadameh-Adeyemi, *supra* note 24 at 561.

framework. At some point in time, cultural rights were even regarded as underdeveloped and unimportant compared to other human rights.[30]

Over the years, however, conversations on the right to culture, and particularly the right to culture of Indigenous people and minorities, have gained momentum in the international legal sphere.[31] Thus presently, the right to culture is acknowledged in numerous human rights instruments including the *Universal Declaration of Human Rights*[32], the *Vienna Declaration*[33], the ICESCR[34], the ICCPR[35], the *International Convention on the Protection of the Rights of Migrant Workers and Members of Their Families*[36], and specifically in relation to minorities and Indigenous peoples, the *Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities*[37], and the *United Nations Declaration on the Rights of Indigenous Peoples* (UNDRIP)[38].

As noted by the independent expert in her first report to the Human Rights Council, in general, cultural rights cover a broad range of issues including language, identity, world view and way of life, education and training, access to and participation in

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[30] See Lotte Hughes & Mark Lamont, "Cultural rights and constitutional change" (12 Apr 2018), online: *Taylor & Francis online* <www.tandfonline.com/doi/full/10.1080/00020184.2018.1452852>.

[31] See Lucy Claridge & Alexandra Xanthaki, "Protecting the right to culture for minorities and indigenous peoples: an overview of international case law" (2016) State of the World's Minorities and Indigenous Peoples 2016, online (pdf): *Minority Rights Group International* <minorityrights.org/wp-content/uploads/2016/07/Protecting-the-right-ot-culture-for-minorities-and-indigenous-peoples.pdf>.

[32] *Supra* note 5, art 27 at 1.4.

[33] *Vienna Declaration and Programme of Action*, UNGA Res A/CONF.157/23 (1993) at 19.

[34] *Supra* note 8, arts 1, 3, 15.

[35] *Supra* note 7, art 27.

[36] UNGA Res A/RES/45/158 (1990) (entered into force 1 July 2003) arts 43 1 (g), 45 1 (d), 31.

[37] UNGA Res A/RES/47/135 (1992).

[38] UNGA Res A/RES/61/295, 61st session (2007).

cultural practices, access to heritage and creation of art.[39] This paper draws on these elements of cultural rights to define them as human rights that allow persons to enjoy and access culture through use of language, protection of intellectual property rights, participation in cultural life of the community, promotion and protection of cultural heritage and land use.

Today, cultural rights are recognised as a basic constituent of human dignity. Thus, the former UN Special Rapporteur in the field of cultural rights, Farida Shaheed, noted that cultural rights are "pivotal to the recognition and respect of human dignity, as they protect the development and expression of various world visions–individual and collective–and encompass important freedoms relating to matters of identity."[40]

Although it has now been acknowledged that the right to culture can be enjoyed both individually and collectively as a group, the right to culture was first regarded as an individual right under Article 15 of the ICESCR[41].[42] The right was then given a wider interpretation particularly with regard to Indigenous and minority peoples under Article 27 of the ICCPR[43].[44] Indigenous peoples' individual and group right to participate in culture is then also highlighted in the UNDRIP[45] which puts the obligation on states to protect the human rights of Indigenous peoples' individually and collectively.

2.3.1 The Intersection of Cultural Rights and Land use

The right to participate in culture is especially important to Indigenous peoples who are culturally distinct from the societies in which they live and retain the unique ways of life associated with the first inhabitants of their geographical territory. The right

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[39] See "International standards" (last visited 6 July 2022), online: *United Nations Human Rights Office of the High Commissioner* <www.ohchr.org/en/issues/culturalrights/pages/internationalstandards.aspx>.

[40] See Hughes & Lamont, *supra* note 30.

[41] See *supra* note 8.

[42] See Claridge & Xanthaki, *supra* note 31 at 62.

[43] See *supra* note 7.

[44] See Claridge & Xanthaki, *supra* note 42.

[45] See *supra* note 38.

to land also plays a big role in the right to culture of Indigenous people. This is because the territory they occupy tends to play a significant role in their way of life, their access to means of sustenance, the preservation of their common language and traditions, as well as the overall link to their dignity as human beings.

Thus, in her 2001 report entitled "Indigenous People and their Relationship to Land", former UN Special Rapporteur notes that:

> "[A]s Indigenous peoples have explained, it is difficult to separate the concept of Indigenous peoples' relationship with their lands, territories and resources from that of their cultural differences and values. The relationship with the land and all living things is at the core of Indigenous societies."[46]

Consequently, for example, many Indigenous peoples such as the Ogiek[47] of Kenya and Tanzania, the Awas Tingni of Nicaragua[48] and the Saramaka people of Suriname[49] are hunter-gatherers who primarily rely on land and natural resources for their livelihood. Moreover, many ethnic groups of Africa and the Americas also rely on the traditional lands they occupy for the performance of cultural and religious practices, such as rites of passage and religious ceremonies, that dominate their way of life.[50]

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[46] Erica-Irene Daes, Special Rapporteur, "Indigenous Peoples and their Relationship to Land, Commission on Human Rights", UN Doc E/CN.4/Sub.2/2001/21 (2001) at para 13. On the importance of land to the cultural identities of Indigenous people see also Robert A Williams, "Encounters on the Frontiers of International Human Rights Law: Redefining the Terms of Indigenous Peoples' Survival in the World" (1990) Duke LJ 981.

[47] See *African Commission on Human and Peoples' Rights v Republic of Kenya* (2017), African Court on Human and Peoples' Rights Application No 006/2012 at para 103 [*Ogiek*].

[48] See *Mayagna (Sumo) Awas Tingni Community v Nicaragua* (2001), Inter-Am Ct HR (Ser C) No 79, Expert opinion by Roque de Jesús Roldán Ortega, attorney [*Awas Tingni*].

[49] See *Saramaka*, *supra* note 3 at para 126.

[50] For example, during my internship in Ghana I communicated with several people who lost touch with their religious and cultural practices (such as pouring libation and honouring gods who were said to be present on landmarks that

Essentially, Indigenous peoples' use of land is strongly tied to the exercise of their cultural rights. It is therefore important to ensure that Indigenous' peoples' rights to culture through land use is safeguarded. Despite this, the cultural rights of the Indigenous people of Africa and the Americas have been undermined by state and corporate activities. In a number of African countries, for example, forest dwelling Indigenous peoples such as the Ogiek peoples of Kenya[51] and the Batwa people of Uganda[52] have been evicted from their forest homelands for the use and/or 'conservation' of the forest by the respective states. And in Central America, Indigenous peoples', such as the Maya Indigenous Community in Belize[53] and the Awas Tingni Community in Nicaragua[54], cultural rights through their use of land have also been undermined by activities of oil and logging companies that have been granted logging and oil concessions by the states.

As a result of the widespread violations of Indigenous peoples' cultural rights by states, jurisprudence has highlighted the importance of cultural rights through land use to Indigenous peoples in many cases on domestic, regional, and international levels. On the regional level, particularly prominent are cases of the African Commission and the IACtHR concerning the Indigenous peoples of Africa and the Americas. The next section therefore examines the RTD and Indigenous peoples' cultural rights in the African and inter-American systems.

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were demarcated by the people on the territory they lived on) due to the compulsory acquisition of the land by the state which resulted in the people's eviction.

[51] See *Ogiek*, *supra* note 47 at para 111.

[52] See *United Organisation for Batwa Development in Uganda v Attorney General* (2021) (Constitutional Petition 3 of 2011) UGCC 22 at 2: this recent landmark decision of the Constitutional Court of Uganda ruled that the evictions carried out by the Government of Uganda of the Batwa peoples from their ancestral land for the establishment of the Echuya Central Forest Reserve, Bwindi Impenetrable National Park and Mgahinga Gorilla National Park were illegal and therefore the state was liable to pay compensation to the peoples.

[53] See *Maya Indigenous community of the Toledo District v Belize* (2004) Inter-Am Ct HR No 40/04, OEA/Ser L/V/II 122 Doc 5 at para 2.

[54] See *Awas Tingni*, *supra* note 48 at para 104.

3. RTD AND CULTURAL RIGHTS IN THE AFRICAN AND INTER-AMERICAN HUMAN RIGHTS SYSTEMS

The tension between the state's RTD and Indigenous peoples' right to culture through land use is predominantly observed in Africa and certain parts of America- particularly in Central and South America. These regions have prominent Indigenous tribes with rich cultures, traditions, and history. In addition, these areas have a well-known colonial history that has shaped the current institutional, legal and structural frameworks of their states. As a result of such frameworks, dominant groups in the states of these regions can be distinguished from Indigenous groups who maintain the way of life of their ancestors and original occupants of the territories they inhabit. Both Africa and the Americas also have strong regional human rights systems which play an important role in the promotion and protection of human rights and facilitate the localisation of human rights norms in member states. Each of these systems is explored below and compared with regard to their focus on the protection and promotion of the RTD and cultural rights.

3.1 The African Human Rights System

The *African Charter on Human and Peoples' Rights* (the 'African Charter') [55] was created under the aegis of the intergovernmental organisation known as the Organisation of African Unity (since replaced by the African Union). The African Charter establishes the regional human rights framework for the African continent, and it is the first human rights instrument to recognise both individual and group rights thereby emphasising the importance of the collective to the African people. As a matter of fact, the African Commission on Human and People's Rights (the 'African Commission') has noted that "[t]he African Charter is unique among regional human rights instruments in placing special emphasis on the rights of peoples."[56]

[55] See *supra* note 9.

[56] See *Endorois, supra* note 2 at para 30.

The African Commission is quasi-judicial body that was set up to interpret the provisions of the African Charter and monitor its implementation by investigating individual complaints of Charter violations. To complement the function of the African Commission, the African Court on Human and Peoples' Rights (the 'African Court') was established by the Protocol to the African Charter on the Establishment of an African Court on Human and Peoples' Rights. The African Court also ensures compliance with and implements the provisions of the African Charter.

The African Charter highlights the RTD and cultural rights multiple times in both its provisions and preamble. Thus, in its preamble it states:

> "Convinced that it is henceforth essential to pay a particular attention to the **right to development** and that civil and political rights cannot be dissociated from economic, social and **cultural rights** in their conception as well as universality and that the satisfaction of economic, social and **cultural rights** is a guarantee for the enjoyment of civil and political rights."[59]

This statement, although quite general, highlights all the rights which are relevant to the topic of this paper. Essentially, it stresses the importance of the RTD and cultural rights to the African peoples.

The RTD is also mentioned in article 20 of the Charter which guarantees all peoples right to existence and allows peoples to "pursue their economic and social development according to the policy they have freely chosen."[60] Such a framing of the right to life which explicitly mentions the entitlement of all peoples to economic and social development through policies highlights the right of a group to development. As mentioned earlier in this paper, the concept of a 'group' if taken more broadly could include the state. In this context, article 20 of the Charter guarantees the right to the social and economic development of a state as a collective through policies chosen by the individuals who form the state. States are also explicitly mentioned in article 22(2) of the Charter[61] which puts an obligation on African

[59] *Supra* note 9, preamble [emphasis added].

[60] See *supra* note 9.

[61] See *ibid*.

member states to ensure the realisation of the RTD. It is important to note the unique dual position of the state in the African Charter with respect to the RTD. This dual position occurs as a result of the different meanings that can be attributed to the word 'state.' On one hand, since a state is made up of individual peoples who form a collective, it is entitled to exercise its right to the development. On the other hand, however, the state as the governing body/government of a nation, has the duty to ensure the exercise of the RTD of its peoples. Moreover, African states as a collective are under an obligation to ensure the realisation of the RTD on the continent.

Further, in article 22(1) of the Charter[62] we observe a fusion of the RTD and cultural rights whereby the Charter promotes the progression of peoples' culture particularly with regard to their identity and enjoyment of the common heritage of mankind. Through this creative fusion of group rights, the African Charter strengthens its position on the advancement of both the RTD and cultural rights of African peoples.

In addition, cultural rights are covered by article 17 of the Charter.[63] Thus, article 17(2) states that "Every individual may freely, take part in the cultural life of his community," whilst according to article 17(3): "The promotion and protection of morals and traditional values recognized by the community shall be the duty of the State." These provisions grant every individual the right to their culture and put the burden on the state to protect the morals and traditional values of its peoples.

However, article 29(7) of the Charter also notes the individual's duty to "preserve and strengthen positive African cultural values in his relations with other members of the society, in the spirit of tolerance, dialogue and consultation and, in general, to contribute to the promotion of the moral well being of society."[64] Therefore, under the African Charter, the individual also holds a dual position with regard to cultural rights. On one hand, the individual is the beneficiary of cultural rights which to

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[62] See *ibid,* Article 22(1) states that: "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."

[63] See *supra* note 9.

[64] See *supra* note 9.

some extent is the state's duty to preserve. On the other hand, the individual also carries the duty to protect and promote African cultural values in relations with other individuals in society.

In addition to recognising both individual and group rights, the African Charter has generally been considered to put emphasis on economic, social, and cultural rights. These elements of the Charter reflect the values of African culture and traditions which are characterised by the close relationship of an individual with his family and community as a whole.[65] The African Charter was thus successfully relied on in the *Endorois* case in favour of the Endorois people as discussed below.

3.1.1 The case of the Endorois Community

In the *Endorois* case[66], the Endorois people, a distinct pastoral community dependent on livestock, had for centuries occupied the area around Lake Bogoria in central Kenya.[67] The territory the community occupied was ideal for their practice of pastoralism because the land was fertile.[68] Moreover, the lake itself was central to the peoples' religious and traditional practices including cultural ceremonies, prayer and ritual sites as well as local festivals.[69] In 1974, the government of Kenya by legal notice declared the Lake Bogoria "Lake Bogoria Game Reserve"[71] and as a result of the creation of the Game Reserve the government required the Endorois to leave their ancestral territory[72] in exchange for compensation of alternative "fertile plots" of land and 25% tourist revenue from the reserve amongst other things.[73] However, in addition to losing complete access to the land after their eviction, the Endorois community was relocated to land of

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[65] See "A Rough Guide to the Regional Human Rights Systems" (last visited 6 July 2022), online: *Universal Rights Group Geneva* <www.universal-rights.org/human-rights-rough-guides/a-rough-guide-to-the-regional-human-rights-systems/>.

[66] *Endorois, supra* note 2.

[67] See *ibid* at para 1.

[68] See *ibid* at para 3.

[69] See *ibid*.

[71] *Ibid*See *ibid* at para 9.

[72] See *ibid* at para 10.

[73] *Ibid* at para 11.

unequal value which was not suitable for pastoralism.[74] As a result, about half of the community's livestock died.[75]

The *Endorois* case is a clear case that demonstrates the tension between a state's RTD and an Indigenous group's right to culture through land use. In this case, the government of Kenya required the land that was occupied by the Endorois for a project that would contribute to the economic development of the country through tourism. Tourism in Kenya is one of the country's largest sources of foreign exchange revenue[76] and one of the main reasons tourists are attracted to Kenya is because of the country's extensive variety of wildlife which can be observed in its natural habitat in national parks and game reserves. Thus, among other things the establishment of Game Reserves is important to the country's revenue generation through tourism.

However, the land surrounding lake Bogoria which was of interest to the Kenyan government was also valuable to the Endorois people for multiple reasons including for the exercise of their cultural rights. The extent of the value of the land to the community's cultural rights can be exhibited through the following passage from the case:

> "The [Bogoria] Lake is also the centre of the Community's religious and traditional practices: around the Lake are the Community's historical prayer sites, the places for circumcision rituals, and other cultural ceremonies. These sites were used on a weekly or monthly basis for smaller local ceremonies, and on an annual basis for cultural festivities involving Endorois from the whole region.[77] The spirits of all former Endorois people, no matter where they are buried, are believed to live on in the Lake. Annual festivals at the Lake took place with the participation of Endorois from the whole region. The Monchongoi forest is

[74] See *ibid* at para 14.

[75] See *ibid* at para 15.

[76] See Reuters Staff, "UPDATE 1-Kenya's tourism earnings, arrivals rise in 2019" (2020), online: *Reuters* <www.reuters.com/article/kenya-tourism-idUKL8N29F0JQ>.

[77] *Endorois*, *supra* note 2 at para 3.

> considered the birthplace of the Endorois people and the settlement of the first Endorois Community."[78]

The question then becomes which right or interest should be advanced to the detriment of the other? In the *Endorois* case, the African Commission held on the basis of articles 17(2) and 17(3) of the African Charter that the Endorois Community's cultural rights had been violated as a result of the Kenyan authorities' creation of a Game Reserve.[79] According to the African Commission, by restricting access to Lake Bogoria, the Kenyan authorities had denied the Community access to a central element of their cultural practices.[80] The African Commission found that the Endorois people had suffered violations of their cultural rights on two counts: first, by facing systematic restrictions on access to sites, such as the banks of Lake Bogoria, which are of central significance for cultural rites and celebrations,[81] and second, as a result of the serious damage caused by the Kenyan authorities to the peoples' pastoralist way of life.[82]

The African Commission interpreted article 17 of the African Charter thus:

> "Article 17 recognises the dual nature of culture in its individual and collective dimensions, protecting on the one hand the individual's participation in the cultural life of his community; and, on the other hand obliging the state to promote and protect traditional values recognised by a community.[83] ... Article 17(3) sets out a distinctive African rendering of cultural rights that amplifies the state's responsibility for cultural rights protection."[84]

With regard to the right to culture, the African Commission emphatically noted that owing to the absence of restrictions on article 17 of the African Charter, it does not appear that the drafters of the Charter envisaged many, if any at all,

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[78] See *ibid* at para 4.

[79] See *ibid* at para 176.

[80] See *ibid*.

[81] See *ibid* at para 202.

[82] See *ibid* at para 203.

[83] See *ibid* at para 191.

[84] See *ibid* at para 192.

circumstances under which the right to culture can be curtailed.[85] Despite this, the Commission stated that even if there is any limitation to a peoples' right to culture, such limitation must be proportionate to a legitimate aim.[86] Therefore, even if in this case, the Game Reserve would qualify as a legitimate aim, the Kenyan government failed to uphold its obligations with regard to the Endorois community's right to culture by failing to secure their access to the land for cultural activities. This therefore made their legitimate aim disproportionate to the limitation they imposed on the right to culture.[87]

On the RTD, the Commission held that the government of Kenya violated the Endorois peoples' RTD as guaranteed by article 22 of the African Charter. According to the Commission:

> "[t]he failure to adequately involve the Endorois in the development process and the failure to ensure the continued improvement of the Endorois Community's well-being together constitute a violation of the right to development."[88]

In its reasoning, the Commission interpreted development in line with the concept of capabilities. It noted that since their eviction from their land, the Endorois peoples' choices and capabilities to utilise land for their survival and well-being significantly diminished.[89] Thus, for example, after their eviction which resulted in the death of their cattle and consequently in a decrease in their income, the community became unable to afford primary and

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[85] See *ibid* at para 207; In paragraph 193, the African Commission also noted the following obligations of states in relation to cultural rights: the duty to respect which requires states to tolerate diversity; the duty to protect which obliges states to take positive steps towards protecting identity groups; and the duty to fulfil or promote cultural rights which includes the obligation to create policies, institutions, or other mechanisms that allow for different cultures and ways of life to exist, develop, and prosper.

[86] See *ibid* at para 208.

[87] See *ibid* at para 209.

[88] See *ibid* at para 217.

[89] See *ibid* at para 238.

secondary education.[90] This disruption in education "significantly affected the Endorois community's capabilities."[91]

With regard to the state's RTD, it is important to note that even though the African Commission indirectly acknowledged such right of the state, it noted that the peoples on behalf of whom a state is exercising the RTD are the beneficiaries of development. Thus, the RTD of the state requires that these peoples participate in the process. The commission quoted article 1(1) of the *Declaration on the Right to Development*[92] in holding that there is a need for the beneficiaries of the right to "participate in, contribute to, and enjoy" the development process."[93] Therefore, it is crucial to highlight here that even though the state does have the RTD, this right also imposes a corresponding duty on the state to first involve the peoples in the planning and implementation of projects that will affect their development.

Consequently, per the relevant African Charter provisions and their interpretations as provided by the African Commission in the *Endorois* case, both Indigenous peoples' right to culture and the state's RTD ought to be respected and promoted. Where a limitation is to be imposed on Indigenous peoples' right to culture in order to advance the state's RTD, the state's aim for the advancement of its RTD must be legitimate. Moreover, it is also important to keep in mind that not only the whole dominant group of peoples that makes up a state have the RTD but also that minority communities within that state also have the RTD. Therefore, in exercising its right to RTD, the state has the duty to consult and obtain prior informed consent of the relevant community that is going to be affected by the development project. It must also allow this community to effectively participate in the development project without pressure, coercion or intimidation, and give the community opportunity to enjoy the benefits of the outcomes of the development project. At this juncture, it is important to also consider the inter-American human rights framework and its coverage of cultural rights and the RTD in contrast to the African human rights system.

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[90] See *ibid* at para 239.

[91] *Ibid*.

[92] DRD, *supra* note 10.

[93] *Endorois, supra* note 2 at para 246.

3.2 The Inter-American Human Rights System

Unlike the African Charter, but similarly to the UN human rights system, the 1948 *American Declaration of the Rights and Duties of Man* (the 'American Declaration')[94] establishes the regional human rights framework for the American continent. The American Declaration predates the Universal Declaration of Human Rights[95], making it the first international human rights instrument of general nature in the world. Although not a legally binding document, the American Declaration was superseded by the *American Convention on Human Rights* (the 'American Convention')[96] which establishes a legally binding regional human rights framework for the Americas.

Although the American Convention strongly guarantees the enjoyment of civil and political rights, it limits its recognition and protection of economic, social and cultural rights to a single article in Chapter III. This omission was later remedied through the *Additional Protocol to the American Convention on Human Rights in the area of Economic, Social and Cultural Rights* (the 'Protocol')[97].

Similarly to the African Commission of the African human rights system, the inter-American human rights system includes the Inter-American Commission on Human Rights (IACHR) which promotes and protects human rights in the Americas. However, the IACHR was established in 1959 before the American Convention came into force and therefore before the Convention, the IACHR sought to promote and defend human rights as outlined by the American Declaration. The American Convention reshaped the principles of the American Declaration and strengthened and codified the functions of the IACHR. The American Convention also established the Inter-American Court of Human Rights

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[94] OAS Res XXX, Final Act, 9th International Conference of American States, Bogotá, Colombia (1948).

[95] *Supra* note 5.

[96] "Pact of San Jose", 22 November 1969, OAS, Costa Rica (entered into force 18 July 1978).

[97] "Protocol of San Salvador", 17 November 1988, OAS A-52, OASTS No 69 (entered into force 16 November 1999).

(IACtHR) which works together with the IACHR to oversee the compliance with the American Convention and generally promote and uphold human rights in the Americas. Both the Commission and the Court are organs of the intergovernmental organisation known as the Organization of American States.

As noted earlier, the American Convention only addresses economic, social, and cultural rights through a single provision. Thus article 26 covers progressive development and states that:

> "The States Parties undertake to adopt measures, both internally and through international cooperation, especially those of an economic and technical nature, with a view to achieving progressively, by legislation or other appropriate means, the full realization of the rights implicit in the economic, social, educational, scientific, and cultural standards[98] set forth in the Charter of the Organization of American States as amended by the Protocol of Buenos Aires."

Hence, by this provision, the American Convention recognises the duty of states, both on a domestic and international level and both individually and collectively, to take measures to ensure the progressive achievement of cultural rights amongst other rights. The provision however does not go further to guarantee such rights nor elucidate on their content.

On the other hand, the Protocol to the American Convention[99], covers both cultural rights and the RTD.

In its preamble the Protocol states:

> "Bearing in mind that, although fundamental economic, social and **cultural rights** have been recognized in earlier international instruments of both world and regional scope, it is essential that those rights be reaffirmed, developed, perfected and protected in order to consolidate in America, on the basis of full respect for the rights of the individual, the

[98] Some of these standards as set forth in the Charter of the Organization of American States (the 'OAS Charter') amended by article X of the Protocol of Buenos Aires include the member states giving primary importance within their development plans to the encouragement of education, science, and culture (Article 45 of the OAS Charter) as well as member states cooperating with one another to meet their educational needs, to promote scientific research, and to encourage technological progress (Article 46 of the OAS Charter) .

[99] See *supra* note 95.

> democratic representative form of government as well as the **right of its peoples to development**, self-determination, and the free disposal of their wealth and natural resources."[100]

Thus, the preamble to the Protocol highlights the importance, particularly to the peoples of the Americas, of reaffirming, developing and protecting cultural rights and the RTD amongst other rights. This accentuation of the need to protect and enforce cultural rights and the RTD is a feature the American human rights framework shares with the African human rights framework.

Article 14(1) of the Protocol[102] also expressly calls on state parties to recognise peoples' right to the benefits of culture which encompasses the right to take part in the cultural and artistic life of the community, the right to enjoy the benefits of scientific and technological progress and to benefit from the protection of moral and material interests deriving from any scientific, literary, or artistic production of which he is the author. Thus, unlike the African Charter[103], the Protocol explicitly guarantees the right to the benefits of culture and refers to specific elements of cultural rights that make up the definition of the right to culture as adopted by this paper.

However, unlike the African Charter, the American Convention[104] and its Protocol do not highlight the individual's duties with regard to the protection and realisation of the RTD and/or cultural rights. Neither does the American Convention or its Protocol, besides a brief mention in the Protocol's preamble, expressly guarantee the RTD of individual persons or groups. In this sense, it appears that the African Charter is stronger with regard to its recognition and protection of the RTD. This paper recognises that the state's RTD is not explicitly guaranteed under the American Convention and its Protocol, however it asserts that it is still possible to imply this right of the state on the basis of the preamble to the Protocol.

Furthermore, it is relevant to highlight that the mentioned provisions of the Protocol relevant to this paper are not directly

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[100] See *ibid*, preamble [emphasis added].

[102] *Supra* note 95.

[103] See *supra* note 9.

[104] *Supra* note 94.

enforceable. According to article 19(6) of the Protocol[105] only two economic, social and cultural rights, being trade unions rights and the right to education, can give rise to legal petitions through the participation of the IACHR and, when applicable, of the IACtHR, against states for non-compliance. Thus, even though the Protocol covers cultural rights and the RTD, it doesn't allow for them to be enforced through the inter-American human rights system when a state party is alleged to not have fulfilled its obligations under the rights.

Despite this, there are cases of the IACtHR that are important to the discussion of Indigenous people's cultural rights through land use and the state's RTD. Although these judgments do not expressly make mention of the rights to culture and development in relation to the American Convention or its Protocol, they nevertheless make reference to these rights through other international human rights instruments such as the ICESCR[106] and the ICCPR[107], as well as through the interpretations of other provisions of the American Convention[108] such as article 21 which guarantees the right to property.[109] One of such key cases is the *Saramaka* case the relevance of which to Indigenous peoples' cultural rights and the state's RTD is explored below.

3.2.1 The case of the Saramaka peoples

In the *Saramaka* case[110], the Saramaka people lived in the Upper Suriname River region in Suriname. The people were identified as a distinct tribe the members of which are descendants of self-liberated African slaves that were forcibly taken to

[105] *Supra* note 95.

[106] *Supra* note 8.

[107] *Supra* note 7.

[108] *Supra* note 94.

[109] For instance, in the *Case of the Mayagna (Sumo) Awas Tingni Community v Nicaragua (supra* note 48), the IACtHR found that Nicaragua violated the right to property protected by article 21 of the American Convention, to the detriment of the Mayagna (Sumo) Awas Tingni Community. Also, in the case of *Saramaka People v Suriname* (*supra* note 3) examined below, the IACtHR interpreted the right to property under Article 21 of the American Convention in light of the rights recognized under common Article 1 and Article 27 of the ICCPR.

[110] *Supra* note 3.

Suriname during the 17th century European colonization.[111] What makes the Saramaka people Indigenous peoples distinct from the other communities of Suriname is their unique cultural and social characteristics and particularly their close connection with their ancestral territory.[112] In the case, the Suriname government, without consulting the Saramaka peoples, granted concessions over lands occupied by the peoples to multinational mining and logging companies to carry out exploitation activities. Under the domestic legal framework of Suriname, the Saramaka peoples did not have the right to use and enjoy property in accordance with their system of communal property. They only had a privilege to use land.[113] Thus, the Saramaka peoples were left without redress whilst the exploitation activities undertaken on their territories by mining and logging companies devastated and destroyed their land.

The IACtHR found that the state had violated the American Convention by failing to put in place measures that recognised the Saramaka people's right to use and enjoy the land they traditionally occupied.[114] Although this case is a landmark decision on the land rights of Indigenous peoples, it effectively demonstrates the tension between an Indigenous groups' cultural rights through land use and the state's RTD.

With regard to the Saramaka's cultural rights that are difficult if not impossible to separate from their land rights, the court noted that:

> "the Saramaka people maintain a strong spiritual relationship with the ancestral territory they have traditionally used and occupied. Land is more than merely a source of subsistence for them; it is also a necessary source for the continuation of the life and cultural identity of the Saramaka people. The lands and resources of the Saramaka people are part of their social, ancestral, and

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[111] See *ibid* at para 80.

[112] *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya* (2010), African Commission on Human and Peoples' Rights 276/2003 at para 160.

[113] See *Saramaka*, *supra* note 3 at para 99.

[114] See *ibid* at para 214.

> spiritual essence. In this territory, the Saramaka people hunt, fish, and farm, and they gather water, plants for medicinal purposes, oils, minerals, and wood. Their sacred sites are scattered throughout the territory, while at the same time the territory itself has a sacred value to them. In particular, the identity of the members of the Saramaka people with the land is inextricably linked to their historical fight for freedom from slavery, called the sacred 'first time.' "[115]

Thus, the court emphasised the connection between the Saramaka peoples' land and cultural rights and their overall dignity and integrity as human beings. In doing this, the court further referred to its earlier judgment in the *Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua* where it stated that:

> "the close ties of Indigenous people with the land must be recognized and understood as the fundamental basis of their cultures, their spiritual life, their integrity, and their economic survival. For Indigenous communities, [their relationship with] the land is not merely a matter of possession and production but a material and spiritual element, which they must fully enjoy ... to preserve their cultural legacy and transmit it to future generations."[116]

Concerning the balance of the state's RTD and the Saramaka peoples' right to culture, the IACtHR adopted a similar approach to that of the African Commission in the *Endorois* case.[117] The IACtHR noted that in exercising its RTD, Suriname had the duty to ensure the effective participation of members of the Saramaka people in development or investment plans within their territory as well as the duty to actively consult with the community and obtain their free, prior, and informed consent according to their customs and traditions.[118] Therefore, both the IACtHR and the African Commission recognized the state's right to national development as well as Indigenous peoples' right to culture[119] and ruled that in order for both group rights to be guaranteed certain conditions must be met on the part of the state. This is because the

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[115] *Ibid* at para 82

[116] See *ibid* at para 90; *Awas Tingni*, *supra* note 48 at para 149.

[117] See *supra* note 2.

[118] *Saramaka*, *supra* note 3 at para 129

[119] And Indigenous peoples' RTD, but this is not the main subject of this paper.

state not only has the RTD as a collective but also carries the duty to ensure the RTD of the collective (its citizens) and thus in order for the state to enjoy its RTD without challenge it must fulfil its obligations[120] under the right with regard to Indigenous peoples' right to culture among other rights.

It is also interesting to consider that the *Saramaka* judgment is a 2007 decision of the IACtHR whilst the *Endorois* case was decided by the African Commission in 2010. As a matter of fact, regarding the issue of whether the Endorois peoples could be regarded as Indigenous peoples, the African Commission directly referenced the *Saramaka* decision in holding that the members of the Endorois community are in fact Indigenous peoples.[121] Although the African Commission did not allude to the *Saramaka* decision in its ruling on the state's RTD and Indigenous peoples' right to culture, it can nevertheless be implied that the Commission was generally guided by the judgment of the IACtHR.

Finally, in the *Saramaka* case the IACtHR held that instead of merely having the privilege to use their ancestral land, which can be easily curtailed by the state or third parties, Indigenous peoples must get legal title to their territory in order to guarantee their permanent access to, use and enjoyment of the land. Consequently, the court noted that the government of Suriname must delimit, demarcate, and grant collective title over the territory to the Saramaka people, in accordance with their customary laws, and through prior informed consultations with the Saramaka people without prejudice to other tribal and Indigenous communities.[122] The same conclusion was reached by the African Commission in the *Endorois* case where the commission held that the Kenyan state must grant the Endorois community title to their territory in order to guarantee them the full enjoyment of their rights.[123]

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[120] These obligations include the duty of the state to consult and obtain prior informed consent of the relevant community according to their customs and traditions, allow this community to effectively participate in the development project without pressure, coercion, or intimidation, and give the community the opportunity to enjoy the benefits of the outcomes of the development project.

[121] See *supra* note 2 at para 161.

[122] See *Saramaka*, *supra* note 3 at para 214.

[123] See *Endorois* case, *supra* note 2 at para 292.

It is crucial to note that as of 30 June 2021, the decision of the African Commission in the *Endorois* case has not been implemented. As noted by the International Service for Human Rights, the Endorois peoples' rights of ownership to their land have not been recognised nor have they been granted unrestricted access to Lake Bogoria and surrounding sites for religious and cultural rites and for grazing their cattle.[124] Moreover, they have not been paid adequate compensation for all the loss suffered as a result of their eviction from their ancestral lands.[125]

Thus, although it appears as though the African human rights system through legal instruments backed by court decisions is effective in guaranteeing cultural rights and the RTD and establishing a balance between the two rights, the enforcement delays of decisions have significantly impacted the power of the system.

In slight contrast to this, the IACtHR's judgement in the *Saramaka* case has been partially implemented. By 2017, the Suriname government had established the Saramaka Community Development fund and paid material damages of US $75,000 and immaterial damages of US $600,000 entirely to the fund. It also paid US $15,000 as compensation to the Forest People Programme and US $75,000 as compensation to the Association of Saramaka Authorities.[126] However, the implementation of the

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[124] See "NGO Forum | Implementation of the African Commission's decision on the rights of the Endorois Indigenous people of Kenya" (30 June 2021), online: *International Service for Human Rights* <ishr.ch/latest-updates/ngo-forum-implementation-of-the-african-commissions-decision-on-the-rights-of-the-endorois-indigenous-people-of-kenya/>.

[125] See *ibid*.

[126] See "Ten years after ground-breaking ruling the Saramaka are still fighting for their rights" (28 November 2017), online: *Both ENDS* <www.bothends.org/en/Whats-new/News/Ten-years-after-ground-breaking-ruling-the-Saramaka-are-still-fighting-for-their-rights/>; B Rombouts, A Meijknecht & J Asarfi, "The implementation of IACtHR judgments concerning land rights in Suriname - Saramaka people v Suriname and subsequent cases: International Law Association (ILA) Committee on the implementation of the rights of Indigenous peoples, case study" (2016) International Law Association at 19, online (pdf): <pure.uvt.nl/ws/portalfiles/portal/12806759/ILA_contribution_Saramaka_vs_Suriname.pdf>.

components of the ruling concerning title of property rights and the legal personality of the Saramaka peoples is still on hold.[127]

It is important to note that earlier in this paper it was established that the inter-American system on human rights does not appear strong in the explicit guarantee and opportunity for enforcement of decisions that would clarify where the balance lies in the protection and enforcement of an Indigenous peoples' right to culture and a state's RTD. Nevertheless, unlike the *Endorois* decision of the African Commission, the decision of the IACtHR in the *Saramaka* case was implemented, albeit partially.

4. INSIGHTS FROM THE JAMES BAY AND NORTHERN QUEBEC AGREEMENT

The examination of the decisions of the African Commission and the IACtHR in the *Endorois*[128] and *Saramaka*[129] cases respectively shows the tendency for regional human rights bodies to swing the balance of rights in favour of Indigenous peoples' right to culture as against the state's right to national development by highlighting the state's duties under the RTD. This could be because the violation of Indigenous peoples' right to culture through land use also includes the violation of a plethora of other rights of Indigenous peoples including their right to property, right to religion and their RTD (which significantly impacts their capabilities). More importantly, as established by this paper, the violation of an Indigenous group's right to culture through land use constitutes a violation of the peoples' inherent dignity and integrity as human beings and therefore, as has been recognised by the African Commission and the IACtHR, it is of utmost importance that their rights be enforced unless there is a legitimate reason for curtailment. However, this paper asserts that the national development of a state through various projects that require land is also important for the peoples within the state, whether they are part of a dominant majority or minority group.

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[127] See *ibid*.

[128] *Supra* note 2.

[129] *Supra* note 3.

Therefore, a balance between these rights must be established on national levels in order for all groups within a state, and the nation as a whole, to benefit from cultural and development rights.

Accordingly, this paper agrees with the implication of the rulings of the African Commission and IACtHR that any unilateral decision by a state or private actors that affects Indigenous peoples' cultural rights ought to be avoided. It is vital that Indigenous communities are consulted, considered, and allowed to participate in government projects targeted at national development that would affect Indigenous peoples and their rights. It is thus recommended that an ongoing dialogue is established between Indigenous peoples and the government of the dominant state in order to reconcile the tensions that occur when the Indigenous groups' cultural rights clash with a state's interest in national development. This paper recommends that such dialogue be established through peaceful negotiations between the state and the Indigenous peoples. This is because out-of-court negotiations would allow the parties to come to a mutually beneficial agreement whilst preserving an amicable relationship. This would in turn give the parties more incentive to implement their part of the agreement thereby avoiding implementation delays such as the ones that have stalled the enforcement of the *Endorois*[130] and *Saramaka*[131] decisions.

A good example of such negotiation can be gleaned from Canada's 1975 James Bay and Northern Quebec Agreement (JBNQA)[132]. The historical background[133] to the agreement was that the Quebec government undertook a development project through the construction of hydroelectric dams in the James Bay region. The goal of the hydroelectric power project was to expand the province's energy potential and revive its economy

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[130] *Supra* note 2.

[131] *Supra* note 3.

[132] All the parties to the agreement are the Cree and Inuit peoples of Quebec, the governments of Canada and Quebec, the James Bay Development Corporation, the James Bay Energy Corporation and Hydro-Québec; Minister of Public Works and Government Services Canada, "Annual report: The James Bay and Northern Quebec Agreement and the Northeastern Quebec Agreement" (2007) at 7, online (pdf): <www.rcaanc-cirnac.gc.ca/DAM/DAM-CIRNAC-RCAANC/DAM-TAG/STAGING/texte-text/jbn_1100100030845_eng.pdf>.

[133] See Kirkley Mackenzie, "The James Bay Northern Quebec agreement" (2015) 45 Journal of Eastern Townships Studies 85 at 87–89.

which in turn would contribute to the national development of the country. However, despite the threat of the project to the way of life of the Indigenous peoples, primarily the Cree and Inuit peoples who inhabited the land, Quebec did not consult them. The Indigenous peoples' failed attempts to voice their grievances to the government resulted in them undertaking legal action. Eventually however, negotiations started between the parties and concluded in a bilateral treaty: the JBNQA.[134] This treaty represents a win-win situation for both the government and the Cree and Inuit Indigenous peoples. Per the agreement, the Quebec government was allowed to resume its development project and complete the construction of hydroelectric dams in the James Bay region. In return, the province recognized the specific rights of the Cree and Inuit and committed to paying a total of CAD $225 million in compensation.[135] Nonetheless, it is important to acknowledge that the JBNQA was initially faced with challenges in implementation. These challenges included uneven and irregular provision of financial and organizational resources from Quebec City and Ottawa as required under the JBNQA, provincial and federal inaction with regard to the terms of the agreement as well as inconsistent disbursement of funds to the Cree and Inuit as stipulated under the JBNQA.[136] These unresolved issues however were later addressed by the 2002 Peace of the Brave accord between Quebec and the Cree and the 2008 agreement between Canada and the Cree.[137] These agreements finally implemented the provisions of the JBNQA[138] thereby ending the tension between the stakeholders.

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[134] In, 1978, a similar subsidiary agreement (the Northeastern Quebec Agreement) was signed between the Naskapi Indian Band, the Government of Quebec, the James Bay Energy Corporation, the James Bay Development Corporation, the Quebec Hydro-Electric Commission (Hydro-Quebec), the Grand Council of the Crees (of Quebec), the Northern Quebec Inuit Association, and the Government of Canada: Minister of Public Works and Government Services Canada, *supra* note 130.

[135] Minister of Public Works and Government Services Canada, *supra* note 130 at 9.

[136] Mackenzie, *supra* note 133 at 90–91.

[137] See *ibid* at 91–92.

[138] See *ibid* at 92.

It is therefore recommended that similar negotiations processes and agreements are undertaken by Indigenous peoples and the relevant state in Africa and the Americas in cases where the groups' cultural and development rights are in tension. It is also possible that if proved to be sufficiently successful, such a mechanism could further be used to navigate other conflicting group rights in order to establish a balance and a win-win situation for all stakeholders.

5. CONCLUSION

Overall, from the court judgements discussed in this paper, it appears that in land cases courts tend to swing the balance of rights to favour an Indigenous group's right to culture as against the state's right to national development. The violation of an Indigenous group's right to culture through land use constitutes a violation of the peoples' inherent dignity and integrity as human beings and therefore as has been recognised by the African Commission and the Inter-American Commission on Human Rights it is of utmost importance that their rights be enforced unless there is a strong justifiable reason for curtailment depending on circumstances. However, this paper has also highlighted the importance of balancing Indigenous people's right to culture and the conflicting RTD of a state in relation to land use. In order for a nation to develop economically, socially, politically, and culturally with the aim of improving the well-being of the entire population and all individuals, it is necessary to recognise and enforce the state's RTD. In situations of tensions in the cultural rights-RTD sphere, it is therefore crucial for the state to be responsive and accountable on one hand and for the Indigenous group to be well organised with a good and representative leadership that has the capacity to negotiate with state authorities. Once a peaceful and amicable dialogue is established between the conflicting parties, a realistic opportunity might then arise to simultaneously advance both the state's RTD and an Indigenous group's cultural rights in cases concerning land.

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