

# Customary communities as ‘peoples’ and their customary tenure as ‘culture’: What we can do with the *Endorois* decision

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## Summary

*The peoples’ rights protected in the African Charter, and in particular the right to culture, development, natural resources and the emphasis on community self-determination and self-identification, potentially provide the basis for creative jurisprudence to protect rural communities and promote their participation in decision making and benefit from the development of their land. In the Endorois decision, the African Commission could have relied on domestic African jurisprudence to give new content to the participation rights of all rural communities living under customary law, and not just those that can prove their own indigeneity. The article deals with the notion of self-defining customary communities in Africa and the jurisprudence of the South African Constitutional Court on living customary law, being varying, localised systems of law observed by numerous communities. The African Charter does not explicitly recognise customary law, but the award of title in the case of the Endorois, the evidence of customary forms of tenure and the centrality of land and associated practices in the culture of the people, amount to such recognition. The article concludes with a note on the procedural aspect of participation*

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*in decision making. The consent standard for any limitation on the right to property, culture and development reflects respect for and recognition of customary law and culture. The customary law tenure rules of communities require community permission before outsiders could use and share in the community's property and resources.*

## 1 Introduction

Ten years ago, Alston<sup>1</sup> wrote that 'there is no reason to expect that the African Charter on Human and Peoples' Rights (African Charter) will prove in the years ahead to be a force for the progressive development of peoples' rights, despite the occasional invocation of the concept for rhetorical purposes'. Two years later, the African Commission on Human and Peoples' Rights (African Commission), the institution mandated with giving content to the rights contained in the African Charter, took a bold step in proving Alston's pessimism wrong by recognising the Ogoni people of Nigeria as a 'people' in terms of the Charter and protecting their rights in this capacity.<sup>2</sup> This prompted Murray and Wheatley to argue that the African Commission has taken peoples' rights beyond mere 'aspirational' and 'exhortatory' tools of rhetoric, to being the subject of legal claims before the Commission.<sup>3</sup>

In the communication brought by the Endorois community against the Kenyan government, the African Commission found the Endorois community to constitute a 'people' and, as such, recognised the violation of its rights to property, culture, development, free disposal of resources and religion.<sup>4</sup>

The question we pose is whether the *Endorois* decision opens the door for customary communities<sup>5</sup> to also seek recognition of their customary rights in communal land and other resources and, importantly, whether they can use the African Charter to protect their tenure rights and enforce their right to participate in any decision involving the use of their land by mining companies and other extractive industries. We argue that this is a crucial and urgent potential role for the

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1 P Alston 'Peoples' rights: Their rise and fall' in P Alston (ed) *Peoples' rights* (2001) 259-287, quoted in R Murray & S Wheatley 'Groups and the African Charter on Human and Peoples' Rights' (2003) 25 *Human Rights Quarterly* 236.

2 *Social and Economic Rights Action Centre (SERAC) & Another v Nigeria* (2001) AHRLR 60 (ACHPR 2001).

3 Murray & Wheatley (n 1 above) 226.

4 *Centre for Minority Rights Development & Others v Kenya* (2009) AHRLR 75 (ACHPR 2009) (*Endorois* case).

5 The terms 'customary', as 'traditional', and 'indigenous' are contentious. We use the term 'customary community' in the article to refer to communities who regulate their lives, and in particular their tenure rights, in terms of customary law. This term is used to denote a far broader group of people than the narrow definition of 'indigenous' or 'tribal' peoples, a distinction that will become clear later in the article.

Charter and the Commission because few, if any, African domestic courts have protected customary tenure rights effectively. If the African Charter continues to protect the rights of individuals and indigenous communities only, the majority of the continent (living on communal land under customary law) will remain onlookers of the human rights discourse in Africa.

At this stage, a qualification is in order: We write as practitioners rather than academics, and therefore declare our interest. We are deliberately promoting a purposive interpretation of the *Endorois* decision that provides room for the recognition of African customary tenure rights<sup>6</sup> beyond the rights ascribed to indigenous peoples by certain international law instruments.<sup>7</sup>

We are not advocating for the re-drawing of the African map in order to recreate some pre-colonial ideal; rather, we are attempting to assert the rights of customary African communities who live on land still effectively regarded as *terra nullius*.

We proceed to analyse how the African Commission reached its decision to recognise the title claim of the Endorois community with particular reference to their choice of authorities and their use of international instruments and precedents relating to indigenous peoples' rights.

In the next section, we address the situation of customary communities in Africa. We briefly outline the history that has led to the current predicament of rural communities in that their customary forms of land tenure receive scant formal legal recognition in domestic African courts.

## 2 Customary communities in Africa: What we do not see does not bother us

### 2.1 Customary law and the colonial imposition

The renowned scholar of customary law and related systems of tenure, the late Professor Okoth-Ogendo, recounted how, as the colonial era drew to a close in the 1950s and 1960s, British legal scholars organised a series of conferences to discuss the 'future' of customary law in Africa

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6 We understand the term 'customary tenure rights' to include the informal rights exercised although not registered or formally acknowledged by the state law system. It may include original ownership or aboriginal title rights where such have not been explicitly extinguished by state law.

7 ILO Resolution 169; C169 Indigenous and Tribal Peoples Convention, 1989 Convention concerning Indigenous and Tribal Peoples in Independent Countries; 1 September 2011, Human Rights Council: Report of the Special Rapporteur on the rights of indigenous peoples, James Anaya: Extractive industries operating within or near indigenous territories.

and the need to 'construct a framework for the development of legal systems in the emerging states'.<sup>8</sup> These initiatives assumed that the 'indigenous' legal systems of African countries and peoples of which they were well aware, were inadequate and inferior compared to the English common law.

These scholars must have felt vindicated when, upon independence, most African countries adopted the colonial legal framework wholesale – especially, as Okoth-Ogendo points out, in view of the development framework's 'general ambivalence as regards the applicability of indigenous law'.<sup>9</sup> Indigenous law and customary legal systems were regarded as inferior, were never extended to areas covered by colonial laws and, when applied, it was done only to the extent that they were not repugnant to Western justice and morality or inconsistent with any written law.

It is trite that the post-colonial era relegated customary law to a separate and unequal system of law that rarely found its way into the formal, 'Western' courts. In an attempt to gain some legitimacy and to give a measure of status to the separate systems, customary courts were created. Bennett argues that these courts were 'intended not only to settle disputes but also to proclaim the reach of government and the values of Western civilisation'.<sup>10</sup>

However, the impact on customary law systems went further. Under colonial rule, the foreign powers gradually realised that they could utilise customary institutions of governance to achieve the subjugation of local communities. Traditional leaders who were open to co-operating with the colonial powers (often for compensation) were supported: Legislation was passed to ensure that the powers of the favoured leaders were entrenched.<sup>11</sup> These statutes were based on a distorted colonial understanding of custom skewed to benefit colonial interests.<sup>12</sup>

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8 HWO Okoth-Ogendo 'The nature of land rights under indigenous law in Africa' in A Claassens & B Cousins (eds) *Land, power and custom* (2008) 95.

9 Okoth-Ogendo (n 8 above) 99.

10 T Bennett *A sourcebook of African customary law of Southern Africa* (1991).

11 Eg, in South Africa, the Bantu Authorities Act of 1951 entrenched 'tribal' boundaries and gave statutory powers to certain chiefs. See also P Delius 'Contested terrain: Land rights and chiefly power in historical perspective' in Claassens & Cousins (n 8 above) 211. Chiefs were recognised and incorporated as the lowest rung of the administrative system. The Native Administration Act 38 of 1927 set out to define a distinct administrative and legal domain for Africans drawing on a highly authoritarian understanding of chiefly rule as a model. Echoing the Natal system, the Act opened with the declaration that the 'Governor General shall be the supreme chief of all the natives in the provinces of Natal, Transvaal and the Orange Free state'. This supreme chief was given a range of powers to which even the most powerful ruler in pre-colonial South Africa could never have aspired, and it permitted him to devolve these vast powers to any administrative official. It also bestowed on the supreme chief the right to rule over all Africans by the simple device of issuing proclamations. Under the Act, the Governor-General could recognise or appoint any person as a chief or a headman in charge of a tribe or location, could depose any chief or headman and was authorised to define their powers, duties and privileges.

12 For more, see Claassens & Cousins (n 8 above).

When these legislative frameworks were entrenched in post-independent states, the colonial distortions of customs were also entrenched. As a result, customary governance systems and community rules were overruled by statutes regulating traditional leadership and, in some cases, communal tenure.

Mnisi<sup>13</sup> describes two possible outcomes of the imposition of inappropriate legislation upon customary communities. On the one hand, the fixed, hierarchical system of state law that is intolerant to negotiated rules sometimes stifles communities' customary law into obscurity. On the other hand, the irreconcilability between the two systems often leads to a complete lack of local engagement with state law beyond the strictly formal, with communities choosing to ignore the state's 'rules' as far as possible. It is the latter phenomenon that is most prevalent in Africa.

As a result, not only was customary law – insofar as it was recognised – relegated to an inferior legal system in terms of the 'official' legal framework, but the imposition of inappropriate statutes upon customary communities forced most of these communities to ignore these statutes as far as possible and continue regulating their lives in terms of their custom. Customary law systems thus developed in spheres invisible to the dominant legal system, but these informal systems remained central to the lives of most of their subjects.

The post-colonial entrenchment of the colonial *status quo* retained this divide. Little effort was made to reinstate customary law as an equal to the imposed colonial legal framework.<sup>14</sup>

Towards the end of the twentieth century, many African countries adopted constitutions which in many cases recognise customary law as an equal source of law to be applied by the courts 'where appropriate'. However, the application of customary law in the formal courts remains almost exclusively limited to issues of personal law, and rights claimed by individuals.

The Food and Agriculture Organisation (FAO),<sup>15</sup> as other international organisations, asserts that 'protecting and enforcing the land claims of rural Africans may be best done by passing laws that elevate existing customary land claims up into nations' formal legal frameworks and make customary land rights equal in weight and validity to documented land claims.' This statement ignores the fact that these claims

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13 S Mnisi '[Post]-colonial culture and its influence on the South African legal system – Exploring the relationship between living customary law and state law' unpublished PhD thesis, Oxford University, 2007.

14 For commentary on this post-independence phenomenon in South Africa, see Claassens & Cousins (n 8 above) and A Claassens 'The resurgence of tribal levies in the context of recent traditional leadership laws in South Africa' paper delivered at Wits University School of Historical Studies conference 'Let's talk about the Bantustans' (2010).

15 RS Knight 'Statutory recognition of customary land rights in Africa: An investigation into best practices for lawmaking and implementation' (2010) vi.

should, in any event, have equal weight and validity where custom is recognised as a source of law. The reason why communities are not protected, we contend, has more to do with the parallel nature of African legal systems and the inability of domestic courts to engage with customary forms of tenure. In addition, codifying customary forms of tenure in terms of common law rights will arguably once more create a parallel system with 'legal' rights on paper and unrecognised customary rights in practice. Rather, we argue, customary rights should be recognised on their own terms, and measured according to standards set by their own systems.<sup>16</sup>

It is trite that African customary law is a community-based system of law in which rights are generally relational and not held by individuals as atomistic beings, but as members of a group and relational to the other members.<sup>17</sup> To restrict the protection of customary law to individual rights, therefore, denies members of customary communities the ability to assert their tenure rights outside the sphere of their own communities and their internal, customary dispute resolution mechanisms.

Customary systems are not based strictly on rules associated with the mainstream understanding of common law. In all societies there are discrepancies between the 'rules' people describe and the actual practices in which they engage. This discrepancy is particularly pertinent with regard to customary law systems. While underlying values and commonalities can be identified in customary practices, rules are not treated as a fixed structure that regulate societal organisation with some occasional leeway for exceptions. Rather than blindly referring to rules in making a decision, the current reality of every situation is considered and the rule tested against the customary values.<sup>18</sup> Customary systems are thus outcomes-based rather than rule-based. Once custom is codified, it loses this ability to adapt contextually.<sup>19</sup>

To make matters worse, Africa has seen decades of efforts from international institutions (notably the World Bank and more recently some documents emanating from the FAO) to promote individual titling and land registries in Africa. These efforts formed an integral part of the

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16 There are other reasons for advancing this argument which extend beyond the focus of this article. See W Wicomb 'Law as a complex system: Facilitating meaningful engagement between state law and living customary law' paper presented at the IASC International Conference on the Complex Commons, Hyderabad, India, January 2011.

17 See eg B Cousins 'Characterising "communal tenure": Nested systems and flexible boundaries' in Claassens & Cousins (n 8 above) 119.

18 See JL Comaroff & S Roberts *Rules and processes: The cultural logic of dispute in an African context* (1981).

19 This feature presents interesting comparisons with international law: It could be argued that a human rights document such as the African Charter is also designed to anticipate outcomes-based interpretations in order to effectively protect the rights of people.

so-called structural adjustment programmes as the World Bank recommended formal titling as a precondition for the modernisation of agriculture and promoted the abandonment of communal/collective tenure as less compatible with a market-based system.<sup>20</sup> As we will see, the uneven outcomes of these programmes has been the cause of an about-turn in various regional policy and soft law instruments on the continent now calling for the recognition of customary law systems of tenure.

Unfortunately, these efforts will remain of little use, we argue, if formal courts do not find a way to accommodate and adjudicate customary systems of tenure – not as versions of common law ownership, but on their own terms.<sup>21</sup>

In the following section, we briefly discuss why this has become an urgent challenge for the customary communities of Africa.

## 2.2 Customary land tenure and the problem of recognition

In a recent study by the FAO on the statutory recognition of customary land rights in Africa, Knight<sup>22</sup> writes:

The issue of how best to increase the land tenure security of the poor and protect the land holdings of rural communities has been brought to the fore in Africa due to increasing land scarcity caused by population growth, environmental degradation, changing climate conditions, and violent conflict. This scarcity is being exacerbated by wealthy nations and private investors who are increasingly seeking to acquire large tracts of land in Africa for agro-industrial enterprises and forestry and mineral exploitation, among other uses. Some nations have received (informal) requests for up to half of their cultivatable land areas, and others are granting hundreds of thousands of hectares to private investors and sovereign nations.

These thousands of hectares are most likely not unoccupied, but rather land being held in terms of customary law by rural communities. These communities are unable to assert their customary tenure rights against their governments or any other external entity simply because they

20 J Quan 'Land tenure, economic growth and poverty in sub-Saharan Africa' in C Toumin & J Quan (eds) *Evolving land rights, policy and tenure in Africa* (2000) 31.

21 Elsewhere we have argued that the interrelation and interaction between the state law and customary law systems depend on the recognition of both the *identity* and *difference* of the two systems. In the latter case, the fundamental differences between the two systems will only be acknowledged properly if they are not understood in terms of the other, but in their difference – thus, avoiding the trap of formulating customary law in terms of state/conventional private property law, thereby distorting the nature of the former (or, indeed, *vice versa*). At the same time, however, we must be able to acknowledge the identity or similarities of the systems in order to facilitate engagement. An over-emphasis on difference has an equally impotent result: In a rural community, eg, where living customary law is at the order of the day, state law is often so foreign to their particular social and cultural contexts that it is simply ignored. See H Smith & W Wicomb 'Towards customary legal empowerment' paper presented at SAIFAC Conference on Transjudicialism, Constitutional Court, 4 October 2010.

22 Knight (n 15 above) v.

cannot assert their rights in courts that know, understand and apply common law ownership only. The relegation of customary law – and, as a result, customary communities – to the invisible, thus continues domestically.

The human rights discourse that first entered African domestic legal systems by way of the continent-wide ratification of the African Charter and later by its inclusion in African constitutions is only relevant where it can be applied. This is evident from the fact that the rare encounters between the rights- and custom-based discourses have largely been in personal law cases before the formal courts where in some instances rights were found to trump custom.<sup>23</sup>

The human rights discourse cannot reach as far as community-based rights as long as these rights never reach formal courts. For the majority of rural Africans, therefore, the African Charter, their countries' constitutions and human rights in general remain foreign concepts of a system of law parallel and irrelevant to their lives.

### 3 South African Constitutional Court's engagement with customary forms of ownership

One of the few African countries where domestic courts have been forced to engage with customary forms of tenure is South Africa. In terms of section 211(3) of the South African Constitution, the courts are obliged to apply customary law when it is applicable, subject to the Constitution and any legislation that deals with customary law.<sup>24</sup> In doing so, the courts must have regard to the spirit, purport and objects of the Bill of Rights. The Constitution<sup>25</sup> declares that

[t]he Bill of Rights does not deny the existence of any other rights or freedoms that are recognised or conferred by common law, customary law or legislation, to the extent that they are consistent with the Bill [of Rights].

23 See eg *Bhe & Others v Magistrate, Khayelitsha & Others*; *Shibi v Sithole & Others* 2005 1 SA 580 (CC); *Ephrahim v Pastory and Kaizingele* [1990] LRC (Const) 757 (HC of Tanzania). The handful community-based claims to property in Tanzania and Kenya have seen communities rely on the protection of indigenous peoples' rights, with limited success. See *Kemai & Others v Attorney-General & Others* (2005) AHRLR 118 (KeHC 2000); *Sesana & Others v Attorney-General* (2006) AHRLR 183 (BwHC 2006).

24 Customary law has been recognised as a source of South African law by the Constitutional Court in a number of cases. See *S v Makwanyane & Another* 1995 3 SA 391 (CC) paras 307-308; *Bhe* (n 23 above) para 45; *Gumede v President of the Republic of South Africa & Others* 2009 3 SA 152 (CC) para 20; *Alexkor Ltd v The Richtersveld Community* 2004 5 SA 460 (CC) para 52; *Shilubana & Others v Nwamitwa* 2009 2 SA 66 (CC) para 45; *Tongoane & Others v Minister for Agriculture and Land Affairs & Others* [2010] ZACC 10; 2010 6 SA 214; 2010 8 BCLR 741 (CC).

25 Sec 39(3).

Section 39(2) of the Constitution envisages the development of customary and common law whilst promoting the Bill of Rights.<sup>26</sup>

To its credit – and perhaps due to its very recent past of racial segregation and discrimination – the South African Constitutional Court has placed great emphasis on the dangers of understanding custom in terms of that which was codified by the colonial powers or, indeed understanding customary forms of tenure in terms of familiar common law principles. As a result, the court has come to distinguish between ‘living’ and ‘official’ customary law and notes that it is the former that is recognised by the Constitution rather than the statutory entrenchments of custom.<sup>27</sup>

Living customary law refers to customary law that is ‘actually observed by the people who created it’, as opposed to “official’ customary law that is the body of rules created by the state and legal profession.<sup>28</sup> Living customary law is a ‘manifestation of customary law that is observed by rural communities, attested to by parol. Although the term ‘living customary law’ gives the impression of a singular, unified legal system being the referent, this term actually points to a conglomerate of varying, localised systems of law observed by numerous communities.<sup>29</sup>

26 Sec 39(2) provides: ‘When developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.’ Sec 8(3) requires that, in the horizontal application of the Bill of Rights affecting natural and juristic persons, the court must apply or develop the common law to give effect to the relevant right to the extent that statute law does not address the matter. Sec 173 refers to the inherent power of the higher courts to develop the common law. We would argue that the development of both customary law and the common law is implied in the wording of secs 8 and 173. See also DM Davis & K Klare ‘Transformative constitutionalism and the common and customary law’ (2010) 26 *South African Journal on Human Rights* 403 fn 76. Further, sec 39(2) should be interpreted to require that whenever any court or even customary law dispute resolution mechanism, such as a community or ‘tribal court’, engages with, interprets, applies or develops customary law, it must implement and promote the rights in the Bill of Rights. It requires more than merely taking into account the political, social and economic human rights contained in the Constitution. See also Davis & Klare (above) 425-431.

27 This principle does give rise to problems of proving custom. However, the Court has developed a number of principles in this regard. It held in *Shilubana* (n 24 above): ‘An enquiry into the position under customary law will therefore invariably involve a consideration of the past practice of the community. Such a consideration also focuses the enquiry on customary law in its own setting rather than in terms of the common law paradigm, in line with the approach set out in *Bhe*. Equally, as this court noted in *Richtersveld*, courts embarking on this leg of the enquiry must be cautious of historical records, because of the distorting tendency of older authorities to view customary law through legal conceptions foreign to it.’

28 Bennett (n 10 above) 138.

29 Mnisi (n 13 above). In *Alexkor* (n 24 above), the Court noted: ‘Bennett points out that, although customary law is supposed to develop spontaneously in a given rural community, during the colonial and apartheid era it became alienated from its community origins. The result was that the term ‘customary law’ emerged with three quite different meanings: the official body of law employed in the courts and by the administration (which, he points out, diverges most markedly from actual social practice); the law used by academics for teaching purposes; and the law actually

The seminal case with regard to customary forms of tenure is that of the Richtersveld community which reached the Constitutional Court in 2003. In recognising the aboriginal title of the Richtersveld community, the Court held that<sup>30</sup>

[t]he real character of the title that the Richtersveld community possessed in the subject land was a right of communal ownership under indigenous law. The content of that right included the right to exclusive occupation and use of the subject land by members of the community. The community had the right to use its land for grazing and hunting and to exploit its natural resources, above and beneath the surface. It follows therefore that prior to annexation the Richtersveld community had a right of ownership in the subject land under indigenous law.

The Court bases its approach on a finding by the Supreme Court of Appeal<sup>31</sup> according to which the mainstay of the community's culture was its customary land tenure laws and rules. The Court then interprets the finding of the lower court in language reminiscent of the Commonwealth authorities on aboriginal title that similarly defer to the origin of the right and the regime in traditional laws, custom and culture (as discussed below).

Finally, it relies on the principle stated as early as 1922 by the Privy Council in *Amodu Tijani*:<sup>32</sup>

The title, such as it is, may not be that of the individual, as in this country it nearly always is in some form, but may be that of a community. Such a community may have the possessory title ... To ascertain how ... this latter development of right has progressed involves the study of the history of the particular community and its usages in each case. Abstract principles fashioned a priori are of but little assistance, and are as often as not misleading.

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lived by the people.'

30 *Alexkor Ltd and the Republic of South Africa v The Richtersveld Community & Others* (CCT19/03) [2003] ZACC 18; 2004 5 SA 460 (CC); 2003 12 BCLR 1301 (CC) (14 October 2003) para 62. The court's preference for the term 'indigenous' law rather than 'customary' law appears to be based on the use of 'indigenous' in schedule 4 of the Constitution.

31 *Richtersveld Community & Others v Alexkor Ltd & Another* 2003 6 BCLR 583 (SCA) para 18: 'The Richtersveld people shared the same culture, including the same language, religion, social and political structures, customs and lifestyle derived from their Khoi-Nama forefathers. One of the components of the culture of the Richtersveld people was the customary rules relating to their entitlement to and use and occupation of their land. The primary rule was that the land belonged to the Richtersveld community as a whole and that all its people were entitled to the reasonable occupation and use of all land held in common by them and its resources.'

32 *Amodu Tijani v The Secretary, Southern Nigeria* (100) (1921) 2 AC 199 403-404. The case involved a claim for compensation by an African chief for lands taken by the Crown for public purposes under a local ordinance in Southern Nigeria, a colony acquired by the cession of Lagos in 1861. In issue was the amount of compensation to be paid, which depended on the nature of the appellant's interest in the lands and his relationship with the community that had occupied and used it. Viscount Haldane dealt with the nature of the land tenure under local customary law and the effect of the cession.

In its *Tongoane* judgment of 2010,<sup>33</sup> the Constitutional Court insisted on the important principle that customary law systems are not invisible, but systems of law equal to statutory and common law. The case was brought by four rural communities who challenged the Communal Land Rights Act (CLARA) of 2004, the legislation created to 'codify' communal forms of tenure in the former homelands of South Africa.

The Court held that 'the presence of living customary law as a form of regulation on the ground is not equivalent to a legal vacuum. It is rather a genuine presence that must be treated with due respect, even if it is to be interfered with.' The 'field ... not unoccupied' with 'living indigenous law as it evolved over time' includes all communal land in South Africa.<sup>34</sup>

Originally, before colonisation and the advent of apartheid, this land was occupied and administered in accordance with living indigenous law as it evolved over time. Communal land and indigenous law are therefore so closely intertwined that it is almost impossible to deal with one without dealing with the other.

If it is the case that one cannot deal with communal land without dealing with indigenous or customary law, then the only avenue for the African regional human rights system to protect the communally-held rights of peoples in Africa is through proper engagement with customary law. In the following section, we investigate the extent to which the African Charter recognises customary law before turning to the significant recent African Commission decision in the matter of the Endorois community of Kenya.

#### 4 African Charter and recognition of customary law

There is no explicit recognition of customary law in the African Charter.<sup>35</sup> However, it has been acknowledged that the Charter was designed to speak to the unique circumstances and needs of the African continent and its people.<sup>36</sup>

The most significant and explicit feature of the African Charter in this regard, and one that certainly seems to indicate an acknowledgment of the communal nature of rights in Africa, is the protection of the rights of 'peoples' in the Charter.<sup>37</sup> The interpretation of this inclusion as a nod in the direction of customary legal system is strengthened by the

33 *Tongoane* (n 24 above).

34 *Tongoane* (n 24 above) para 45.

35 The African Charter on Human and Peoples' Rights, also called the 'Banjul Charter', was adopted on 27 June 1981 and came into force on 21 October 1986. It has been ratified by all African countries except Morocco.

36 Murray & Wheatley (n 1 above) 213-216.

37 *Endorois* (n 4 above) paras 19-24.

inclusion of duties alongside rights in the Charter. This has led some analysts to argue shortly after the adoption of the Charter that it<sup>38</sup>

makes it clear that the rights of an individual are bound up with and thus are only realised within the context of the community in which those rights are not restricted, but rather protected. It 'places individual human rights in the contextual setting of peoples' rights, with due respect for the human person as the central subject of development.

It is perhaps not surprising, however, that these analyses were pro-pounded at the very beginning of the African Commission's mandate of interpreting the African Charter in terms of article 45(3). Given the last 25 years of jurisprudence of the Commission, this interpretation has been eroded seriously. Not only did it take the Commission years to give content to the term 'peoples', but it has shown very little indication that it aims to protect communally-held rights. It was only in the famous *SERAC* decision,<sup>39</sup> handed down in 1996, where the Commission boldly recognised the Ogoni people – as a section of a population – as a 'people'. It has since also referred to an entire nation as well as an indigenous community as a 'people'.<sup>40</sup>

In this context, it is interesting to relate the comments of the Commission in the *Endorois* decision on its delay in giving content to the term 'peoples'.<sup>41</sup>

Despite its mandate to interpret all provisions of the African Charter as per article 45(3), the African Commission initially shied away from interpreting the concept of 'peoples'. The African Charter itself does not define the concept. Initially the African Commission did not feel at ease in developing rights where there was little concrete international jurisprudence. The ICCPR and the ICESCR do not define 'peoples'.

This comment seems odd and even disappointing in view of the fact that the African Charter – by the African Commission's own admission – aims to speak to the unique needs of Africa and therefore it should refrain from modelling itself on international jurisprudence exclusively. Indeed, the Commission goes on to say that<sup>42</sup>

normatively, the African Charter is an innovative and unique human rights document compared to other regional human rights instruments, in placing special emphasis on the rights of 'peoples'. It substantially departs from the narrow formulations of other regional and universal human rights instruments by weaving a tapestry which includes the three generations of rights ...

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38 Murray & Wheatley (n 1 above), citing R Kiwanuka 'The meaning of "people" in the African Charter on Human and Peoples' Rights' (1988) 82 *American Journal of International Law* 80 82 and E Bello 'The African Charter on Human and Peoples' Rights' (1985-86) 194 *Hague Recueil* 13 24.

39 *SERAC* (n 2 above).

40 Murray & Wheatley (n 1 above) 231.

41 *Endorois* (n 4 above) para 147.

42 *Endorois* (n 4 above) para 149.

If this is the case, the African Commission should be brave in giving content to these innovative provisions without impoverishing the African Charter by falling back on inappropriate international jurisprudence operating within a context where 'indigenous' or 'tribal' people are absolute minorities, recognised by international law and therefore can exist despite a measure of exclusion from the dominant legal system..

In fact, it could even be argued that the African Commission should rather rely on the jurisprudence of domestic African courts that do battle with the difficulties of uniquely African problems of legal pluralism as was shown in the previous section. As we will see, the Commission had a great opportunity to do just that in the *Endorois* decision, but unfortunately relied on the accepted wisdoms of other regional systems.

This development in the African Commission's jurisprudence seems out of step with the African Charter itself. Articles 60 and 61 of the Charter empowers the Commission to 'draw inspiration from international law on human rights', but in particular from 'the provisions of various African instruments on human and peoples' rights'. While the instruments referred to are not specified, the principle of resorting to African instruments in preference of international human rights instruments is clear.

Article 61, relating to subsidiary means of interpretation, reflects the emphasis on the African context even stronger. It reads:<sup>43</sup>

The Commission shall also take into consideration, as subsidiary measures to determine the principles of law, other general or specialised international conventions laying down rules expressly recognised by member states of the (then) Organisation of African unity, African practices consistent with international norms on human and peoples' rights, *customs generally accepted as law, general principles of law recognised by African states, as well as legal precedents and doctrine.*

This article could be read to include both local customary law systems and African domestic jurisprudence as sources to be considered by the African Commission – especially, we would argue, when uniquely African issues are at stake.

This interpretation was supported by the Preamble to the Commission's Draft principles and guidelines to the interpretation of socio-economic rights in the Charter<sup>44</sup> which stated that the Commission draws 'inspiration from domestic courts within the jurisdiction of states parties to the African Charter'.

However, the same document did reveal a narrow, common law-inspired understanding of the property clause contained in the Charter. Article 14 reads:

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43 Our emphasis.

44 This document was released for comment in 2008 by the African Commission and has not been adopted as of June 2011.

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.

In its comments on the article, the draft principles and guidelines failed to even mention communal property and customary forms of tenure – despite the fact that more than 60 per cent of land in Africa is held in this way.

On other fronts, however, the tide is slowly turning. International and regional human rights institutions are increasingly moving towards the idea that proper recognition of customary law tenure systems may be a solution to Africa's problems of poverty and unequal resource distribution – and indeed to realise the right to land. An emphasis on customary principles is also found in many international, regional and sub-regional soft law documents promoting sustainability.

Significantly, in its recent Framework and Guidelines on Land Policy in Africa, the African Union Commission, the African Development Bank and the United Nations (UN) Economic Commission for Africa encouraged countries to 'acknowledge the legitimacy of indigenous land rights' and 'recognise the role of local and community-based land administration/management institutions and structures, alongside those of the state'. Unfortunately, a closer analysis of the document reveals a complete lack of understanding of what the recognition of customary law systems as equal to the state law system would entail, and rather defers to the FAO position of recognising customary tenure in common law terms.

This move towards the recognition of customary law tenure systems alongside that of Western models of private ownership is arguably also in line with the UN Committee on Economic, Social and Cultural Rights (ESCR Committee)'s longstanding emphasis on the appropriateness of measures taken to achieve the progressive realisation of rights. In their General Comment on the right to adequate housing, for example, they add: 'The way housing is constructed ... and the policies supporting these must appropriately enable the expression of cultural identity and diversity of housing'. The Committee on the Convention to Eliminate All Forms of Discrimination has declared a failure to recognise indigenous forms of land tenure as contrary to the Convention.<sup>45</sup> Within this context, we argue, the *Endorois* decision, with all its flaws and missed opportunities, can and should be seen as opening a door to the recognition of customary community-based rights of rural Africans.

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45 General Recommendation 23 of the Committee.

## 5 Recognising the title of the Endorois community

The Endorois are a community of about 60 000 people who have lived in the Lake Bogoria area of Kenya for centuries. They claimed that they were dispossessed of their land in 1973 through the government's gazetting of the land and, as a result of not being able to access their land ever since, their rights to property and religion and, as a people, their rights to development and to freely dispose of their natural resources.

The community had no formal title to the land, but sought to prove their customary ownership in terms of the concept of 'aboriginal title'. Significantly, they argued that Kenyan law does not make provision for ownership by a community (which the Kenyan government disputed in their arguments on admissibility, but to no avail) and that the African Commission was thus the only forum where they could bring this claim as a community.

The community claimed that they had a right to property both in terms of Kenyan law and the African Charter 'which recognise indigenous peoples' property rights over their ancestral land'.<sup>46</sup> They argued that in cultivating the land and enjoying unchallenged rights to pasture, amongst other things, 'they exercised an indigenous form of tenure, holding the land through a collective form of ownership. Such behaviour indicated traditional African land ownership, which was rarely written down as a codification of rights or title but was, nevertheless, understood through mutual recognition and respect between landholders.'<sup>47</sup>

To support their argument, they contended that both international and domestic courts have<sup>48</sup>

recognised that indigenous groups have a specific form of land tenure that creates a particular set of problems, which include the lack of 'formal' recognition of their historic territories, the failure of domestic legal systems to acknowledge communal property rights, and the claiming of formal legal title to indigenous land by the colonial authorities.

They cited *Amodu Tijani* (as the Court did in *Richtersveld*), the Canadian Supreme Court's decision in *Calder* and the Australian High Court's decision in *Mabo* as examples of courts recognising indigenous property rights even in the face of colonial seizure. In arguing that the rights of customary communities survived annexation, they quoted *Richtersveld*.<sup>49</sup>

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46 *Endorois* (n 4 above) para 78. In para 113, the community argues that the recognition given Kenyan law is limited and 'provides in reality only minimal rights'.

47 *Endorois* (n 4 above) para 87.

48 *Endorois* (n 4 above) para 90.

49 *Endorois* (n 4 above) para 94.

When the African Commission turns to its reasoning on the merits of the property argument, it resorts to a judgment of the European Court of Human Rights, in *Dogan v Turkey*, to reach a decision that registered title is not necessary for a right to property, and could include other rights and interests.<sup>50</sup>

In recognising the framework of communal property, they cite various cases of the Inter-American Commission on Human Rights at length (including *Mayagna Awas Tingni* and *Saramaka*).<sup>51</sup> These cases relate both to what was defined as 'indigenous' communities and 'tribal communities': the former consistent with the narrow definition of 'first nation' people, while the second community (in *Saramaka*) was in fact not indigenous to the land, but regarded as 'tribal' and therefore entitled to the protection afforded to indigenous peoples.<sup>52</sup> The significant point for our argument, however, is that both these definitions rely on the community sharing 'distinct social, cultural, and characteristics, including a special relationship with their ancestral territories, that require special measures under international human rights law in order to guarantee their physical and cultural survival', in the words of the Inter-American Court.<sup>53</sup>

The African Commission's final authority before deciding that the right to property of the Endorois community was indeed encroached upon is the UN Declaration of the Rights of Indigenous Peoples.<sup>54</sup>

It is difficult to understand why the African Commission completely ignored the African jurisprudence before it (both *Amodu Tijani* and *Richtersveld*). It is significant, however, as these cases dealt with communities who were not asking recognition for their system of property and governance to be treated as a 'special case' and protected from the dominant legal system by ring-fencing their rights. Rather, these communities asked for the recognition of their legal systems as equal to the dominant system – and relied on this recognition in order to gain access to the dominant legal system and assert their rights in that space.

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50 *Endorois* (n 4 above) para 188.

51 *Endorois* (n 4 above) paras 190-191.

52 This distinction was made in the ILO 169 Convention, the first significant international instrument protecting indigenous peoples' rights. Art 1 provides: 'This Convention applies to: (a) tribal peoples in independent countries whose social, cultural and economic conditions distinguish them from other sections of the national community, and whose status is regulated wholly or partially by their own customs or traditions or by special laws or regulations; (b) peoples in independent countries who are regarded as indigenous on account of their descent from the populations which inhabited the country, or a geographical region to which the country belongs, at the time of conquest or colonisation or the establishment of present state boundaries and who, irrespective of their legal status, retain some or all of their own social, economic, cultural and political institutions.'

53 Inter-American Court of Human Rights, *Case of the Saramaka People v Suriname* (judgment of 28 November 2007) para 86.

54 *Endorois* (n 4 above) para 204.

It may be that the African Commission feels apprehensive about ‘creating’ law as a quasi-judicial body without being able to call on their regional and international counterparts for authority. This is particularly disappointing and alarming, however, in the face of the Commission’s mandate to give content to a uniquely African document.

A second important reason may be its fear of taking politically-contentious decisions. While the Endorois community based their claim to aboriginal title on judgments that mostly protected communities not necessarily identified as ‘indigenous’, the African Commission was at pains to formulate its entire analysis of the merits in terms of the rights of indigenous (or ‘tribal’) peoples. This may be the most disheartening aspect of the decision as it could be interpreted to narrow the protection of customary tenure rights to a handful of groups in Africa recognised as ‘indigenous’ or ‘tribal’ in the analysis of the Inter-American Court cited above – leaving half of the continent out to dry. This interpretation is supported by the opening statements of the African Commission in its merits analysis.

Before going into the substance of the claims of violations, the Commission<sup>55</sup> notes that ‘the respondent state has requested the African Commission to determine whether the Endorois can be recognised as a ‘community’/sub-tribe or clan on their own’. Instead of answering this simple question, the Commission – without explanation – changes the question to: ‘Are the Endorois a distinct community? Are they indigenous peoples and thereby needing special protection?’<sup>56</sup> The Commission’s agenda to turn the case into one about the rights of indigenous peoples *only* is revealed – and continued throughout the remainder of the text.

It is with little rigour that the Commission conflates the notion of ‘peoples’ with ‘indigenous peoples’ throughout the decision, moving seamlessly from speaking about ‘peoples’ to speaking about ‘indigenous communities’, thereby intimating that peoples’ rights (in the context of communal tenure at least) belong to indigenous peoples only.

For example:

[148] The African Commission, nevertheless, notes that while the terms ‘peoples’ and ‘indigenous community’ arouse emotive debates, some marginalised and vulnerable groups in Africa are suffering from particular problems. It is aware that many of these groups have not been accommodated by dominating development paradigms and in many cases they are being victimised by mainstream development policies and thinking and their basic human rights violated. The African Commission is also aware that indigenous peoples have, due to past and ongoing processes, become marginalised in their own country and they need recognition and protection of their basic human rights and fundamental freedoms.

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<sup>55</sup> *Endorois* (n 4 above) para 145.

<sup>56</sup> *Endorois* (n 4 above) para 146.

[150] The African Commission also notes that the African Charter, in articles 20 through 24, provides for peoples to retain rights as peoples, that is, as collectives. The African Commission through its Working Group of Experts on Indigenous Populations/Communities has set out four criteria for identifying indigenous peoples.

This conflation by the African Commission is not only dangerous in suggesting that only indigenous communities can claim aboriginal title to land, but also because it allowed the Commission to resort to the far more stringent principles of consultation and limitation of rights that international law provides to indigenous communities without reading these into the African Charter. For example, by falling back on the international law principle of free, prior, informed consent as contained in the ILO Convention 169, amongst others, when dealing with the Endorois community's right to development, the African Commission gave no further content to the Charter right for rural communities or 'peoples' who do not benefit from the international protection of indigenous peoples.

## 6 Re-interpreting *Endorois*

Despite the insistence of the African Commission to narrow their legal interpretation of the Endorois' rights to those of indigenous peoples, there is a strong argument to suggest that the decision may still be used to enable customary communities to claim their tenure rights in terms of the African Charter.

Firstly, even despite itself, it seems, the African Commission acknowledges in the decision<sup>57</sup>

its own observation that the term 'indigenous' is also not intended to create a special class of citizens, but rather to address historical and present-day injustices and inequalities. This is the sense in which the term has been applied in the African context by the Working Group on Indigenous Populations/Communities of the African Commission. In the context of the African Charter, the Working Group notes that the notion of 'peoples' is closely related to collective rights.

It could well be argued that the marginalisation of customary law systems and the inability of domestic African courts to protect customary forms of tenure – as recognised elsewhere in the *Endorois* decision – constitute present-day injustices and inequalities. This would extend the protection to all customary communities.

We have also raised the distinction between 'indigenous' and 'tribal' peoples that is included in the *Endorois* decision by way of the citation of the cases of the Inter-American Court. Whereas the interpretation of the Inter-American Court errs on the side of caution by insisting that the two categories both refer to groups who require special protection

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<sup>57</sup> *Endorois* (n 4 above) para 149.

for the survival of their cultures, a re-interpretation of this distinction may well be possible.

Arguably, many customary communities will be able to identify themselves in terms of a broad reading of article 1(a) of the Convention, thereby providing them with the recognition of their customary ownership, the right to proper consultation and the right to natural resources in terms of the Convention.

In fact, many customary communities would be able to identify themselves as 'tribal peoples' or indeed as indigenous peoples on the African Commission's own analysis of the factual evidence in *Endorois*. Its reasoning suggests that the labels indigenous and local customary community may be used interchangeably. For example, the African Commission appears to measure the Endorois community's indigeneity to its seasonal semi-nomadic occupation of the lake shores and inland areas. However, trans-humant nomadism is but one of the characteristics of both 'indigenous' and 'local' customary communities who occupy communal land.

Finally, we argue that the connection that the African Commission makes between aboriginal rights and the right to culture provides the most important avenue for broadening the interpretation of 'peoples' to customary communities. For this argument, we turn briefly to an analysis of how the connection between these rights has been dealt with in comparative jurisprudence.

## 7 Recognition of custom in terms of the right to culture

Legally and politically, the justification for the doctrine of customary or aboriginal title is the protection of culture.

We argue that in the case of indigenous (or tribal) communities the argument for the protection of their property rights is more often than not about the survival of a 'distinct' culture on land currently and or partially occupied by the group defining itself as an indigenous community with a distinct culture. It is a form of 'special' protection for a community that finds themselves outside the dominant development discourse, culturally, socially and economically and, we would add, legally. As such, this protection can only be afforded to minorities and does little to integrate these communities within the 'formal' legal systems of their countries.

In the case of communities on communal land adhering to living customary law by contrast, the argument for the recognition of their rights to property is about the recognition of informal tenure rights as cultural activities and therefore the right to culture.<sup>58</sup> In other words,

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58 K Lehman 'Aboriginal title, indigenous rights and the right to culture' (2004) 20 *South African Journal on Human Rights* 1. She questions whether the doctrine of aboriginal title really is of value for South African communities.

the way in which these communities exercise their tenure rights within a communal system is an articulation of their culture – and must thus be protected simply on the basis of their right to exercise their culture. It does not matter whether the community is distinct in every way, or whether their cultural survival is linked to a specific piece of land, or whether they constitute a minority. If they can demonstrate a system of tenure, then this system constitutes a form of aboriginal title. If this title has never explicitly been extinguished by statute, then the title deserves recognition and protection based on the system being an expression of the culture of the people.

This distinction is nuanced. The African Commission missed it in its decision in *Endorois*. The jurisprudence with regard to aboriginal title could be read to support this assertion – but also indicates that courts have always battled to keep distinction with regard to land and culture clear.

The Canadian jurisprudence on aboriginal title is concerned with the aboriginal rights recognised under its Constitution. The Supreme Court recognises the protection of culture as the rationale behind the recognition of specific customary rights in land over which communities do not enjoy full ownership of customary title.

The link between land and culture was clearly made in Canada by the Supreme Court in *R v Adams* and *R v Van der Peet*:<sup>59</sup>

Where an aboriginal group has shown that a particular practice, custom or tradition taking place on the land was integral to the distinctive culture of that group then, even if they have not shown that their occupation and use of the land was sufficient to support a claim of title to the land, they will have demonstrated that they have an aboriginal right to engage in that practice, custom or tradition.

In *Van der Peet*, the Court was preoccupied with the integrality of the customary practice or cultural activity to the culture and the distinctiveness and difference of culture.<sup>60</sup> In the next important decision of the Canadian Supreme Court on aboriginal title, it spelt out the theoretical underpinning of the doctrine of aboriginal title in disappointingly narrow terms:<sup>61</sup>

Although aboriginal title is a species of aboriginal right recognised and affirmed by s 35(1), it is distinct from other aboriginal rights because it arises where the connection of a group with a piece of land was of central significance to their distinctive culture. From this passage it is clear that the Supreme Court will grant Aboriginal Title only to those groups for whom a piece of land was, historically, of central significance to their distinctive culture ... A piece of land being of central significance to the culture of

<sup>59</sup> *R v Van der Peet* (1996) 2 SCR 507 45.

<sup>60</sup> The court must look in identifying aboriginal rights to what makes those societies distinctive, gives it a core identity, and a people's culture being one that 'truly made the society what it was'. This is implied by para 56 in *Van der Peet* (n 59 above).

<sup>61</sup> *Delgamuukw v British Columbia* (1997) 153 DLR (4th) 193.

the group in question then, appears to be the theoretical rationale behind granting aboriginal title.

The centrality of land to the culture then apparently becomes the 'rationale' – similar to definitions of indigenous peoples as related in the *Endorois* decision.

In *Sappier*,<sup>62</sup> the Canadian Supreme Court's more recent consideration of aboriginal rights, the Court rejected the *Van der Peet* articulation of the standard for aboriginal title recognition. It now states that the use of the word 'distinctive' as a qualifier is meant to incorporate an element of aboriginal specificity. However, 'distinctive' does not mean 'distinct', and the notion of aboriginality must not be reduced to 'racialised stereotypes of aboriginal peoples'. It continues: 'Flexibility is important when engaging in the *Van der Peet* analysis because the object is to provide cultural security and continuity for the particular aboriginal society.'<sup>63</sup> The essential test, however, seemingly remains that the court must also determine whether the activity claimed to be an aboriginal right is part of a practice, custom or tradition that was an integral part of the distinctive culture of the aboriginal community asserting the right prior to contact with Europeans.<sup>64</sup>

This interpretation that underplays the necessity of the cultural relation to land is supported by the Human Rights Committee. In *Apirana Mahuika and Others v New Zealand*,<sup>65</sup> the Committee observed that

minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture [which] may consist in a way of life which is closely associated with territory and use of its resources. This may particularly be true of members of indigenous communities or any other communities constituting a minority.

Likewise, Australian courts have held that aboriginal title is rooted in the traditional laws and customs of aboriginal peoples. To the extent that indigenous communities have survived dispossession from their land, they possess a title to the land based on their traditional laws and customs.

Arguably, the South African courts have gone further than their international counterparts in its application of so-called 'indigenous law', culture and its relation to land. It may even be argued that the right to culture has been linked explicitly to customary land tenure and rules. The Constitutional Court in *Richtersveld* based its finding of aboriginal

62 *R v Sappier; R v Gray* 2006 SCC 54, [2006] 2 SCR 686 para 45.

63 *Sappier* (n 62 above) para 33. 'Culture' refers to the 'way of life of particular aboriginal community, including their means of survival, their socialisation methods, their legal systems, and, potentially, their trading habits' (para 45).

64 *Ahousaht Indian Band and Nation v Canada (Attorney-General)* 2009 BCSC 1494; *Ahousaht Indian Band and Nation v Canada (Attorney-General)* 2011 BCCA 237.

65 Communication 547/1993, CCPR/C/70/D/547/1993 (2000) para 9.7; General Comment 23: The Rights of Minorities (art 27) (50th session, 1994), CCPR/C/21/Rev 1/Add 5, 4 August 1994, paras 1 & 3.2.

title on a finding by the Supreme Court of Appeal according to which *the mainstay of the community's culture was its customary land tenure laws and rules* – but not its link to a specific piece of land.

The South African Constitution, like the African Charter and the International Covenant on Civil and Political Rights (ICCPR),<sup>66</sup> recognises a direct right to culture. This may attract a negative and positive content. It may require the nation state to take positive measures to ensure the promotion and development of the right to culture including its attributes of developing local living law, customary title and customary rights in land. In short, the following principles emerge from this jurisprudence:

- (a) Communal ownership is associated with customary law and culture.
- (b) Customary community law is founded on the premise that it is a system of law developed by the community through practice by the community. A thorough investigation on a case-by-case basis is necessary to ascertain its content.
- (c) What matters for a community seeking protection of its communal land is that it defines itself as adhering to customary law.
- (d) The community's custom as culture may be related to a specific territory, but this is not essential (for example in the case of communities that have been removed from their land).

In *Endorois*, the right to culture is given limited explicit coverage. Despite this, we would argue that the right to culture is crucial to the overall approach of the African Commission.

The property and development rights asserted and recognised in *Endorois* are inextricably linked to the community's culture with the relevance granted to the promotion of culture in the African Commission's premises relating to the bearers of rights and victims of violations of rights. The African Commission argues that, under the African Charter, the concept community, indigenous or otherwise, recognises the links between people, their land and culture and that such a group expresses its desire to be identified as a people or have the consciousness that they are a people. It thus understands culture to mean that complex whole which (may) include a spiritual and physical association with one's ancestral land, knowledge, belief, art, law, morals, customs: the sum total of the material and spiritual activities and products of a given social group that distinguishes it from other similar groups.

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<sup>66</sup> The UN Human Rights Committee interprets the right to culture to include 'economic and social activities which are part of the culture of a community' to which indigenous peoples belong. *Chief Bernard Ominayak and the Lubicon Lake Band v Canada* Communication 167/1984, UN Doc CCPR/C/38/D/167/1984 (1990) para 32.2.

This interpretation is significant as the right to culture cannot be limited.<sup>67</sup> Thus, if customary forms of tenure are indeed understood to be central to a community's culture, it provides a strong argument for the recognition and protection of these land rights.<sup>68</sup>

## 8 Consent in customary law and *Endorois*

A short note on consent and customary law is apposite because the consent standard for any limitation on the right to property, culture and development reflects respect for and recognition of customary law and culture. The customary law tenure rules of communities, as expected, require community permission before outsiders could use and share in the community's property and resources.<sup>69</sup> The scope of possible transactions with parties who are not part of or members of the community and its legal systems is restricted. The nature of aboriginal title has been found to eschew alienation of the resource.<sup>70</sup>

In *Endorois*, the African Commission set a high standard of limitation to the right to development of the community. It emphasised community equity and choice and required of the state that<sup>71</sup>

[in] any development or investment projects that would have a major impact within the Endorois territory, the state has a duty not only to consult with the community, but also to obtain their free, prior, and informed consent, according to their customs and traditions.

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67 In para 249 it is stressed that the right to culture in the African Charter does not have a claw-back clause.

68 The power of cultural rights are illustrated when the Commission finds that any infringement of the right amounting to the denial of access to heritage sites and resources for their livelihoods, and destroying the community's way of life, cannot be rationally justifiable and proportionate to any conservation aim.

69 *Richtersveld Community & Others v Alexkor Ltd & Another* 2001 3 SA 1293 (LCC) para 65. The circumstances that the Richtersveld people, prior to being excluded from the subject land, occupied it and regarded it as their own, is evidenced by the fact that outsiders required permission before they could use the land (a requirement which they were not always able to enforce), and that grazing fees were extracted from outsiders whenever possible. The *Richtersveld* SCA judgment (in para 18) similarly emphasises the central rule of permission of access to outsiders: 'All members of the community had a sense of legitimate access to the land to the exclusion of all other people. Non-members had no such rights and had to obtain permission to use the land for which they sometimes had to pay ... The captain and his "raad" enforced the rules relating to the use of the communal land and gave permission to newcomers to join the community or to use the land.' In *Delgamuukw* (n 61 above) paras 157 and 158, the Supreme Court considers aboriginal trespass laws and aboriginal treaty law providing for 'permission ... granted to other aboriginal groups to use or reside even temporarily on land'.

70 *Delgamuukw* (n 61 above) para 129: '... lands held by virtue of aboriginal title may not be alienated. Alienation would bring to an end the entitlement of the aboriginal people to occupy the land and would terminate their relationship with it.'

71 *Endorois* (n 4 above) para 291.

The African Commission found that the Endorois community suffered a 'major impact' and ruled that the procedural development right had been violated. It did not elaborate on what in general terms would constitute major as opposed to other impact. It referred to international precedent and soft law on the content of the free prior informed consent standard. We would argue that customary law also provides a sound basis for the consent requirement.

The principle and right of 'free, prior and informed consent' demands that states and institutions obtain the consent and authorisation of customary communities before adopting and implementing development projects, land use changes or new laws that may affect them. Information on the likely impact of activities must be disclosed in advance. The development process should be self-determined and any development project must respond to community concerns and prioritisation. This cannot happen without a legitimate process of participation in decision making and consent. The consent principle requires full and effective participation at every stage of any action that may affect communities directly or indirectly. Communities should be included as competent partners in projects that affect their sphere of existence and culture.

In addition to being free, prior, informed and consensual, such consent must be enduring, enforceable and meaningful.<sup>72</sup> In this context, meaningfulness translates into tangible recognition, in word and deed. Recognition of the rights of traditional communities over their lands as the basis for negotiations over proposed extractive industries, necessarily involves the organisation of engagement, partnership and sharing of financial benefits. In instances where communities consent to extractive activities on their land, payments or benefit-sharing arrangements should be based on annual reviews throughout the life of the activity. Incomes from any mining must cover all costs associated with closure and restoration and include sufficient funds to provide for potential future liabilities.

Where benefit-sharing arrangements are channelled through a foundation or other entity, corporations must ensure that these entitlements remain under the control of the customary community.<sup>73</sup> Consent is not transferable.

## 9 Conclusion

We have argued that there is an urgent need for the recognition of customary forms of tenure of communities across the continent in

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72 LJ Laplante & SA Spears 'Out of the conflict zone: The case for community consent processes in the extractive sector' (2008) 11 *Yale Human Rights and Development Law Journal* 17.

73 Report of the International Expert Group Meeting on Extractive Industries, Indigenous Peoples' Rights and Corporate Social Responsibility: Manila Philippines Permanent Forum on Indigenous Issues, New York: United Nations E/C 19/2009/CRP, 4 May 2009.

order to allow them to have an effective ‘bargaining position’ when confronted with the possibility of land grabs. While we have shown that this need has similarly been identified by international organisations and the African Union itself, we argue that it cannot be done, as is often suggested, by awarding common law tenure rights to customary communities and formalising these – because common law notions are by and large incompatible with customary law forms of tenure.

The jurisprudence on aboriginal title and customary ownership, including associated jurisprudence on land-related resources such as forests and fisheries, can be depicted as a search for the current and future legal implications of

- (a) cultural activities, practices and customs;
- (b) often exercised in terms of customary law.

The different outcomes in the different jurisdictions of evaluation exercises of such activities more often than not depend on the relative weight given to customary law as opposed to common law. The African Charter and the *Endorois* decision may offer a new angle. The right to culture and the promotion of cultural rights apply equally to indigenous and other communities who use communal land under customary law. It requires that the relevance of cultural activities in recognising land and tenure rights be considered in terms of and through the lens of living customary law.

This potential will only be unlocked, however, if the African Commission (and even domestic African courts) recognises customary communities as ‘peoples’ whose rights to development and resources deserve protection. While we are critical of the Commission’s deference to international jurisprudence despite relevant African jurisprudence argued before them, we argue that the African Commission’s reasoning still resonates with the understanding of aboriginal title developed in the South African Constitutional Court and other foreign and international jurisdictions. We submit that the right to culture as protected in the African Charter (devoid of a claw-back clause) provides the basis for an interpretation of the protection of custom as culture. As the South African courts have recognised, customary land holding is often the central expression of a community’s culture. In keeping with this argument, there is no need to resort to a definition of indigenous peoples and evaluate communities in terms of their aboriginality or indigeneity in order to protect the land rights of a community.

This will require a brave leap by the African Commission which may have risky political consequences. However, if we fail to provide this protection to the customary communities of Africa, it becomes difficult to argue that the African Charter is indeed an instrument for the protection of the continent’s peoples.