

Indigenous land claims in Europe:

The European Court of Human Rights and the
decolonization of property¹

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Abstract: This study examines the potential impact of recent developments in international human rights law relating to indigenous land claims on the protection of property under the *European Convention on Human Rights*. In a departure from colonial law the authors show how the doctrine of ancestral indigenous land title has recently been incorporated into international human rights law. This development, however, has yet to occur within the regime of the European Convention. The authors argue that the new decolonized approach to property can and should be adopted by the European Court of Human Rights in its interpretation of Article 1 of Protocol No. 1 of the European Convention.

Key words: Indigenous Peoples, European Court of Human Rights, Land Rights, Property, Legal Pluralism, Ancestral Land Title, International Human Rights Law, Protocol No. 1 of the European Convention on Human Rights.

1. Introduction

The current challenge of recognition of the rights of indigenous peoples, originated in the heart of Europe as early as the 15th century. With the push towards world-

1. This is an English translation of an article first published in French in vol. 89 of the *Revue trimestrielle des droits de l'homme* (2012).

wide colonial expansion the stage was set for the gradual emergence of indigenous claims as a key issue in international human rights law. With the development of the *European Convention on Human Rights* (ECHR), Europe has moved to ensure the international protection of fundamental rights, including those of individuals belonging to minorities. However, there has been little progress in the area of indigenous rights² despite the fact that a number of communities have already been recognized by European states as “indigenous peoples”.³ This paper proposes an innovative approach to the ECHR with respect to the land rights of indigenous peoples still living under European sovereignty. It argues that the European Court of Human Rights (ECtHR) should take stock of the recent evolution of international human rights law and interpret Article 1 of Protocol No. 1 of the ECHR, which guarantees property rights, as affording a more vigorous protection to indigenous land tenure than what has been the case so far.

Between the 15th and 20th centuries European powers employed various means to acquire sovereignty over vast territories on every continent. When establishing their political and legal relationships with the indigenous peoples occupying those territories, the colonizing powers frequently drew on an ethnocentric and evolutionistic notion of international law that tended to legitimize their ambitions of colonial domination. The most well-known of the colonial doctrines is undoubtedly that of “discovery”, which was used to justify unilateral assertions of sovereignty over peoples whose political, legal, and economic systems were deemed insufficiently developed to provide a basis for international sovereignty, a status reserved for “civilized” nations only.⁴ By the 19th century the internalization of the status of indigenous peoples had become irresistible.⁵ Accordingly the

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2. One commentator, for example, refers to “Europe’s forgotten indigenous peoples”: Grote, Rainer, “On the Fringe of Europe: Europe’s Largely Forgotten Indigenous Peoples” in *Am. Indian L. Rev.*, (31) 2006–2007 pp. 425–443. See also Koivurova, Timo, “Jurisprudence of the European Court of Human Rights Regarding Indigenous Peoples: Retrospect and Prospects” in *International Journal on Minority and Group Rights*, (18) 2011 pp. 1–37.
 3. The Inuit of Greenland, the Saami people of Scandinavia and Russia, the indigenous small numbered peoples of the North, Siberia and the Far East, and the Kanaks of New Caledonia, which the *Nouméa Accord* designates as “original people” and the “indigenous population”.
 4. This doctrine was adapted from *terra nullius*, the theory of vacant and unoccupied land, as developed by Grotius. See Miller, Robert, *Native America, discovered and conquered: Thomas Jefferson, Lewis & Clark, and Manifest Destiny*, Bison Books, University of Nebraska Press, Lincoln NE 2008 at pp. 9–24; Morin, Michel, *L’usurpation de la souveraineté autochtone*, Boréal, Montréal 1997 at pp. 163–182.
 5. Internalization should be understood as the gradual transfer of relations with indigenous peoples from the area of international law to that of domestic law. See Schulte-Tenckhoff, Isabelle, *La question des peuples autochtones*, Bruylant, L.G.D.J., Bruxelles, Paris 1997 at p. 169.

issue of indigenous peoples' rights over the lands they traditionally occupied and used pursuant to their customary systems was relegated exclusively to the sphere of domestic law. Under colonial logic, indigenous peoples were then and now at the mercy of the power of the state and its often racist policies.

Through the internalization of the indigenous issue, public domain law became a powerful tool in the exercise of a state's control over the lands of the first occupants. Many national legal systems, but not all, applied the principle of eminent domain – a presumption of state monopoly over land – to indigenous territories on the grounds that no legal title of ownership existed over those lands.⁶ In this way, states became the lawful owners of lands traditionally occupied and used by indigenous peoples but nevertheless deemed to be “vacant and unoccupied”, which the government could therefore grant or allocate to third parties without resorting to expropriation. Their ancestral customary tenure thus disregarded, indigenous peoples could now only hold *derived* land rights granted by the state or acquired by conveyance or prescription. The state's law became the only formal source of rights over land and resources, even where this law took into account the *fact* of ancestral occupation as a cultural, economic, or political justification for rights granted to indigenous peoples under the official legal system. Indeed, this is still the case today in the domestic laws of European states where indigenous claims exist.⁷

Indigenous peoples have not rested, however, in their efforts to challenge the discriminatory premises of colonial law. In Europe as elsewhere indigenous land claims are frequently based on the assertion that, by the time of European colonization, native populations had already appropriated land and resources in ac-

6. See Economic and Social Council, Commission on Human Rights, Sub-Commission on the Promotion and Protection of Human Rights, 53th Sess., *Indigenous Peoples and their Relationship to Land – Final working paper prepared by the Special Rapporteur Mrs. Erica-Irene A. Daes*, E/CN.4/Sub.2/2001/21.

7. See, for example, the regimes in force in Russia, Scandinavia, and the French Overseas Territories: Fondahl, Gail & Poelzer, Greg, “Aboriginal Land Rights in Russia at the Beginning of the Twenty-first Century” in *Polar Record*, (39) 2003 pp. 111–122; Baer, Lars-Anders, “The Rights of Indigenous People – A Brief Introduction in the Context of the Sami” in *International Journal on Minority and Group Rights*, (12) 2005 pp. 245–267. *Finnmark Act* (Act of 17 June 2005 nr 85: Lov om rettsforhold og forvaltning av grunn og naturressurser i Finnmark fylke). (Norway), available in English at <http://www.galdu.org/web/index.php?sladja=51&vuolitsladja=97&giella1=eng>; Lafargue, Régis, *La coutume face à son destin. Réflexions sur la coutume judiciaire en Nouvelle-Calédonie et la résilience des ordres juridiques infra-étatiques*, L.G.D.J., Paris 2010 at pp. 228–230; Tiouka, Alexis & Karpe, Philippe, “Droits des peuples autochtones à la terre et au patrimoine” in *ATBA, Revue d'ethnobiologie*, (40) 2008 pp. 611–632.

cordance with their own cultures and legal systems.⁸ Possession from pre-colonial times under an indigenous legal tradition forms the basis for claims that the ancestral indigenous customary title has survived the colonial state's acquisition of sovereignty, and is still legally effective where indigenous peoples have continued to exist as distinct ethnocultural groups with a connection to their traditional lands. Thus, such indigenous claims concern primarily ancestral land rights, which contemporary indigenous peoples hold not through an allocation by the state but by virtue of a pre-colonial legal order. As such, they are claimed as pre-existing rights to be *recognized* by the state, not created or granted.

The distinctive legal nature of indigenous land rights is reflected in international instruments specifically designed to affirm the rights of indigenous peoples, such as the *Indigenous and Tribal Peoples Convention (Convention No. 169)*⁹ of the International Labour Organization (I.L.O) and the *Declaration on the Rights of Indigenous Peoples* adopted by the United Nations General Assembly in 2007.¹⁰ That said, few European states have ratified *Convention No. 169*,¹¹ and the U.N.

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8. The most well-known indigenous claims are those of the Sami of Scandinavia, the northern peoples of Russia, the Inuit of Greenland, and the original peoples of the French Overseas Territories. Regarding the Sami, see Bankes, Nigel & Koivurova, Timo, eds., *The Proposed Nordic Saami Convention. National and International Dimensions of Indigenous Property Rights*, Hart Publishing, Oxford 2013; Borchert, Nanna, *Land is Life: Traditional Sámi Reindeer Grazing Threatened in Northern Sweden*, online: <http://www.sametinget.se/6816> Kenyon Fields ed. 2001. *Rovaniemi Declaration*, 2008 at <http://www.saamicouncil.net/?deptid=2161>. Regarding the Amerindians of Guyana, see Tiouka, Felix, "Adresse au gouvernement et au peuple français, 9 décembre 1984" in *Ethnies*, (1-2) 1985 pp. 7-10; Menget, Patrick & Razon, Jean-Patrick, *Guyane : le nouveau amérindien*, *Ethnies no 31-32*, Peuples autochtones et développement : Survival international, Paris 2005. Regarding the Kanaks of New Caledonia, see *Declaration by the Kanak Indigenous People of August 9, 2007*, in particular paragraphs 3 and 5(a), at http://www.bio-logiques.org/index.php?option=com_content&view=article&id=102:nouvelle-caledonie-declaration-du-peuple-kanak&catid=85:declarations&Itemid=478. See also Saihu, Dick, *Déclaration De Gatope-Vook Du 08 Août 2009, Du Peuple Kanak*, at <http://www.gitpa.org/Peuple%20GITPA%20500/GITPA%20500-7ACTUsept09cndpa.pdf>; Boanemoui, Julien, *Déclaration de Monsieur Julien BOANEMOI sénateur coutumier de l'aire Ajie-Aro. Devant la 4ème Commission de l'Organisation des Nations Unies, 63 ème session (9 October 2008)*, translation in English available here : <http://overseasreview.blogspot.fr/2008/11/un-asked-to-monitor-decolonisation-in.html>.
 9. Revised I.L.O. Convention (No. 169) concerning Indigenous and Tribal Peoples in Independent Countries, 27 June 1989, I.L.O. Official Bulletin, Vol. 72, Series A, No. 2 (entered into force: 5 September 1991), <http://www.ilo.org/ilolex/cgi-lex/convde.pl?C169>.
 10. G.A. Res. 61/295, annex, U.N. Doc. A/RES/61/295 (entered into force 13 September 2007), http://www.un.org/esa/socdev/unpfi/documents/DRIPS_en.pdf.
 11. To this date it has been ratified by four European countries: Denmark, Spain, Norway, and the Netherlands.

Declaration, although widely supported in Europe,¹² does not have the legal status of a treaty; indeed, its legal effect is a matter of some debate.¹³ And therein lies the practical interest of this paper's objective, which is to determine whether the general human rights regime flowing from the ECHR can be used to support the recognition and protection of the ancestral land rights of the indigenous peoples of Europe.

The main focus of our analysis is the right to enjoy possessions guaranteed under Article 1 of Protocol No. 1 to the *European Convention*.¹⁴ In the first part of this article we will show how international human rights law has recently developed a doctrine of ancestral indigenous property rights that departs from the colonial legacy because it is premised on the *equality* of indigenous and Western legal cultures. In the second part, we will argue that this pluralistic and decolonized property doctrine can and should be imported into the ECHR system so as to achieve, particularly through Article 1 of Protocol No. 1, a more effective protection of indigenous land rights in Europe.

2. Ancestral Indigenous Property in International Human Rights Law

Since the late 20th century the trend in international law has favoured the gradual decolonization of the legal status of indigenous peoples. International law is invoked with increasing frequency to challenge the hierarchical representation of legal cultures espoused by colonial thought, and a new understanding of claims to ancestral rights over traditional indigenous lands is currently emerging through the principle of *recognition*, which revives non-Western legal traditions as a source of indigenous land rights. Official state law is no longer the only means of determining the existence and scope of first peoples' rights over their traditional lands. Now, even under general human rights instruments, states can be compelled to

12. Among European countries only Russia has abstained, citing the "lack of balance in the text" which received "additions on the political unity of sovereign and independent States", and deeming that the provisions concerning rights over land and natural resources and the right to compensation created problems. The representative from France celebrated its adoption of the *Declaration*, while noting that, according to the principle of the indivisibility of the Republic, collective rights could not prevail over individual rights <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N07/504/65/PDF/N0750465.pdf?OpenElement>.

13. See Anaya, James S., *International Human Rights and Indigenous Peoples*, Aspen Publishers, New York 2009 at pp. 79–105.

14. The focus of this article is thus more specific than Koivurova's recent study, which reviews all potential indigenous rights issues revealed by the European Court's jurisprudence. See Koivurova, *supra* note 1, at 1.

recognize pre-existing land tenure created under indigenous legal orders, a source that is both prior to and external to state law.

2.1 The Gradual Recognition of Ancestral Indigenous Title in International Law

The first explicit statement of the principle of recognition in contemporary international law is in Article 11 of I.L.O. *Convention No. 107*, dated June 26, 1957, on indigenous and tribal populations (also known as the *Convention concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries*). This provision states that “[t]he right of ownership, collective or individual, of the members of the populations concerned over the lands which these populations traditionally occupy shall be recognised.” The source of the land tenure this provision refers to is traditional indigenous occupation. Consequently, state law does not create or confer the said ownership, but merely *recognizes* it as it exists in the indigenous legal tradition, which may generate group rights that differ from the Western model of individual ownership. The originality of this type of “ownership” is apparent: it is both formally and substantively autonomous from the law of the state, from which it distinguishes itself by its sources and its attributes.

Article 14 of I.L.O. *Convention No. 169*, an instrument drafted to update international norms relating to indigenous peoples, validated recognition as a way to confirm an autonomous and pluralist indigenous property regime in international law. It states that “[t]he rights of ownership and possession of the peoples concerned over the lands which they traditionally occupy shall be recognised.” Moreover, under Article 13, states have the obligation to respect the cultural and spiritual value of the land for indigenous peoples, as well as the “collective aspects” of their land tenure system. The increased autonomy of indigenous land tenure in relation to state law and the Western notion of ownership is also confirmed through the explicit and systematic recognition in *Convention No. 169* of indigenous legal systems, which the states can no longer ignore.¹⁵ The *U.N. Declaration on the Rights of Indigenous Peoples* also contains several provisions requiring states to respect pre-existing land rights under indigenous legal systems.¹⁶ Article 26, in particular, clearly enunciates the right of indigenous peoples to have their “traditional ownership or other traditional occupation” of land recognized and protected. It adds that

15. Subject to respect for the fundamental rights of indigenous individuals, see *Convention No. 169*, Article 8, *supra* note 8.

16. *Declaration on the Rights of Indigenous Peoples*, Articles 25–30, *supra* note 9.

“such recognition shall be conducted with due respect to the customs, traditions and land tenure systems of the indigenous peoples concerned.”

The confirmation of the principle of recognition – and thus of indigenous land rights as both ancestral and autonomous – is of critical legal importance, as it entrenches rights that are to be received by the state because they existed prior to its control over the territory. Consequently, proof of a grant, title, or confirmation under state law is not required as a precondition to the protection of these indigenous land rights in international law. The mere fact that a state’s legal system has always denied these rights, deeming that they have never existed or that they were extinguished from the outset by the imposition of state ownership, can no longer justify their exclusion from protection under international law.¹⁷ In the eyes of international law, the colonial failure to recognize pre-existing rights has not effected their extinguishment.

Therefore, ancestral property exists and is protected under international law, even when the claim has no basis under state law. Because ancestral rights existed at the time of colonization, they need not be acquired under state law. By removing the need to rely on the state’s legal regime, the confirmation by international law of the continued existence of pre-colonial tenure overturns centuries of internalization of indigenous claims. The only way ancestral rights could have disappeared after the state’s assertion of sovereignty is if the indigenous peoples willingly abandoned them or if they were subject to a specific expropriation or displacement measure in compliance with international law. Similarly, interrupted or intermittent presence on traditional land due to changes in the indigenous way of life does not defeat a claim. It cannot be inferred from such a situation or from a lack of Western-style development of the land, that there was a clear intention on the part of the indigenous community to permanently and completely sever their ancestral legal relationship with the land. Moreover, the intrusion of non-indigenous peoples onto indigenous lands does not defeat pre-existing, ancestral rights that have never been waived. In short, ancestral ownership confirmed through recognition may turn out to be more resilient than ownership derived from state law.

Even where state law confers on indigenous peoples certain rights over land and natural resources, ancestral indigenous property rights remain highly significant, both symbolically and practically. For many indigenous peoples, the rights they hold directly from their ancestors, rather than at the pleasure of the state, are expressions of their indigeneity and their incontestable historical legitimacy.

17. I.L.O., *Indigenous and Tribal Peoples’ Rights in Practice: A Guide to I.L.O. Convention No. 169*, 94 (International Labour Organization 2009); Committee of Experts, 73rd Session, 2002, Observation, Peru at §7.

Moreover, because it is neither created nor defined by state law, ancestral ownership may contain rights that extend beyond what the state would deign to concede to its first occupants. States are generally concerned with confining indigenous peoples within spaces much smaller than their ancestral lands and with granting them only circumscribed rights of use, which are potentially more limited than the attributes of ancestral property.

It is true that, technically speaking, the recognition of indigenous property enshrined in *Convention No. 169* is mandatory in only a small number of states¹⁸ and that the UN Declaration is not in itself a formally binding instrument. On the other hand, one of the structuring principles of these documents – namely, the replacement of colonial Darwinism by an equality that respects indigenous legal difference – is fundamentally consistent with international human rights law. Therefore, specialized indigenous rights instruments do not formulate an exceptional legal doctrine but rather embody a general rejection of racial discrimination.¹⁹ Now that international law admits that non-discrimination may require culturally differential treatment,²⁰ states that have not ratified the I.L.O. conventions but are party to universal and regional human rights instruments will likely find it increasingly difficult to reconcile these commitments with the denial of the ancestral rights of the indigenous peoples living on their territories.

As is explained in the next section, the decolonization of indigenous property is increasingly taking place under widely ratified general human rights instruments, spurred on by the ever more widespread understanding of international human rights conventions as an interdependent normative network, as opposed to a collection of air-tight legal silos. Indeed, it appears that international human rights law is all the more hospitable to the notion of ancestral indigenous property because it is able to combine the non-discrimination principle with the general protection of property rights.

18. To this date twenty states have ratified *Convention No. 169*, *supra* note 8.

19. As Anaya writes, “the problem of discrimination against indigenous populations was in fact the point of departure for the surge in of U.N. activity concerning indigenous peoples over the last few decades”: Anaya, James S., *Indigenous Peoples in International Law*, 2nd ed., Oxford University Press, New York 2004 at p. 130.

20. See Henrard, Kristin, “The Protection of Minorities Through the Equality Provisions in the UN Human Rights Treaties: The UN Treaty Bodies” in *International Journal on Minority and Group Rights*, (14) 2007 pp. 141–180; Thornberry, Patrick, “Confronting Racial Discrimination: a CERD Perspective” in *Human Rights Law Review*, (5) 2005 pp. 239–269.

2.2 The Incorporation of Ancestral Indigenous Property Rights into General Human Rights Law

The *Universal Declaration of Human Rights*, adopted by the U.N. General Assembly in 1948, states that “[e]veryone has the right to own property alone as well as in association with others” (Article 17) and that “[e]veryone is entitled to all the rights and freedoms set forth in this *Declaration*, without distinction of any kind” (Article 2). The reference to the protection of joint or collective tenure indicates that this founding charter can accommodate a pluralistic interpretation of property. These provisions inspired the *International Convention on the Elimination of All Forms of Racial Discrimination*, a U.N. treaty ratified by the vast majority of states. Under Article 5 (v) of that instrument, the states parties agree to eliminate all forms of discrimination in the exercise of the “right to own property alone as well as in association with others”. Similarly, all the important regional human rights instruments protect property rights while proscribing racial and ethnic discrimination in the recognition and implementation of this right.²¹ Although the U.N. *International Covenant on Civil and Political Rights* does not necessarily compel the recognition of original, pre-colonial collective property rights over land and resources, the Human Rights Committee interprets Article 27 of the *Covenant*, which sets out the rights of individuals belonging to minorities, as obliging states to recognize and respect the sense of identity that indigenous peoples feel in connection with their traditional lands.²²

The U.N. Committee on the Elimination of Racial Discrimination, for its part, has found that the *Convention on the Elimination of All Forms of Racial Discrimination* compels states to recognize a range of systems of land tenure that vary according to the specific and collective relationship that indigenous peoples

21. See Article 14 of the *European Convention on Human Rights*, Article 24 of the *American Convention on Human Rights*, and Article 3 of the *African Charter of Human and Peoples’ Rights*.

22. See Scheinin, Martin, “Indigenous Peoples’ Land Rights Under the International Covenant on Civil and Political Rights”, online: *Torkel Opsahls minneseminar 2004* http://www.galdu.org/govat/doc/ind_peoples_land_rights.pdf; Eide, Asbjørn, “Rights of Indigenous Peoples - Achievements in International Law During The Last Quarter of a Century” in *Netherlands Yearbook of International Law*, (37) 2006 pp. 186–212. See also the views of the Human Rights Committee on French Polynesia, CCPR/C/60/D/549/1993/Rev.1 of 29 July 1997. The Committee accepted a broad definition of family and found that the construction of a hotel complex on the site of an ancestral burial ground constituted an interference with the family life and private lives of the indigenous authors. The Committee did not rule on the foundations of Article 27 because of France’s Statement regarding this article. See also the findings of inadmissibility, October 23, 2000, CCPR/C/70/D/822/1198, in a similar dispute in New Caledonia.

traditionally maintain with “their communal lands, territories and resources”.²³ The Committee, taking into account the multiplicity of potential relationships with land, refers to “lands and territories traditionally owned or otherwise inhabited or used”. Adopting the logic of indigenous rights instruments, the Committee applies the principle of recognition that forms the basis of the ancestral and autonomous tenure of indigenous peoples. Thus the Committee is of the view that the traditional occupation and use of these territories and resources by indigenous peoples grounds their rights under the *Convention for the Elimination of All Forms of Racial Discrimination*. In its observations to the states, it concluded not only that the lack of recognition of these rights in a state’s legal system is not a bar to the application of the *Convention*, but also that this lack in fact constitutes a violation of the *Convention*.²⁴ The non-discrimination principle forbids states from ignoring the ancestral rights of indigenous peoples flowing from their traditional occupation of territories in accordance with indigenous custom. The failure to recognize such rights is discriminatory because it denies the specific identities of these peoples as defined by their connection with their land.

The Inter-American Court of Human Rights has gone even further in transposing the distinctive aspects of indigenous land rights into the substantive property rights set out in a general human rights instrument, specifically, the *American Convention on Human Rights*.²⁵ The case law of the Inter-American Court of Human Rights is founded on the premise of the equality of indigenous and Western legal cultures and the need for a pluralist definition of the property protected by Article 21 of the *American Convention*. Indigenous tenure, which is autonomous and cannot be reduced to categories of Western law, is protected by a provision stipulating that “[e]veryone has the right to the use and enjoyment of his property.” Therefore, the *American Convention* meets the universality requirement by acknowledging the equal value of ancestral indigenous systems of communal and lineal property.²⁶ The egalitarian treatment of indigenous legal traditions un-

23. Committee on the Elimination of Racial Discrimination, General Recommendation XXIII (51) on the rights of indigenous peoples, adopted by the committee during its 1235th meeting on August 18, 1997.

24. See UNCERD, Consideration of Reports submitted by States Parties under Article 9 of the Convention, Concluding Observations on Suriname, §11 (case file of appendices to the representatives’ brief, appendix 4.2, folios 1487).

25. See generally, Pentassuglia, Gaetano, *Minority groups and judicial discourse in international law: a comparative perspective*, Martinus Nijhoff Publishers ed., Boston, 2009 at pp. 74–83.

26. *Mayagna (Sumo) Awas Tingni Community v. Nicaragua* (31 August 2001), Inter-Am. Ct. H.R. (Ser. C) No. 79 at §§146 and 149 [hereinafter *Mayagna*].

der international human rights law is clearly presented by the Court as one of the very foundations of a pluralist notion of property:

This notion of ownership and possession of land does not necessarily conform to the classic concept of property, but deserves equal protection under Article 21 of the American Convention. Disregard for specific versions of use and enjoyment of property, springing from the culture, uses, customs, and beliefs of each people, would be tantamount to holding that there is only one way of using and disposing of property, which, in turn, would render protection under Article 21 of the Convention illusory for millions of persons.²⁷

By invoking the property rights of indigenous community members under communal land tenure systems, these decisions also defuse the oft-asserted antagonism between collective rights and individual rights, recognizing that individual rights may exist within a collective tenure regime and that it would therefore be discriminatory to deny individuals the protection of their land rights because they are derived from communal title specific to indigenous legal culture.²⁸

To justify this decolonization of property under international law, the Inter-American Court relies in particular on Article 29(b) of the *Convention*, whereby that instrument may not be interpreted more restrictively than a state's domestic law or any other international convention to which the state is party.²⁹ This clause, which urges a coordination between regional and universal human rights norms, has permitted readings of the leading U.N. instruments favourable to collective indigenous tenure to be imported into the Inter-American system.³⁰ This approach has also loosened the grip of domestic law on international law. Thus, in *Saramaka v. Suriname*, the Inter-American Court of Human Rights very explicitly stated that Suriname, which had ratified the U.N. instruments, was violating the Saramaka's right of property recognized in Article 21 of the *Convention*, even though the collective rights in the lands and resources claimed by the Saramaka people had no basis in the domestic law of that state.³¹

27. *Sawhoyamaya Indigenous Community v. Paraguay* (29 March 1996), Inter-Am. Ct. H.R. (Ser. C) No. 146 at §120. See also *Xakmok Kasek Indigenous Community v. Paraguay* (24 August 2010) at §87.

28. Consider the remarks of Judge Sergio Garcia Ramirez in *Mayagna*, *supra* note 25, at §14.

29. Article 29 of the *American Convention* reads as follows: No provision of this Convention shall be interpreted as... (b) restricting the enjoyment or exercise of any right or freedom recognized by virtue of the laws of any State Party or by virtue of another convention to which one of the said States is a party... .

30. *Saramaka People v. Suriname* (28 November 2007) Inter-Am. Ct. H.R. (Ser. C) No. 172 at §§93–96.

31. *Id.* at §§97–107.

The international protection of ancestral indigenous lands has also been upheld by the African Commission on Human and Peoples' Rights in its recent decision in *Endorois Welfare Council v. Kenya*,³² In particular, the Commission relies on sources of international law relating to indigenous peoples to broaden the notion of property protected by Article 14 of the *African Charter* to include collective indigenous tenure and establish it as an autonomous regime in international law which supersedes national legal definitions.³³

We may therefore conclude that there is a convergence of opinion in international human rights law regarding the recognition and protection of ancestral indigenous land rights that acknowledges their prior existence and the historical fact of colonial racism. This emerging consensus is due in part to cross-fertilization and dialogue between courts and monitoring bodies taking place at both domestic and supranational levels. Indigenous claims have been received favourably in various international forums because, among other things, some courts or monitoring bodies have influenced the reasoning of others, guided them towards the relevant provisions in the instruments, and legitimized their decisions.³⁴

A similar dynamic is apparent within the system established by the ECHR, where the ECtHR is central to the trans-judicial network of interpretation of fundamental rights. As we shall demonstrate below, this constitutes one of the arguments in favour of recognizing ancestral indigenous tenure in European human rights law by strengthening the autonomy of the property regime under the *European Convention*.

3. Towards the Decolonization of Property in European Human Rights Law

The current movement in international law towards the recognition of indigenous land rights has not left Europe on the sidelines. Indeed, this movement involves

32. *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v. Kenya* (4 February 2010), Communication 276/2003, AC.H.P.R., 27th Activity Report covering activities from June to November 2009 [hereinafter *Endorois*].

33. *Id.* at §185.

34. Thus, the use by the Inter-American Human Rights Court of I.L.O. *Convention No. 169* and U.N. treaties is one example among many of normative "imports" relating to the protection of rights and freedoms that is regularly carried out by the Court to enrich its case law and increase its legitimacy. See Neuman, Gerald, "Import, Export, and regional Consent in the Inter-American Court of Human rights" in *The European Journal of International Law*, (19) 2008 pp. 101–123 at p. 101.

all European states parties to the leading U.N. instruments whose beneficiaries include indigenous peoples. For example, the *International Convention on the Elimination of All Forms of Racism*, which, as noted above, compels the recognition and protection of ancestral indigenous rights including collective tenure to traditional lands, has been ratified by nearly all of the members of the Council of Europe.³⁵ The Committee for the Elimination of Racial Discrimination has also made recommendations to European states regarding the protection of the rights of indigenous peoples to their lands and resources.³⁶ In addition, the European Union is increasingly urging its partners to uphold the rights of indigenous peoples³⁷ and deliberations on the Draft Nordic Saami Convention are ongoing.³⁸

Within the Council of Europe itself, the Advisory Committee on the *Framework Convention for the Protection of National Minorities*³⁹ has expressed its most serious concerns regarding the issue of indigenous land rights in the northern states.⁴⁰ The Committee's recommendations reveal the existence of a real problem with re-

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35. All the member states of the Council of Europe have ratified the *Convention*, and only Croatia, Estonia, Macedonia, Greece, Latvia, the United Kingdom and Northern Ireland, and Turkey have not recognized the jurisdiction of the Committee for the Elimination of Racial Discrimination.
36. See the Committee for the Elimination of Racial Discrimination, General Recommendations No. 23: Indigenous Peoples (18 August 1997) 55th session; see in particular the remarks on Finland (§214) and Sweden (§338) in the Committee's report for the year 2000, 56th session (6–24 March 2000) and 57th session (31 July–25 August 2000), General Assembly, 55th session, Supplement No. 18 (A/55/18); the observations on Finland (§405) and Norway (§481) in the Committee's report for the year 2003, 62nd session (3–21 March 2003), 63rd session (4–22 August 2003), 58th session, Supplement No. 18 (A/58/18); the remarks on Norway (§336), 68th session (20 February–10 March 2006), 69th session (31 July–8 August 2006), General Assembly, 61st session, Supplement No. 18 (A/61/18); and the remarks on the Russian Federation (§374) and Sweden (§406) in the report for the year 2008, 72nd session (18 February – 7 March 2008), 73rd session (28 July–August 2008), General Assembly, Supplement No. 18 (A/63/18).
37. Special provisions regarding the rights of the Saami people were included in the agreements whereby Sweden and Finland joined the Union. See also the joint declaration called "the European Consensus" which was adopted in 2005 by the Council, the Parliament and the Commission (2006/C 46/01, art. 101 and 103).
38. See Bankes & Koivurova, *supra*, note 7.
39. For an explanation and analysis of the functioning of this framework convention and its follow-up mechanism, see Benoit-Rohmer, Florence, "La Convention-cadre du Conseil de l'Europe pour la protection des minorités nationales" in *European Journal of International Law*, (6) 1995 pp. 573–597; Klebes, Heinrich, "The Council of Europe's Framework Convention for the Protection of national minorities" in *Human Rights Law Journal*, (16) 1995 pp. 92–98.
40. *Resolution CM/ResCMN(2007)1 on the Implementation of the Framework Convention for the Protection of National Minorities by Finland* (Adopted by the Committee of Ministers on 31 January 2007 at the 985th meeting of the Ministers' Deputies).

spect to indigenous lands in Europe, as well as the obligation to remedy this problem. The ECtHR is in a position to acknowledge the significance of the European Committee's concerns regarding the indigenous land issue, as illustrated in its recent decision addressing the situation of the Roma in the field of education.⁴¹

Indeed, once the ECtHR hears a claim specifically concerning ancestral indigenous rights under Article 1 of Protocol No. 1, which states that “[e]very natural or legal person is entitled to the peaceful enjoyment of his possessions”, it will be in a position to integrate the *European Convention* into the network of international norms protecting indigenous rights over ancestral lands. The Court will not be able to disregard the work done on indigenous issues by U.N. treaty implementation bodies.⁴² It will also benefit from an attentive reading of the case law of the Inter-American Court, which integrates ancestral indigenous tenure into property law for the purposes of the *American Convention on Human Rights*. Indeed, the ECtHR already relies on the precedents of the Inter-American Court to confirm its reasoning in the interpretation of the ECHR, even though its reference to the *American Convention*, an entirely external instrument, can have no more than a persuasive weight.⁴³

The ECtHR has in fact had the opportunity to hear cases involving indigenous claims to land and resources based on Article 1 of Protocol No. 1 of the *European Convention*, although none of these cases have required a determination of the central issue as to whether the notion of “possessions” includes the pre-existing ancestral tenure that flows from customary indigenous law but that is *not* recognized under state law. As the following section explains, the applications in these cases were not framed in such a way as to require the Court to address this issue directly. Thus the Court has not had the occasion to test the limits of the autonomy of the property regime under the ECHR in the context of indigenous land rights.

41. *D.H. and others v. The Czech Republic*, No. 57325/00, [2007] ECHR 922 (13 November 2007) at esp. §200; *Oršuš and others v. Croatia*, No. 15766/03, [2010] ECHR 337 (16 March 2010) at esp. §160.

42. The Court refers frequently to the work of the U.N. Human Rights Committee: see *Py v. France*, No. 66289/01 (11 January 2005) at §63; *Sejdovic v. Italie*, No. 56581/00 (10 November 2004) at §44; *Mamatkooulov and Askarov v. Turkey*, Nos. 46827/99 and 46951/99 (4 February 2005); *Saadi v. United Kingdom*, No. 13229/03 (29 January 2008).

43. *Timurtas v. Turkey*, No. 23531/94 (13 June 2000); *Mamatkulov and Abdurasulovic v. Turkey*, Nos. 46827/99 and 46951/99 (6 February 2003); *Maszni v. Romania*, No. 59892/00 (21 September 2006); *Silih v. Slovenia*, No. 71463/01 (9 April 2009).

3.1 Indigenous Peoples before the European Court of Human Rights: the Unresolved Issue of Ancestral Property Rights

In some cases, the Court (or, when it existed, the Commission) did not address the merits of an indigenous land claim because it found the application to be inadmissible for other reasons. In *Könkäma and 38 other Saami villages v. Sweden*,⁴⁴ for instance, the Saami villages challenged the Swedish authority's granting of hunting and fishing licenses to the entire population on reindeer grazing lands where the Saami claimed to hold exclusive hunting and fishing rights. These rights, they argued, while not recognized under Swedish law, flowed from their ancestral use of these lands. In the view of the Saami, authorizing hunting and fishing on the claimed lands constituted a violation of their rights under Article 1 of Protocol No. 1 to the *Convention*. The Commission, however, found this ground to be inadmissible because the applicants had failed to exhaust all domestic remedies and to file the application before the Commission within the prescribed six months following the final national decision.⁴⁵

Similarly, in *Hingitaq 53 and others v. Denmark*,⁴⁶ the Court found that it did not have jurisdiction *rationae temporis* over the infringement of possessions alleged by the indigenous applicants. In that case, in the summer of 1953 members of an Inuit tribe of Greenland had been displaced and re-settled a few kilometres away from their native village in the district of Thulé because of an agreement between the United States and Denmark to build an airbase. The Inuit alleged that the land they had been deprived of was their "possession" within the meaning of Article 1 of Protocol No. 1, due to their traditional occupation of this land since long before colonization by the Danes. The Court did not rule on this claim to ancestral title under the *Convention*, finding that the alleged violation by the Danish authorities fell outside the Court's jurisdiction because the facts in dispute had taken place

44. *Könkäma and 38 other Saami villages v. Sweden*, No. 27033/95, [1996] ECHR 79 (25 November 1996) at 78 [hereinafter *Könkäma*].

45. *Id.* at 87.

46. *Hingitaq 53 et al. v. Denmark*, No. 18584/04 (12 January 2006).

prior to the coming into force in Denmark of the *European Convention* (September 3, 1953) and Protocol 1 to the *Convention* (May 18, 1954).⁴⁷

G. and E. v. Norway, a case dating back to 1983,⁴⁸ demonstrates that, when appearing before the national courts, indigenous applicants must file clear land rights claims based on evidence of ancestral occupation of the territory. In that case, two Saami went before the Commission to claim that the construction of a hydroelectric dam authorized by Norway violated their property rights because the work caused the loss of part of what they considered to be their traditional lands and thus contributed to undermining their unique way of life. It appears, however, that the applicants had not provided the national courts with sufficient proof of their precise legal connection with the flooded land, even though Norwegian law actually recognized a right to compensation for any form of expropriation due to the building of a dam. Consequently, the Commission found that the applicants had not established that they held any property right over the site of the dam.⁴⁹

Admittedly, the Commission appeared in that case to be fairly resistant to the very notion that the traditional use of the land by the Saami – namely, for hunting, fishing, and reindeer grazing – could ground a claim for “possession” within the meaning of the *Convention*. The Commission was doubtful that the Saami could hold a property right in the disputed site in the “traditional sense of that concept”⁵⁰ although it was prepared to admit that the dam could affect their traditional way of life in the area concerned in a way that triggered the application of Article 8 of the *Convention*.⁵¹ We should note, however, that the Commission later clarified its views in *Könkäma*, stating unequivocally that the hunting and fishing rights claimed by the Saami “can be regarded as possessions within the meaning of Article 1 of Protocol No. 1”.⁵² Thus this broad notion of property, encompassing

47. Indeed, on page 18 of its decision, the Court characterized the facts surrounding the forced displacement of the Inuit as “instantaneous acts” that were completed before the *Convention* and *Protocol* became legally applicable to the state of Denmark, even though the applicants alleged that the deprivation of their lands was a continuing violation. In contrast, other international bodies have tended to find this type of violation as continuing. For example, in the same case, the I.L.O. expert committee found that the violation was continuing (see docs GB. 277/1889 and GB. 280/18/5, 1999). The Inter-American Court of Human Rights has also favoured this approach (*Moiwana village v. Suriname* (15 June 2005), Inter-Am. Ct. H.R. (Ser. C) No. 124).

48. *G and E. v. Norway* (3 October 1983) Eur. Comm’n. H.R. D.R 35.

49. *Id.* at 43–44.

50. *Id.* at 43.

51. *Id.* at 42–43. Regarding the protection of the way of life, see FARGET, Doris, “La protection juridique des modes de vie minoritaires et autochtones : analyse comparée des décisions de deux juridictions régionales” in *Lex electronica*, (13) 2008 pp. 1–35.

52. *Könkäma*, *supra* note 42, at 85.

distinctively indigenous cultural and economic aspects, has been accepted by the Court, which has found that reindeer grazing, hunting and fishing rights fall under the notion of “possession” within the meaning of the *Convention*.⁵³

Finally, in the most recent decision involving an indigenous property claim under Protocol No. 1, the rights invoked by the applicants were not in actual fact pre-existing ancestral property rights standing independently from any recognition by state law. In *Handölsdalen Sami Village v. Sweden*,⁵⁴ the Court was asked to rule on the admissibility of the Swedish winter grazing case. In Swedish court, the Saami applicants had lost a trial in which they had sought recognition of traditional winter reindeer grazing rights on land belonging to private parties. Before the ECtHR, the applicants argued that Article 1 of Protocol No. 1 had been violated because the right to use that they claimed was recognized under Swedish law and therefore constituted a possession under this provision.⁵⁵ In particular, they argued that Sweden had violated the Protocol through a lack of precision in the domestic law defining the territory of their grazing area.

The Court ruled that the right to access private property for the purposes of reindeer grazing claimed by the Saami had no basis in Swedish law and that the argument based on Article 1 of Protocol No. 1 was therefore inadmissible. The Court found that because Swedish law required the national courts to determine whether the applicants had grazing rights on land belonging to private owners, the claim could not be characterized as an “existing right” or “existing possession”.⁵⁶ The applicants had to show that they had a claim “in respect of which the applicant can argue that he or she has at least a legitimate expectation of obtaining effective enjoyment of a property right”.⁵⁷ According to the Court, such a legitimate expectation can exist only if there is a sufficient basis in Swedish law and, in particular, in the decisions of the Swedish courts.⁵⁸ The Court found that this requirement was not met because Swedish law assigns the courts the task of determining whether such a right exists and they had answered this question in the negative.⁵⁹

In that decision, the ECtHR’s analysis focuses on the basis of the indigenous claim in Swedish domestic law. It should be noted, however, that the applicants did not develop an argument clearly grounded in the pre-existence of an ancestral

53. *Handölsdalen Saami Village and others v. Sweden*, No. 39013/04 (3d sec.) [2009] ECHR 472 (17 February 2009), decision of partial admissibility at §46 [hereinafter *Handölsdalen 2009*].

54. *Id.*

55. *Id.* at §47.

56. *Id.* at §§49–51.

57. *Id.* at § 48.

58. *Id.* at §52. On the concept of legitimate expectation, see below.

59. *Id.* at §§53–55, in particular §54.

indigenous tenure that had continued to exist under international law regardless of whether it had been recognized or confirmed by Swedish law and Swedish courts. This may explain why the Court did not find that a possession or legitimate expectation of enjoyment of that possession could, in the specific case of indigenous peoples, have a legal basis outside of Swedish law. It therefore cannot be inferred from this decision that the Court has explicitly and definitively closed the door to indigenous land claims based on ancestral rights arising from customary indigenous law.

In the judgment on the merits in *Handölsdalen*,⁶⁰ only the dissenting Judge Ziemele seemed to concern herself with the specific situation of the indigenous people. She referred to developments in international indigenous law, which she used to challenge the reasoning of the Third Chamber⁶¹ and, unlike the majority judges, concluded that the right to access to courts had been violated.⁶² In our opinion she was correct to believe that developments in international law in indigenous matters are essential to understanding these land issues in Europe.

On the whole, while the main issue of the recognition of ancestral indigenous tenure may yet remain unresolved, the work done by the ECtHR is far from inconsistent with the advancement of indigenous rights in Europe. Indeed, indigenous peoples are being welcomed into the system established under the ECHR as the Court recognizes their entitlement to judicial protection and access to courts, a right which carries a special meaning in the context of the international protection of these groups.⁶³ For example, indigenous groups – Saami villages, in particular – may allege that their right to respect for their property has been violated because “the rights designated in that Act [Reindeer Herding Act] can be exercised by a Saami only as a member of a Saami village”.⁶⁴ In addition to including traditional indigenous activities within the notion of property for the purposes of Article 1 of Protocol No. 1, the Court has also had the opportunity to recognize that the protection of the right to use conferred on the Saami under domestic law – a right attached to their way of life and their culture – is in the general interest, thus

60. *Handölsdalen Sami Village and Others v. Sweden*, No. 39013/04 (3d sec.), [2010] ECHR 418 (30 March 2010) [hereinafter *Handölsdalen 2010*]. The Court found that Article 6 §1 of the *Convention* had been violated because of the length of proceedings.

61. Dissenting opinion of Judge Ziemele, *id.* at §5.

62. *Id.* at §10.

63. Pentassuglia, *supra* note 24, at 150.

64. *Könkäma*, *supra* note 42, at §86. On the other hand, the European Court of Human Rights found that an association promoting Saami culture could not be characterized as a victim of a violation of the *Convention* because it had no responsibilities in the area of fishing, which were at issue in this case, and did not represent its members in such matters: *Johtti Sappmelaccat R.Y. and Others v. Finland*, No. 42969/98 (18 January 2005) ECHR.

empowering the state to limit exclusive use of property by a private owner.⁶⁵ It therefore cannot be denied that the Court is receptive to the collective aspect of indigenous rights and to the distinctive history of these peoples. This openness can only be confirmed by the significant progress of ancestral indigenous rights under international law.

Indeed, today the ECtHR is in a position to assess the developments that have taken place in international human rights law and to recognize the existence of ancestral indigenous rights based on the autonomous property rights protected under the *European Convention*.

3.2 Ancestral Indigenous Rights and the Autonomy of the Property Regime under the ECHR

It is now clearly established in European human rights law that the right to respect for one's possessions in Article 1 of Protocol No. 1 is analyzed as an autonomous regime, that is to say, "as a way of creating an *ius commune* to compensate for the lack of precision of the terms in the *Convention* and the lack of homogeneity among national laws".⁶⁶ Indeed, the ECHR protects "possessions", or "*biens*" in French, which are notions of sufficient breadth and imprecision to include the various concepts of property defined by the different legal orders and cultures of Europe. Depending on their specific traditions, Europeans have very diverse modes of appropriation, from the common law notion of the commons to modern real estate capitalism, including the legacy left behind by the Soviet Union. The European human rights regime is able to apply the concept of property to situations that are characterized differently by the various legal traditions and, in this way, to harmonize the obligations of the member states.

At the outset, Article 1 of Protocol No. 1 was conceived to protect property from arbitrary interference by the state.⁶⁷ Accordingly, the provision does not guarantee

65. In a case where an owner, whose property was located in an area where the Saami were authorized under Swedish law to hunt elk, the Commission recognized that these rights could limit the property of others in accordance with the general interest (*Halvar From v. Sweden*, No. 34776/97 (4 December 1998) Eur. Comm'n H.R.)

66. Sudre, Frédéric et al., *Les grands arrêts de la Cour européenne des Droits de l'Homme*, Presses Universitaires de France, Paris 2003 at p. 35, [translation].

67. Ruiz-Fabri, Hélène, "The approach taken by the European Court of human rights to the Assessment of compensation for "regulatory expropriations" of property of foreign investors" in *N.Y.U. Envtl L.J.*, (11) 2002–2003 pp. 148–173 at pp. 148–150.

future acquisitions;⁶⁸ the notion of possession, for example, does not guarantee the right to inherit.⁶⁹ Consequently, when deciding whether an applicant's claim falls within the substantive scope of Article 1 of Protocol No. 1, the ECtHR must balance two imperatives: on the one hand, the autonomy of the *European Convention* and, on the other, the pre-existence of a form of property in the applicant's assets. One potential solution could have been for the Court to assign an actual definition to the term "possessions" or "*biens*" in international law, and then to verify whether the applicant's situation corresponded to that definition. This is not what emerges from the case law, however;⁷⁰ the autonomy of the *Convention* implies merely greater flexibility than domestic law in the legal characterization of the claims brought before the Court. The Court determines, on a case-by-case basis, whether Article 1 of Protocol No. 1 is triggered, specifically "whether the circumstances of the case, considered as a whole, conferred on the applicant title to a substantive interest protected by Article 1 of Protocol No. 1".⁷¹

Consequently the Court has been receptive to an increasingly innovative interpretation of the notion of possession, taking into consideration, *inter alia*, the facts of the very specific situation of the applicants, without limiting itself to the formal categories of domestic law. As a result some of the proprietary interests the Court has recognized have been characterized as "most peculiar legal interests".⁷²

The autonomy of the notion of possession means that the *Convention* can be used to protect a possession, or property, that is not formally characterized as such under domestic law, so long as the state provides substantive protection of this interest.⁷³ It is sufficient that there be such a basis, even if it is revocable or precarious,⁷⁴ even if the national judge who recognized it lacks the jurisdiction

68. The European Court has on numerous occasions stated that "Article 1 of Protocol No. 1 does not guarantee the right to acquire property", as it did, for example, in *Kopecký v. Slovakia*, No. 44912/98, [2004] ECHR 446 (28 September 2004) at §35 [hereinafter *Kopecký*].

69. *Marckx v. Belgium*, No. 6833/74 [1979] ECHR 2 (13 June 1979), G.A.C.E.D.H. No. 42.

70. See Frigo, Manlio, "Peaceful enjoyment of possessions, expropriation and control of the use of property in the system of European convention on human rights" in *Italian Y.B. Int'l L*, (10) 2000 pp. 45–69 at pp. 45–49.

71. *Beyeler v. Italy*, No. 33202/96, [2000] ECHR 1 (5 January 2000) at §100 [hereinafter *Beyeler*].

72. Sudre et al., *supra* note 63, at 500, [translation].

73. With respect to autonomous notions, Professor Sudre et al. consider that [translation] "European judges opt for a 'substantive', not formal, concept of the notions to be determined, which enables them to go beyond the usual meaning that the notion at issue carries under national law, conferring on it a broad meaning.": Sudre et al., *supra* note 63, at 37. In the same vein, see also *Gasus Dosier und Fördertechnik GmbH v. Netherlands* (23 February 1995) ECHR.

74. *Beyeler*, *supra* note 68.

to establish ownership rights,⁷⁵ and even if the applicants have not sought formal recognition by the courts of their right to the possession.⁷⁶ For example, as we have seen, the Saami right to use land for hunting and fishing granted by domestic law fell within the ambit of Article 1 of Protocol No. 1 because this interest existed under the state's law, even though such usage did not necessarily meet the legal concept of possessions or property in domestic law.⁷⁷

Moreover, a claim itself can be regarded as a possession if, even though there may be no material possession, the claim is certain, or there is a legitimate expectation that a legal ownership right will be recognized under domestic law.⁷⁸ Thus, generally speaking, the decisive element of a legitimate expectation resides in the existence of a "sufficient basis in domestic law, as interpreted by the domestic courts, for the applicant's claim to qualify as an 'asset' for the purposes of Article 1 of Protocol No. 1".⁷⁹ As is the case with an "existing" possession, however, protection under the *Convention* remains highly dependent on domestic law.

Finally, the Court has pushed the autonomy of the notion of possession even further by recognizing that a protected property interest can crystallize if a person draws his or her economic resources and income from a possession, even if there is no legal connection under domestic law between the possession and the person concerned. The Court recognized this type of interest in *Doğan and Others v. Turkey*,⁸⁰ in which the applicants had been forcibly evicted from their homes because of terrorist concerns and prevented from returning to their villages. Some of the applicants did not hold title to the land but were descendants of the owners with whom they had been living and cultivating the land. The Court agreed to apply the notion of "possessions" to the situation of the applicants, basing it on their economic activities.⁸¹ It should be noted that the Court also included "unchallenged rights over the common lands in the village" among its reasons for recognizing a

75. *Papastavrou and others v. Greece*, No. 46372/99, [2003] ECHR 168 (10 April 2003) at §§34–35.

76. *The Holy Monasteries v. Greece*, No. 13092/87; 13984/88, [1994] ECHR 49 (9 December 1994).

77. See *Könkämä*, *supra* note 42, at 12 et seq.

78. The rule is set out in a judgment from 1995: *Pressos Compania Naviera SA and others v. Belgium*, No. 17849/91, [1995] ECHR 47 (20 November 1995). But the notion of "legitimate expectation" in the context of Article 1 of Protocol No. 1 was used for the first time in *Pine Valley Developments Ltd and others v. Ireland*, No. 12742/87, [1991] ECHR 55 (29 November 1991) at §51.

79. *Kopecký*, *supra* note 65, at §54. This is in fact the case on which the Court based its decision in *Handölsdalen 2009*, *supra* note 51.

80. *Doğan and Others v. Turkey*, No. 8803/02 [2004] ECHR 296 (29 June 2004) [hereinafter *Doğan*].

81. The Court explains this reasoning in *Id.* at §139.

proprietary interest, thus implicitly recognizing the collective aspect.⁸² Therefore, the fact that this economic or subsistence property interest was not recognized under domestic law did not prevent the Court from regarding it as a possession distinct from the property right over the possession itself.

The growing autonomy of the property regime under the ECHR highlights an element that is essential to the recognition of ancestral indigenous property, namely, the exemption of applicants from the requirement to establish title or to have their rights over the claimed land formally recognized under domestic law. By definition, ancestral tenure derives from indigenous law that predates the state's legal system and therefore its existence is in no way dependent on the grant of formal title by the state. The question that has yet to be addressed by the ECHR is whether the *Convention* imposes an obligation on the state to recognize ancestral title to traditional indigenous lands when, as is the case in Europe, domestic law has still not confirmed pre-colonial title.

In a number of cases unrelated to indigenous matters, the Court has identified various forms of recognition or tolerance⁸³ under domestic law that are sufficient to crystallize a property interest in the use of land or resources. But the Court has not yet entirely disentangled itself from the will of the state, and this undoubtedly explains why, in *Handölsdalen*, the Saami did not claim ancestral rights wholly independent of any recognition or confirmation under Swedish law.⁸⁴ The Court has yet to acknowledge that letting the state have the last word with regard to whether pre-colonial indigenous land rights should be recognized leaves the field wide open for the perpetuation of discriminatory colonial law doctrines and is fundamentally inconsistent with the ancestral character of those rights, the existence of which does not depend on the discretion or tolerance of government authorities.

The Court is a mere step away from rendering the notion of possession fully autonomous for the benefit of indigenous peoples; all that remains is its interpretation of Protocol No. 1 of the ECHR as imposing an obligation on European states to recognize the existence of ancestral tenure. In so doing, the Court would reconcile

82. This is indeed what inspired the African Commission to say, “the ECHR have recognized that property rights could also include the economic resources and rights over the common land of the applicants” (*Endorois*, *supra* note 31, at §186). Therefore, the African Commission used this European decision as one of the justifications for recognizing ancestral indigenous tenure (see above), thus demonstrating how useful *Doğan*, *supra* note 77 can be to the indigenous cause.

83. The Court has on occasion ruled that tolerance with regard to otherwise unlawful land use may give rise to a protected patrimonial interest. See *Oneryildiz v. Turkey*, No. 48939/99 [2002] ECHR 496 (18 June 2002); *Hamer v. Belgium*, No 21861/03 (27 November 2007); *Matos e Silva, Lda. and Others v. Portugal*, No. 15777/89 [1996] ECHR 37 (16 September 1996); *Depalle v. France*, No. 34044/02 [2010] ECHR 385 (29 March 2010).

84. See *Handölsdalen*, *supra* note 51, at 14 et seq.

the two imperatives in Article 1 of Protocol No. 1: (1) the autonomy that would enable all forms of property to be protected effectively and (2) the pre-existence of the possession, since ancestral tenure is based on the prior and continuous existence from pre-colonial time of a customary proprietary relationship between the land and indigenous peoples. Where there has been no specific measure of expropriation, a possession is not lost merely because of the fact of colonization; under the *European Convention*, therefore, it should be recognized as an existing possession.

Another advantage of extending the autonomy of the property regime in this way would be the considerable progress it would represent towards the equal respect of legal cultures, a value to which the Court cannot be indifferent. As other international bodies have demonstrated, a lack of recognition of the ancestral land rights of indigenous peoples constitutes a denial of the equality of cultures. Colonial states justified taking control of land by discriminating against civilizations that they deemed to be inferior because, according to Western legal systems, the culturally differentiated use by indigenous peoples indicated a lack of ownership of or rights over the land. The only way to eliminate this type of discrimination is by decolonizing property – that is, by admitting that the relationship of indigenous peoples to the land can differ in nature and origin from the model of property as defined by the majority, and still yet be worthy of equal protection.

The spirit of *equality* animating the *Convention* is in fact embodied in the very idea of an autonomous regime. As we have seen, the autonomy of the notion of possessions has made it possible to place the various different legal cultures within the Council of Europe on an equal footing. This means that every applicant before the ECtHR receives equal treatment because the judges of that Court are receptive to the applicant's culture or legal system of origin, whatever form it may take. The Court is now in a position to expand the system of equal protection under the *Convention* irrespective of the applicant's culture by recognizing the indigenous legal cultures forming the basis of ancestral title.

As the Inter-American Court has understood, this openness to indigenous legal difference implies that the indigenous group itself can be the holder of the ancestral possession. The property right thus recognized can be exercised by the indigenous individual only as a member of the indigenous community to which he or she belongs. It is true that the ECtHR has so far avoided making the *Convention* “an instrument at the service of group interests”.⁸⁵ Nevertheless, it would be inaccurate to state that there is an inconsistency or conflict of principle between individual rights and group rights in the indigenous context. Indeed, the Inter-American

85. Larralde, Jean-Manuel, “La Convention Européenne des Droits de l’Homme et la protection de groupes particuliers” in *Rev. trim. dr. h.*, (56) 2003 pp. 1247–1274 at p. 1259, [translation].

Court has found that it would be misguided, in the interest of preventing collective rights from prevailing over the individual, to reject group claims and thereby deprive indigenous individuals of the enjoyment of any of their ancestral rights.

Moreover, it is entirely possible to preserve individual rights in the context of group rights while simultaneously doing justice to indigenous peoples. Indeed, in *Refah Partisi*, the European Court noted the care that must be taken not to define individuals solely as members of their groups.⁸⁶ It would not be acceptable to subject individuals to the rules of an indigenous community that unjustifiably infringe on individual rights and freedoms protected by the ECHR and international human rights law. International instruments do not grant communities rights over their members that would be incompatible with those members' fundamental rights.⁸⁷ By recognizing ancestral tenure, the Court would not be abdicating its role as guarantor of individual rights and freedoms because it would be required to ensure that the exercise of this tenure was subject to those rights. Moreover, as Article 1 of the Protocol No. 1 makes clear, the enjoyment of a possession is in no way absolute; thus, the states may preserve their roles as guardians of individual rights and freedoms. Finally, the recognition of ancestral indigenous property would not open the floodgates to claims from other groups, since this solution is based on the specific historical circumstances of indigenous peoples, who have long been deprived of their rights over lands in a manner that today is considered to be discriminatory. International law has taken note of these distinctions arising from historical circumstance, and has initiated a remedial process of decolonization. Europe should do the same.

4. Conclusion

The decolonization of property in the European human rights system is a necessary step towards greater respect for indigenous legal cultures. Current developments in international law and European human rights principles can only move us closer to the recognition of ancestral land rights. Where the states lag behind, the ECtHR should urge them on.

Adopting this position, and thereby eradicating discrimination from the foundations of the ECHR property regime, will create a solid basis for land management regimes accommodating both indigenous and non-indigenous peoples. It will then fall to the ECtHR to consider the merits of any interference with the rights of

86. *Refah Partisi (The Welfare Party) and Others v. Turkey*, Nos. 41340/98, 41342/98, 41343/98 and 41344/98, [2003] ECHR 87 (13 February 2003) (Gd. Ch.).

87. Article 8(2) of I.L.O. *Convention No. 169* and Article 34 of the U.N. *Declaration on the Rights of Indigenous Peoples* subject indigenous custom to respect for human rights.

indigenous peoples to the free enjoyment of their possessions.⁸⁸ As it has already done in a number of cases, the Court will be required to assess, on a case-by-case basis, the balance of indigenous, general, and private individual property interests that has been struck by the states in their domestic legal systems. Even a decolonized right to indigenous property may be subject to legitimate and lawful limits or deprivations. It will be up to the ECtHR to gauge the interference and determine the conditions under which a state can infringe upon indigenous land rights. These conditions may include a duty to consult the indigenous peoples prior to limiting their rights, or a duty to comply with the proportionality principle, or to respect any other condition found in evolving international norms regarding indigenous peoples. Once again, the solutions that various international bodies have found may provide useful inspiration to the ECtHR as it reflects on the steps to be taken in the decolonization of the relationship between states and the indigenous peoples.

Земельные претензии коренных народов в Европе: Европейский суд по правам человека и деколонизация собственности

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В этом исследовании рассматриваются потенциальные последствия происходящих событий в международном законодательстве в области прав человека, в отношении земельных претензий коренных народов по защите собственности в соответствии с Европейской конвенцией о правах человека. Авторы показывают, как, в связи с отходом от колониального права, в последнее время в международное законодательство по защите прав человека включаются учение предков коренных народов на право собственности на землю. Такое развитие событий, однако, пока не произошло в рамках действия Европейской конвенции. Авторы утверждают, что новый подход к деколонизации собственности может и должен быть принят на рассмотрение в Европейском суде по правам человека, в своем толковании статьи Протокола № 1 Европейской конвенции.

88. The interference with the right of property referred to in Article 1 of Protocol No. 1 of the Convention is governed by three distinct yet complementary “rules”: substantive interference, interference through deprivation, and control of use. See *Sporrong and Lönnroth v. Sweden*, No. 7151/75, [1982] ECHR 5 (23 September 1982) at §61. These three forms of interference must obey the principle of proportionality and be consistent with procedural protections so as not to constitute a violation.