

# INDIGENOUS ISSUES UNDER THE EUROPEAN CONVENTION OF HUMAN RIGHTS, REFLECTED IN AN INTER-AMERICAN MIRROR

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## INTRODUCTION

It is an honor to have been invited to participate in the Symposium on the Identity and Future of Human Rights and to pay tribute to Professor Dinah Shelton's longstanding contributions in the field of human rights and environmental protection.

In 1984, Professor Shelton taught at a session of the International Institute of Human Rights in Strasbourg, France, and my interaction with her stimulated an interest in the Inter-American jurisprudence on human rights. Professor Shelton was not an easy professor, but she was a very effective one. Subsequently I had the honor of collaborating closely with her, as a friend and as a colleague, in both American and Hungarian research endeavors.<sup>1</sup> Professor Shelton's books<sup>2</sup> remain on my bookshelves, and I was

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1. The Author is particularly pleased to have been involved in some of Professor Shelton's research projects. See Péter Kovács, *The Protection of Minorities under the Auspices of the League of Nations*, in THE OXFORD HANDBOOK OF INTERNATIONAL HUMAN RIGHTS LAW 325 (Dinah Shelton ed., 2013); Péter Kovács, *Ethnic and Linguistic Minorities and International Law and Racial Groups*, in ENCYCLOPEDIA OF GENOCIDE AND CRIMES AGAINST HUMANITY, 692-700, 855-57 (Dinah Shelton ed., 2004) [hereinafter Kovács, *Protection of Minorities*]. Professor Shelton and the Author also collaborated with other colleagues on additional projects. See, e.g., INTERNATIONAL LAW AND DOMESTIC LEGAL SYSTEMS—INCORPORATION, TRANSFORMATION, AND PERSUASION (Dinah Shelton ed., 2011). Finally, Professor Shelton agreed to participate in common research organized in Hungary. See Dinah Shelton, *The World of Atonement: Reparations for Historical Injustices*, in HISTORIA ANTE PORTAS/L'HISTOIRE EN DROIT INTERNATIONAL/HISTORY IN INTERNATIONAL LAW 311-45 (Péter Kovács ed., 2005).

2. See Donald Anton & Dinah Shelton, ENVIRONMENTAL PROTECTION AND HUMAN RIGHTS (2011); Alexandre Kiss & Dinah Shelton, A GUIDE TO INTERNATIONAL ENVIRONMENTAL LAW (Martinus Nijhoff 2007); Thomas Buergenthal, Dinah Shelton & David Stewart, INTERNATIONAL HUMAN RIGHTS IN A NUTSHELL (West Group 3rd ed., 2002); Thomas Buergenthal, Robert Norris & Dinah Shelton, *Selected Problems*, in PROTECTING HUMAN RIGHTS IN THE AMERICAS (International Institute of Human Rights, Deutsche ed., 1982).

quite pleased that she was granted the *honoris causa* doctorship from the university at which I teach, the Péter Pázmány Catholic University, in 2014.

In this short contribution, I would like to pay tribute to Professor Shelton by analyzing the protection of the rights of indigenous peoples, an area which she researched and promoted in her capacity as professor and as a member and president of the Inter-American Commission of Human Rights. This Article will focus primarily on the protection of the rights of indigenous peoples in Europe.

Although not as widely known as the indigenous peoples of the Americas or other parts of the world, a handful of such communities remain on the European continent. Like all Europeans, various treaty mechanisms guarantee these peoples certain human rights; however, the right of these peoples to conduct their traditional ways of life is not well established in Europe. For complex social and historical reasons, the complaints of indigenous European peoples are frequently marginalized, and these communities have had limited success in obtaining *in merito* judgments when appearing before the organs of the European Convention of Human Rights (ECHR).

The lack of *in merito* judgments is a stark contrast to the jurisprudence of the Inter-American Court of Human Rights (IACHR), where cases involving indigenous peoples are regularly addressed and resolved on their merits. The result is that the rights of indigenous peoples in the Americas are increasingly well established, while in Europe they remain in a state of limbo. This dichotomy between the European and Inter-American systems is not, however, insurmountable, and the Council of Europe (CoE) can learn from the Inter-American system to ensure that the human rights of indigenous peoples are sufficiently protected.

In Part I, this Article outlines the mechanisms in Europe relevant to protecting the human rights of indigenous peoples, with emphasis on the CoE as the most important organ. Part II provides a brief synopsis of the jurisprudence of the European Court of Human Rights (ECtHR), and its predecessor, the European Commission of Human Rights (Commission), relating to indigenous peoples issues. Part III summarizes various criticisms of the CoE's treatment of indigenous peoples issues, and Part IV discusses the development of the jurisprudence of the IACHR, as a possible model for the European human rights system. Part V provides a brief defense of the CoE and recognizes that, despite its deficiencies, the European system for protecting human rights does possess

some mechanisms for ensuring the protection of indigenous peoples' rights.

## I. HUMAN RIGHTS AND MINORITY-PROTECTING MECHANISMS IN EUROPE

In Europe, the most important institutions addressing the protection of human rights are the Council of Europe and the Organization for Security and Cooperation in Europe (OSCE). Although there exist sub-regional organizations which can address minority rights issues, namely the Central European Initiative<sup>3</sup> and the Commonwealth of Independent States,<sup>4</sup> these organizations lack the power and reputations of the CoE and OSCE in the arena of human rights law in Europe. In the framework of the OSCE, the basic norm of reference began in 1990 with the adoption of the detailed chapter on minorities within the Final Act.<sup>5</sup> The High Commissioner on National Minorities has since been established, with an umbrella of useful documents<sup>6</sup> issued by the institution.

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3. The Central European Initiative was created through the cooperation of Albania, Austria, Belarus, Bosnia and Herzegovina, Bulgaria, Croatia, the Czech Republic, Hungary, Italy, Macedonia, Moldova, Montenegro, Poland, Romania, Serbia, Slovakia, Slovenia, and Ukraine. It was adopted in 1994 as a soft law-type Instrument for the Protection of Minority Rights, the norms of which are very close to those of the Council of Europe's Framework Convention for the Protection of National Minorities. See Herald Kreid, *The CEI Has Understood the Need for Adjustment*, in CENTRAL EUROPEAN INITIATIVE, MINORITIES AND THE CENTRAL EUROPEAN INITIATIVE 10, 10 (Central 2004), [http://www.cei.int/sites/default/files/attachments/publications/cei\\_publication\\_on\\_instrument\\_2004\\_revised\\_april\\_05\\_final\\_final.pdf](http://www.cei.int/sites/default/files/attachments/publications/cei_publication_on_instrument_2004_revised_april_05_final_final.pdf).

4. The Commonwealth of Independent States (CIS) is composed entirely of former Soviet states, including: Russia, Armenia, Azerbaijan, Kazakhstan, Kyrgyzstan, Moldova, Turkmenistan, Tajikistan, and Uzbekistan. See *About Commonwealth of Independent States*, COMMONWEALTH OF INDEPENDENT STATES (CIS), <http://www.cisstat.com/eng/cis.htm> (last visited May 11, 2016). The CIS adopted a Convention on Human Rights and Fundamental Freedoms in 1995. Article 20 of that convention secures equality and non-discrimination. Commonwealth of Independent States Convention on Human Rights and Fundamental Freedoms, May 26, 1995, 3 I.H.R.R. 1, 212. Article 21 promotes ethnic, linguistic, cultural, or religious identity. *Id.* art. 21. Article 26 guarantees the right to property. *Id.* art. 26. Article 27 refers to national traditions in the context of the right to education. *Id.* art. 27. The Commission of Human Rights of the CIS monitors compliance with the convention. *Id.* art. 34.

5. See Conference on Security and Co-operation in Europe (CSCE), Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE §§ 30–40.7 (June 29, 1990), <http://www.osce.org/de/odihhr/elections/14304>.

6. See, e.g., Organization for Security and Co-operation in Europe (OSCE) High Commissioner on National Minorities (HCNM), *The Ljubljana Guidelines on Integration of Diverse Societies* (Nov. 7, 2012), <http://www.osce.org/hcnm/96883>; OSCE HCNM, *The Bolzano/Bozen Recommendations on National Minorities in Inter-State Relations* (June 2008), <http://www.osce.org/hcnm/33633>; OSCE & COUNCIL OF EUROPE, *THE NATIONAL MINORITY STANDARDS: A COMPILATION OF OSCE AND COUNCIL OF EUROPE TEXTS* (2007);

The legal nature of these documents is soft law, and they act as a kind of *sui generis* mixture of guidelines, best practices, codes of conduct, and manuals. This Article will not address the standard-setting activity of the European Union Intergroup, where deputies of different political persuasions are devoted to the minority rights issues within the European Parliament, which is currently attempting to create a comprehensive document for the sake of minority protection in Europe.<sup>7</sup>

Despite the important role of the OSCE in protecting minority rights in Europe, this Article will focus only on the Council of Europe, due largely to the similarities between its approaches and institutions and those of the Inter-American system. Under the Council of Europe, several treaty law instruments secure the protection of minorities: (1) the European Convention of Human Rights, (2) the European Charter for Regional or Minority Languages, (3) the Framework Convention for the Protection of National Minorities, and also (4) non-treaty soft law documents which serve as terms of reference for the monitoring of states' commitments in favor of minorities.<sup>8</sup> The ECHR is of particular importance to indigenous peoples issues, and its provisions are currently enforced by the European Court of Human Rights, which is discussed in greater detail below.

## II. PROTECTION OF INDIGENOUS COMMUNITIES IN THE EUROPEAN COURT OF HUMAN RIGHTS

If one compares the number of times that the ECtHR has addressed the issue of indigenous peoples' rights with that of the Inter-American Court of Human Rights, it is readily apparent that the ECtHR's jurisprudence on these issues is significantly less rich. Far fewer cases of this type have been adjudged in Strasbourg as

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OSCE HCNM, The Recommendations on Policing in Multi-Ethnic Societies (Feb. 2006), <http://www.osce.org/hcnm/32310>; OSCE HCNM, The Guidelines on the Use of Minority Languages in the Broadcast Media (Oct. 2003), <http://www.osce.org/hcnm/32310>; OSCE HCNM, The Lund Recommendations on the Effective Participation of National Minorities in Public Life & Explanatory Note (Sept. 1999), <http://www.osce.org/hcnm/30325>; OSCE HCNM, The Oslo Recommendations Regarding the Linguistic Rights of National Minorities & Explanatory Note (Feb. 1998), <http://www.osce.org/hcnm/67531>; OSCE HCNM, The Hague Recommendations Regarding the Education Rights of National Minorities (Oct. 1996), <http://www.osce.org/hcnm/32180>.

7. For more on this subject, see PRO MINORITATE EUROPAE—MINORITIES OF EUROPE UNITE! (Csaba Tabajdi ed., 2009).

8. Such non-treaty soft law documents include, first and foremost, standard-setting and monitoring documents adopted by the Committee of Ministers, the Parliamentary Assembly, and the Commissioner for Human Rights.

compared to Costa Rica. One significant reason for the disparity in jurisprudential quantity is itself a matter of numbers: there remain only a handful of indigenous communities in Europe today, such as the Sami (also known as the Lapps) of Scandinavia, and the various indigenous communities in the Northern and Siberian regions of Russia.<sup>9</sup> These groups are quite few in number compared to those in South and Central America, where over 800 distinct indigenous groups exist to this day.<sup>10</sup> The lack of indigenous communities remaining in Europe is a major reason that European minority rights protection has instead focused on the far more numerous communities of linguistic and religious minorities.

While the difference between the numbers of cases brought before the ECtHR and the IACHR involving indigenous communities can be explained by population figures, substantial discrepancies between the outcomes of such cases cannot be explained away so easily. Of the few cases addressed by the ECtHR and its predecessor, the European Commission of Human Rights, nearly every case was dismissed at the stage examining issues of admissibility without ever reaching the merits of the claims. A brief chronological synopsis of this jurisprudence follows.

#### A. *G. & E. Against Norway*

The Lapp community in Norway brought the first case by an indigenous European population before the European Commission on Human Rights.<sup>11</sup> The Lapps alleged that the construction of the Alta Hydroelectric Power Station, authorized by the Norwegian government, violated the property rights of the Lapps because it would result in the loss of traditional territories used for herding and fishing, activities that the Lapps claimed were essential to their way of life.<sup>12</sup> Prior to initiation of the case, members of the Lapps held reportedly violent political demonstrations before the Norwegian parliament.<sup>13</sup> Thus, in addition to the claims of loss of tradi-

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9. In Russia, these include the Samoyeds, Yakuts, Khantis, and the Manysis, among others. *Indigenous Peoples of the North*, <http://www.arctic-info.com/Encyclopedia/Rubric/indigenous-peoples-of-the-north> (last visited May 27, 2015); see also Nikolai Vakhtin, *Native Peoples of the Russian Far North*, in POLAR PEOPLES: SELF DETERMINATION AND DEVELOPMENT 29, 29-80 (Minority Rights Group ed., 1994).

10. See *Guaranteeing Indigenous People's Rights in Latin America*, ECON. COMM'N FOR LATIN AM. & THE CARIBBEAN 38 (2014), [http://repositorio.cepal.org/bitstream/handle/11362/37051/S1420782\\_en.pdf?sequence=4](http://repositorio.cepal.org/bitstream/handle/11362/37051/S1420782_en.pdf?sequence=4).

11. *G. & E. v. Norway*, App. No. 9278/81, 35 Eur. Comm'n H.R. Dec. & Rep. 30 (1983).

12. See *id.* at 31-32.

13. See *id.* at 31.

tional herding lands, the application before the Commission in Strasbourg also alleged violations of freedom of speech related to the demonstrations.<sup>14</sup>

The European Commission on Human Rights *in abstracto* recognized not only the applicability of the right to protection of property through ECHR Protocol 1, Article 1,<sup>15</sup> but also recognized the inherent links between the construction activity and ECHR Article 8's right to privacy<sup>16</sup> in *lato sensu*. The court ultimately decided against the Lapps, however.<sup>17</sup>

Concerning the protection of property, the Commission denied the complaint as lacking sufficient evidence.<sup>18</sup> On the issue of privacy, the Commission was significantly more verbose, stating that the construction of the power plant "could interfere with the applicant's possibilities of enjoying the right to respect for their private life."<sup>19</sup> Nevertheless, when compared to the vast areas of northern Norway used for reindeer herding and fishing, the Commission concluded that the Lapp community would lose only a "comparatively small area" of herding land as a result of the Alta River project.<sup>20</sup>

Despite the Commission's ultimate finding against the Lapps on both the property and privacy elements of their claim, its reasoning evidenced an openness to the idea that the right to privacy could

14. *See id.* at 37.

15. Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms art. 2, enacted Mar. 20, 1952, E.T.S. 5, 213 U.N.T.S. 222 [hereinafter European Human Rights Convention Protocol]. ("Protection of property: Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law. The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.") [hereinafter European Human Rights Convention Protocol].

16. Convention for the Protection of Human Rights and Fundamental Freedoms arts. 26, 30 Nov. 4, 1950, 213 U.N.T.S. 222 [hereinafter European Human Rights Convention] ("Right to respect for private and family life: 1. Everyone has the right to respect for his private and family life, his home and his correspondence. 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic wellbeing of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.") [hereinafter European Human Rights Convention].

17. *See G. & E.*, 35 Eur. Comm'n H.R. Dec. & Rep. at 37-38.

18. *See id.* at 36.

19. *See id.*

20. *See id.*

extend to the protection of the ethnic identity of indigenous peoples.

### B. *O.B. and Others Against Norway*

The *O.B. and Others Against Norway* dispute arose from the arrival of non-Sami peoples to the traditional grazing territories of the Skolte Sami.<sup>21</sup> The Skolte Sami,<sup>22</sup> a distinct geographic group within the Sami communities of Norway, follow a traditional way of life that includes fishing, hunting, and reindeer herding. The Skolte Sami were concerned that the new settlers, having acquired property rights, would interfere with Sami use of traditional reindeer grazing lands, and subsequently filed a request with the local administration to grant the Skolte Sami “an exclusive right to reindeer husbandry on the basis of immemorial usage.”<sup>23</sup> The local administration instead registered the new inhabitants and then rejected a Sami counterclaim, stating that it was a legal dispute belonging to the judiciary.<sup>24</sup> Following a lengthy litigation process, the Sami lost their case before both the District Court and on appeal to the High Court; the Supreme Court of Norway did not grant leave to the appeal.<sup>25</sup>

The case was then brought before the European Commission on Human Rights pursuant to ECHR Articles 6 and 14.<sup>26</sup> The Commission rejected as unsubstantiated the Sami’s claims contesting the fairness of the home trial, holding that “the Norwegian courts are established on the basis of Norwegian culture, values and way of life and thinking. Therefore they are not impartial when determining the rights of a national minority belonging to another cul-

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21. *O.B. & Others v. Norway*, App. No. 15997/90, Eur. Comm’n H.R. Dec. & Rep. 1 (1993), <http://hudoc.echr.coe.int/app/conversion/pdf/?library=ECHR&id=001-1462&filename=001-1462.pdf&TID=IHgdqbxnfi>.

22. Note that the European Commission of Human Rights and the European Court of Human Rights sometimes used the expression “Saami” instead of “Sami” in both the titles and text of decisions. “Sami” is used throughout this Article for the purposes of consistency, except where used in official case titles or quotations.

23. *See O.B. & Others*, App. No. 15997/90, Eur. Comm’n H.R. Dec. & Rep., at 2.

24. *See id.*

25. *See id.* at 4–7.

26. *See id.* at 8; European Human Rights Convention, *supra* note 16, art. 6 (“Right to a fair trial: In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.”); *id.* art. 14 (“Prohibition of discrimination: The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.”).

ture and having another way of thinking and determining natural rights.”<sup>27</sup> The Commission emphasized, however, that in Strasbourg, the independence of tribunals is analyzed according to both objective and subjective tests, and it found no major problem vis-à-vis the Norwegian judiciary.<sup>28</sup> Furthermore, the Commission considered the four year legal process to be a reasonable length.<sup>29</sup>

As far as the violation of the right to property was concerned, the Commission noted that even if “the applicants’ complaint that they have been deprived of their exclusive right to reindeer husbandry in the area in question” was correct, that legal conclusion did not decide the matter.<sup>30</sup> The Commission invoked the interpretation of Norwegian courts and arrived at the conclusion that the Sami “indeed have a right—although not an exclusive one—to reindeer husbandry and it does not appear that this right has been interfered with or controlled in a way not acceptable under . . . the Convention.”<sup>31</sup> The parts of the complaint based on Articles 6 and 14 were rejected with formalistic arguments.<sup>32</sup>

In essence, although the Commission again recognized that the indigenous Sami peoples have some rights to property to conduct their traditional way of life, the Commission still found other reasons to decide against the indigenous peoples.

### C. *Könskämä and 38 Other Saami Villages Against Sweden*<sup>33</sup>

In another case involving a group of Sami peoples, several Sami villages complained against the modification of the Swedish legal regime for hunting, fishing, and herding, which would require licenses when such activities occurred within state-owned territories.<sup>34</sup> The Commission examined the complaints based on Articles 6 and 14 of the ECHR and Article 1 of Protocol 1, and recognized that “the exclusive hunting and fishing rights claimed by the applicant Saami villages . . . can be regarded as possessions

27. See O.B. & Others, App. No. 15997/90, Eur. Comm’n H.R. Dec. & Rep., at 8–9.

28. See *id.* at 9.

29. See *id.* at 10–11.

30. See *id.*

31. The invocation of Article 8 occurred not at the beginning of the proceeding, but after the 6 month time limit. As far as concerned Article 14, the applicants invoked it alone and not in conjunction with another article, according to the well-established jurisprudence that suggests its autonomous character. See *id.*

32. See *id.* at 11–12.

33. *Könskämä & 38 Other Saami Villages v. Sweden*, App. No. 27033/95, Eur. Comm’n H.R. Dec. & Rep. (1996), <http://hudoc.echr.coe.int/app/conversion/pdf/?library=ECHR&id=001-3390&filename=001-3390.pdf&TID=THkbhnilzk>.

34. See *id.* at 2.

within the meaning of Article 1 of Protocol 1.” Moreover, the Commission recognized first that “it is not disputed that the applicant Saami villages are to be regarded as non-governmental organisations,” and second that “the central issue is whether the Saami villages were holders of exclusive hunting and fishing rights and the question arises whether they had any remedy in this respect before the Swedish courts.”<sup>35</sup>

Before reaching the merits of the case, however, the Commission declared the complaints inadmissible because the Sami failed to exhaust local remedies.<sup>36</sup> By the time this case reached the Commission, the Commission’s pattern was well established: although it again recognized some legitimacy of the indigenous peoples’ complaints, it found procedural grounds to dismiss the case.<sup>37</sup>

#### D. *Halvar FROM Against Sweden*<sup>38</sup>

In yet another case involving the Sami peoples of Sweden, a non-Sami Swedish citizen sought protection of his land from hunting by the Sami, whose state-defined territorial boundaries overlapped with his own land.<sup>39</sup> Although Swedish law recognized traditional Sami herding regions, it did not exclude the acquisition of property rights in those same fields and forests by other Swedish citizens in accordance with the Swedish civil code.<sup>40</sup> The applicant did not empathize with the servitude endured by the Sami and invoked his own right to protection of property, pursuant to ECHR Article 1 of Protocol 1.<sup>41</sup>

This case was among the few instances where the Commission spoke openly about the necessity of protecting the traditional Sami way of life, and the Commission ultimately held in the Sami’s favor. The Commission noted that “the decision to include the applicant’s property in the relevant Sami village’s elk-hunting area was taken in accordance with the provisions of the Swedish Hunting Act and Reindeer Herding Act.”<sup>42</sup> Under this act, the Sami’s right to hunt—which the Commission analogized to their right to herd reindeer—in the areas of northern Sweden where the applicant’s

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35. *See id.* at 8.

36. *See id.* at 9.

37. *See id.*

38. Halvar FROM v. Sweden, App. No. 34776/97, Eur. Comm’n H.R. Dec. & Rep. (1998), <http://hudoc.echr.coe.int/eng?i=001-4167>.

39. *See id.* at 1.

40. *See id.*

41. *See id.* at 2.

42. *See id.* at 3.

property was located, was based on “custom from time immemorial” and therefore trumped the applicant’s claims.<sup>43</sup> The Commission further found it to be “in the general interest that the special culture and way of life of the Sami be respected,”<sup>44</sup> and that “reindeer herding and hunting are important parts of [Sami] culture and way of life.”<sup>45</sup> Thus, the Commission clearly recognized the relationship between traditional husbandry and Sami ethnic identity.

#### E. *Johtti Sappmelaccat RY and Others Against Finland*<sup>46</sup>

The European Court of Human Rights heard this case, the Commission having ceased operation at this point. Still, formalistic obstacles formed the basis for inadmissibility. The case background concerns an amendment to the Finnish Fishing Act of 1997 introducing a licensing system by which permanent residents in several municipalities became entitled to enjoy public fishing rights within state-owned waters.<sup>47</sup> The applicants, an association dedicated to the promotion of Sami culture and several of the association’s members, argued that the amendment weakened the position of landless Sami peoples whose fishing rights were guaranteed in the constitution for time immemorial.<sup>48</sup> It was further alleged that the amendment violated Sami rights under ECHR Articles 6, 8, 13, and 14, and Article 1 of Protocol 1.<sup>49</sup>

The European Court of Human Rights did not recognize primary applicant Johtti Sappmelaccat RY’s standing, on the grounds that it could not, as an organization, be considered a victim of the impugned legislation.<sup>50</sup> In contrast, the Sami villages in Sweden were permitted to appear before the Commission.<sup>51</sup> The remaining four applicants, Sami members of the organization, could not substantiate their complaint as they had not “appreciably shown

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43. *See id.* at 2.

44. *See id.* at 3.

45. *See id.*

46. Johtti Sappmelaccat RY, App. No. 42969/98, Eur. Ct. H.R. (2005), <http://hudoc.echr.coe.int/eng?i=001-68136>.

47. *See id.* at 2–3.

48. *See id.* at 2, 11.

49. *See id.* at 10–11; European Human Rights Convention, *supra* note 16, arts. 6, 8, 13–14 (“Right to an effective remedy: Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.”); European Human Rights Convention Protocol, *supra* note 15, Prot. 1, art. 1.

50. *See* Johtti Sappmelaccat RY, App. No. 42969/98, Eur. Ct. H.R., at 12.

51. *See id.*

the adverse impact of the 1997 amendment of the Fishing Act on their concrete possibilities to exercise their traditional fishing rights.”<sup>52</sup> The Court further noted that the restriction on the use of certain fishing equipment stemmed from the legitimate objective of protecting fish stocks.<sup>53</sup>

The Court emphasized, however, that the “precise scope of the traditional fishing and other rights belonging to the Sami population was not determined at the relevant time,”<sup>54</sup> finding it to be “a complex legal, historical and political issue.”<sup>55</sup> The Court concluded that the 1997 amendment of the Fishing Act was not intended to curb the rights of the Sami population, such as they existed at the time,<sup>56</sup> but was, based on the *travaux préparatoires*, intended to protect the rights of both the Sami and the other local residents to the fish stocks.<sup>57</sup>

It should be emphasized that the Court seemed to cautiously consider *in abstracto* the Sami’s right to the fishing stocks “based on custom from time immemorial.”<sup>58</sup> The Court described this right at length in its presentation of the circumstances of the case and the respective pieces of legislation, even if ultimately the court did not find an infringement of the Sami’s traditional rights.<sup>59</sup>

#### F. *The Muonio Saami Village Against Sweden*<sup>60</sup>

The applicant in this case, another Sami village in Sweden, submitted a complaint when three non-Sami people were guaranteed a license for reindeer herding in a Sami village.<sup>61</sup> At the same time, the license was denied for five Sami individuals living in the traditional territory.<sup>62</sup> As the decisions concerning who would receive a license were within the broad discretion of an administrative body, the local tribunals lacked authority to overturn the decisions.<sup>63</sup>

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52. *See id.* at 18.

53. *See id.*

54. *See id.* at 17.

55. *See id.*

56. *See id.*

57. *See id.*

58. *See id.* at 2, 4.

59. *See id.* at 18.

60. *The Muonio Saami Village v. Sweden*, App. No. 28222/95, Eur. Ct. H.R. (2000), <http://hudoc.echr.coe.int/eng?i=001-5078>.

61. *See id.* at 2.

62. *See id.*

63. *See id.*

Based on Article 6 of the ECHR, the Court declared the complaint admissible.<sup>64</sup> But because a friendly settlement between the government and the village was reached shortly thereafter, the application was soon struck from the docket.<sup>65</sup> Although the merits were never reached, this case represents an important example of the Court allowing an indigenous peoples case to pass the admissibility threshold.

### G. *HINGITAG 53 Against Denmark*<sup>66</sup>

The roots of this case relate to the construction of a U.S. naval base in the Thule District of Denmark, on the Dundas peninsula, and the subsequent resettlement of the Thule tribe, a local indigenous Inuit population.<sup>67</sup> The first U.S. military constructions were built on the peninsula during World War II pursuant to an agreement with Danish ministers in exile, and the constructions were later enlarged.<sup>68</sup> The Thule tribe was forced to relocate from the peninsula and leave its traditional villages, churches, and graveyards behind.<sup>69</sup> In the 1950s, the Danish government promised to compensate the inhabitants, but the negotiations were conducted at a slow pace; the documents containing the original written promises disappeared in the 1960s before being rediscovered in 2000.<sup>70</sup>

A compensation program was adopted in 1985 by the Danish government, whereby the Thule tribe and the individual members of the relevant Inuit community were given monetary and material damages.<sup>71</sup> The government's damages determination took into consideration the fact that the tribe traditionally lived not only by fishing, but also by hunting narwhals, seals, and foxes; immaterial damages, such as those caused by the resettlement and abandon-

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64. *See id.* at 6; European Human Rights Convention, *supra* note 16, art. 6.

65. *See* The Muonio Saami Village, App. No. 28222/95, Eur. Ct. H.R., at 4, §§ 13–14.

66. *HINGITAG 53 v. Denmark*, App. No. 18584/04, Eur. Ct. H.R. (2006), <http://hudoc.echr.coe.int/eng?i=001-72219>.

67. *See id.* at 2.

68. *See id.* at 2–3.

69. *See id.* at 3.

70. *See id.*

71. In this context, “material damages” are losses in property and economic possibilities. In 1999, the Danish High Court decided that the tribe should receive half a million DKK (approximately 66,666 Euros), and the individual members should each be granted either 25,000 DKK (approximately 3,333 Euros) or 15,000 DKK (approximately 2,000 Euros), based on whether they were adults or children in the 1950s. The Supreme Court of Denmark upheld the decision in 2003. *See id.* at 8–12.

ment of cemeteries, were also considered.<sup>72</sup> The Danish state built new houses for the concerned Inuits and the military presence on the peninsula was reduced by half following a subsequent Danish-U.S. agreement.<sup>73</sup>

The Thule tribe brought the case before the ECtHR, which, in addition to the facts above, considered the timing of the military appropriation of the Thule territories.<sup>74</sup> Because the appropriation occurred before the entry into force of the ECHR commitment, the Court found its jurisdictional competence hampered *ratione temporis*.<sup>75</sup> Thus, the Court declared the application inadmissible because “the national authorities did strike a fair balance between the proprietary interests of the persons concerned and [the Court was] satisfied that the present case [did] not disclose any appearance of a violation of Article 1 of Protocol No. 1.”<sup>76</sup>

#### H. *Handölsdalen Sami Village and Others Against Sweden*<sup>77</sup>

This case arose out of a legal dispute between one region’s Sami inhabitants and non-Sami landowners. The landowners wanted to impose local geographical limits on reindeer herding.<sup>78</sup> The Sami applicants complained on the basis of ECHR Article 6, emphasizing the high procedural costs of the legal proceedings, the duty to pay damages in case of a procedural loss, and the fact that only individuals were entitled to legal aid while a legal entity, such as a Sami village, was not.<sup>79</sup> The applicant’s complaint also concerned the duration of the proceedings.<sup>80</sup> While the Court did not agree with the majority of the applicant’s procedural complaints, the Court did conclude that the proceeding’s delay of thirteen years and seven months was excessive.<sup>81</sup>

One very important aspect of this judgment was the language used by the Court to discuss reindeer herding. The Court mentioned several times in its opinion that “the reindeer herding right

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72. *See id.* at 6. “Immaterial damages” refers to moral damages.

73. *See id.* at 20.

74. *See id.* at 16.

75. *See id.* at 18.

76. *See id.* at 20; European Human Rights Convention Protocol, *supra* note 15, Prot. 1, art. 1.

77. *Handölsdalen Sami Village & Others v. Sweden*, App. No. 39013/04, 49 Eur. Ct. H.R. 15 (2010), <http://hudoc.echr.coe.int/eng?i=001-97993>.

78. *See id.* at 2, §§ 7–8; European Human Rights Convention, *supra* note 16, art. 6.

79. *See Handölsdalen Sami Village & Others v. Sweden*, 49 Eur. Ct. H.R., at 10–11, § 49.

80. *See id.* at 14, § 60.

81. *See id.* at 12–13, 15, §§ 53, 59, 65–66.

is a usufruct of economic value founded on prescription from time immemorial.”<sup>82</sup> Although these sentences were inserted into the section of the judgment devoted to the presentation of the facts, this language was not a mere recitation of the applicants’ submissions, but the Court’s own characterization of the importance of reindeer herding to Sami culture.

### I. *Chagos Islanders Against United Kingdom*<sup>83</sup>

This final ECtHR case originated with the construction of the famous Diego Garcia U.S. naval base in the 1960s, which forced the inhabitants of the Chagos islands to leave their ancestral homeland beginning in 1967.<sup>84</sup> The case implicates several unique questions given that the Chagos islands, although located in the Indian Ocean, are under the administration of the United Kingdom<sup>85</sup>; the United Kingdom considers the islands “dependencies” to which the protection of the ECHR does not apply.<sup>86</sup> Following their forced exodus from the island, one group of islanders was resettled on the Seychelles and the other on Mauritius.<sup>87</sup> The United Kingdom granted compensation to those who were resettled on Mauritius, but those resettled on Seychelles were not compensated at all.<sup>88</sup>

The complaint brought by the islanders was based on Articles 3, 6, 8, and 13 of the ECHR and on Article 1 of Protocol 1,<sup>89</sup> but was declared inadmissible on several grounds, primarily *ratione loci*, *ratione temporis*, *ratione materiae*, and *ratione personae*.<sup>90</sup> Most of these grounds were linked to the special public law status of the Chagos archipelago within the British Indian Ocean Territory.<sup>91</sup> The dependencies were under the protection of the ECHR only if the United Kingdom extended application of the ECHR by a distinct declaration. Not all the dependencies, however, were in the same

82. *See id.* at 8–9, § 39.

83. *Chagos Islanders v. United Kingdom*, App. No. 35622/04, 56 Eur. Ct. H.R. (2012), <http://hudoc.echr.coe.int/eng?i=001-115714>.

84. *See id.* at 3, § 8.

85. *See id.* at 2–5, §§ 3, 6–7, 10, 16.

86. *See id.*; *id.* at 9–10, §§ 38–39.

87. *See id.* at 3–4, § 11.

88. *See id.*

89. European Human Rights Convention, *supra* note 16, arts. 3, 6, 8, 13 (“Prohibition of torture: No one shall be subjected to torture or to inhuman or degrading treatment or punishment.”); European Human Rights Convention Protocol, *supra* note 15, Prot. 1, art. 1.

90. *See Chagos Islanders*, 56 Eur. Ct. H.R., at 8–9, §§ 32–36.

91. *See id.* at 10–11, § 38–41.

sort of protective limbo.<sup>92</sup> The Chagos' legal status had to be taken into account, as well as the *ratione temporis* factor, the time of the expulsion and resettlement, compensations to date, and the subsequent domestic proceedings.<sup>93</sup>

These ambiguities, accentuated by a complicated British jurisprudence on the matter, militated against the jurisdictional competence of the ECtHR.<sup>94</sup> Moreover, those applicants who had been compensated in 1982 by the United Kingdom via Mauritius were not considered to be victims by the Court, and thus did not have standing.<sup>95</sup> The remaining claims failed on the basis that local remedies had not been exhausted.<sup>96</sup> Consequently, the Court declared all the applications as manifestly ill-founded without making any concrete pronouncements on the merits of the legal arguments of the indigenous peoples.<sup>97</sup>

### III. CRITICAL APPRECIATION FOR THE ECtHR'S INDIGENOUS PEOPLES JURISPRUDENCE

The aforementioned cases of the European Commission on Human Rights and the ECtHR plainly demonstrate a problem which has been observed for years: no real judgment has ever been pronounced on indigenous peoples issues by these tribunals. The above (exhaustively) enumerated cases generally represent decisions on admissibility; although the merits of the claims of indigenous peoples were mentioned in several cases, both the European Commission of Human Rights and the ECtHR dismissed each case on procedural grounds.

Not only has the ECtHR failed to reach the merits on any case involving indigenous peoples, but the number of cases that even address these issues is quite small. If one compares the handful of indigenous peoples cases that were dismissed with the 17,754 *in merito* or "real judgments" pronounced in Strasbourg since the establishment of the Court,<sup>98</sup> the disparity becomes fairly striking. Even comparing the number of indigenous peoples cases with the

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92. See *id.* at 9–10, § 38; *id.* at 17–18, §§ 61–62.

93. See *id.* at 22–23, §§ 80–81.

94. The Court ultimately found it unnecessary to pass judgment on the geographical applicability of the ECHR given its finding that the applicants had not satisfied the eligibility criteria to be recognized as victims. See *id.* at 22, §§ 76–77.

95. See *id.* at 22, § 78.

96. See Chagos Islanders, 56 Eur. Ct. H.R. at 24–26, §§ 83, 86–87.

97. See *id.*

98. See *The ECHR in Facts & Figures 2014*, EUR. CT. H.R. 6 (2015) (year-by-year figures) [http://www.echr.coe.int/Documents/Facts\\_Figures\\_2014\\_ENG.pdf](http://www.echr.coe.int/Documents/Facts_Figures_2014_ENG.pdf).

roughly fifty judgments issued by the Court concerning linguistic or ethnic minorities, the figures remain disappointing.<sup>99</sup> Although since 2000 the Court has evinced some openness to addressing European minority grievances, such as those of the Roma/Tzigane, that willingness was not followed by new efforts to address the problems of indigenous peoples.<sup>100</sup>

Scholars have taken note of the dearth of indigenous peoples jurisprudence and have offered many critical analyses of the Court's approach. Gismondi, for one, argues that the European Court of Human Rights has not always taken a progressive approach and treated the ECHR as a living instrument, but has instead taken the more conservative position of preserving common European values.<sup>101</sup> Gismondi concludes that the "narrow interpretation of Protocol I continues to undermine the cultural preservation of indigenous peoples."<sup>102</sup> Gismondi is particularly critical in regard to the *HINGITAG 53* case. In her opinion, the Court's acceptance of the substitute homeland provided for the Inuits in *HINGITAG 53* represents yet another case where "the European Court's analysis failed to consider the significance of lands for the physical and cultural integrity of indigenous peoples."<sup>103</sup> Koivurova is likewise skeptical of the Court's approach, noting that "even if there are promising signs, it is useful to keep in mind that indigenous peoples have received only scant protection for their rights from the European Commission and the Court of Human Rights."<sup>104</sup>

Some scholars, such as Otis and Laurent, are more generous toward the Court's position, writing that:

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99. See *id.* at 7.

100. See ANIKO SZALAI, PROTECTION OF THE ROMA MINORITY UNDER INTERNATIONAL AND EUROPEAN LAW 119 (2015).

101. See Giovanna Gismondi, *Denial of Justice: The Latest Indigenous Land Disputes Before the European Court of Human Rights and the European Court of Human Rights and the Need for an Expansive Interpretation of Protocol I*, YALE HUM. RTS. & DEV. L.J. (Summer 2015) (manuscript at 45), [https://works.bepress.com/giovanna\\_gismondi/1/](https://works.bepress.com/giovanna_gismondi/1/).

102. *Id.* at 45.

103. *Id.* at 24. It bears noting that in exceptional or irreversible circumstances, the Inter-American Court of Human Rights also considers the substitution of territory to be a legitimate practice. See also Mauricio Del Toro Huerta, *Los Aportes de la Jurisprudencia de la Corte Interamericana de Derechos Humanos en la Configuración del Derecho de Propiedad Colectiva de los Miembros de Comunidades y Pueblos Indígenas*, YALE L. SCH. LEGAL SCHOLARSHIP RESPOSITORY, SELA PAPERS 17 (2008), [www.law.yale.edu/documents/pdf/sela/Del\\_Toro.pdf](http://www.law.yale.edu/documents/pdf/sela/Del_Toro.pdf).

104. Timo Koivurova, *Jurisprudence of the European Court of Human Rights Regarding Indigenous Peoples: Retrospect and Prospects*, 18 INT'L J. MINORITY & GROUP RTS. 1, 28 (2011).

[T]he 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.<sup>105</sup>

Otis and Laurent believe that “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.”<sup>106</sup> Professors Otis and Laurent are convinced that “by recognizing ancestral tenure, the Court would not be abdicating its role of guarantor of individual rights and freedoms because it would be required to ensure that the exercise of this tenure was subject to those rights.”<sup>107</sup>

The evolution of the ECtHR’s jurisprudence on indigenous peoples, however, is arguably hampered by sociological and demographic factors: for indigenous or tribal groups such as “the Inuit of Greenland and the Saami of Scandinavia[,] their numbers were too small and their location on the outskirts of Europe too remote for them to enter the popular European awareness.”<sup>108</sup> Sympathizers with indigenous peoples can, perhaps, trust somewhat in “the emerging global consensus on indigenous rights, stemming from the non-binding [United Nations] Declaration on the Rights of Indigenous Peoples.”<sup>109</sup> This declaration could have a positive influence on the jurisprudence in Strasbourg, obliging the ECtHR “to develop an autonomous interpretation of what property rights means for indigenous peoples.”<sup>110</sup>

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105. Ghislan Otis & Aurélie Laurent, *Indigenous Land Claims in Europe: The European Court of Human Rights and the Decolonization of Property*, 4 ARCTIC REV. L. & POL. 156, 173 (2013).

106. *Id.* at 177.

107. *Id.* at 179.

108. See Koivurova, *supra* note 104, at 29.

109. See *id.* at 31–32; see also Anikó Szalai, *Same Target from Different Angles? Anti-discrimination, Protection of Minorities and the Rights of Indigenous Peoples in the UN*, PÉCS J. INT’L & EUR. L. 30, 38 (2014), [http://epa.oszk.hu/02600/02691/00001/pdf/EPA02691\\_pjjiel\\_2014\\_1\\_030-044.pdf](http://epa.oszk.hu/02600/02691/00001/pdf/EPA02691_pjjiel_2014_1_030-044.pdf) (On this declaration and its impact on the protection of “historical” minorities).

110. See Koivurova, *supra* note 104, at 34.

## IV. INDIGENOUS ISSUES IN THE INTER-AMERICAN SYSTEM

It is widely recognized that if one compares the aforementioned ECtHR jurisprudence on indigenous peoples with that of the Inter-American system, the human rights protection mechanism in the Americas is significantly more developed than its European counterpart.<sup>111</sup> This disparity is exemplified by the fact that not only have indigenous peoples' claims come before the Inter-American Commission and the Inter-American Court, but the Courts have issued *in merito* judgments on these issues as well.<sup>112</sup> The impressive series of judgments from the IACHR can perhaps be linked to the fact that corresponding articles of the Inter-American Convention of Human Rights were formulated in a more robust fashion than their European analogs in the ECHR.

*Prima facie*, the wording of Article 21<sup>113</sup> of the Inter-American Convention of Human Rights, addressing the right to property, is not much different from the ECHR's version. Provisions concerning respect for privacy, however, are significantly more generous in the Inter-American system, including an invocation of the right to dignity<sup>114</sup> and an autonomous prohibition on discrimination.<sup>115</sup>

Within the Inter-American jurisprudence, the analyses of many legal scholars<sup>116</sup> generally include many of the same ten cases, all

111. See Elisa Ruozi, *Indigenous Rights and International Human Rights Courts: Between Specificity and Circulation of Principles*, APSA 2011 ANN. MEETING PAPER 8 (2011).

112. See *id.*

113. Compare Organization of American States, American Convention on Human Rights, ch. 1, art. 21, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123 ("Right to Property: 1. Everyone has the right to the use and enjoyment of his property. The law may subordinate such use and enjoyment to the interest of society. 2. No one shall be deprived of his property except upon payment of just compensation, for reasons of public utility or social interest, and in the cases and according to the forms established by law. 3. Usury and any other form of exploitation of man by man shall be prohibited by law.") [hereinafter American Convention on Human Rights], with European Human Rights Convention Protocol, *supra* note 15, Prot. 1, art. 1 ("Every natural and legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.").

114. American Convention on Human Rights, *supra* note 113, ch. 1, art. 11 ("Right to Privacy: 1. Everyone has the right to have his honor respected and his dignity recognized. 2. No one may be the object of arbitrary or abusive interference with his private life, his family, his home, or his correspondence, or of unlawful attacks on his honor or reputation. 3. Everyone has the right to the protection of the law against such interference or attacks.").

115. *Id.* art. 24 ("Right to Equal Protection: All persons are equal before the law. Consequently, they are entitled, without discrimination, to equal protection of the law.").

116. See, e.g., Dieter Kugelmann, *The Protection of Minorities and Indigenous Peoples Respecting Cultural Diversity*, 11 MAX PLANCK Y.B. U.N. L. ONLINE 1, 233–63 (2007); Valerio de

of which could be considered indigenous peoples cases.<sup>117</sup> While the Author of this Article is no expert on the jurisprudence of the Inter-American system, and this Article is not intended to provide a deep analysis of its courts' decisions, a brief look at these cases reveals a major difference between Inter-American and European practice: the former's courts have pronounced a number of *in merito* judgments on indigenous peoples cases and have not limited themselves to dismissing cases on formalistic procedural grounds.<sup>118</sup>

The path towards *in merito* judgments on indigenous peoples cases has not always been easy for the IACHR. For example, in the 1990s, Dinah Shelton critiqued the Inter-American Court's decision in the *Saramaka People* case, first, for not following the proposal of the Inter-American Commission to be more open to the interests of the tribal peoples, and second, for failing to balance "uniformity and diversity, as it extends some benefits to those not commonly treated as successors while rejecting the interests of the tribe as a whole. The latter position conservatively fails to acknowledge the uniqueness of tribal societies."<sup>119</sup> The Author of the present Article believes that since that time, the Inter-American Court has arrived much closer to the direction that Professor Shelton thought necessary.

The right to the protection of property was confirmed both in principle and in practice in favor of the indigenous tribal commu-

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Oliveira Mazzuoli & Dilton Ribeiro, *Indigenous Rights before the Inter-American Court of Human Rights: A Call for a Pro Individual Interpretation*, 56 HARV. INT'L L.J. 1, 13 (2015).

117. See *Kichwa Indigenous People of Sarayaku v. Ecuador*, Merits & Reparations, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 245 (June 27, 2012); *Indigenous Communities of the Xingu River Basin in Pará v. Brazil*, Inter-Am. Comm'n H.R., Apr. 11, 2011, (PM 382/10); *Salvador Chiriboga v. Ecuador*, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 222 (Mar. 3, 2011); *Xákmok Kásek Indigenous Community v. Paraguay*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 214 (Aug. 24, 2010); *Saramaka People v. Suriname*, Preliminary Objections, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 172 (Nov. 28, 2007); *Sawhoyamaya Indigenous Community v. Paraguay*, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 146 (Mar. 29, 2006); *Yakye Axa Indigenous Community v. Paraguay*, Inter-Am. Ct. H.R. (ser. C) No. 125 (June 17, 2005); *Moiwana Community v. Suriname*, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 124 (June 15, 2005); *Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, Inter-Am. Ct. H.R. (ser. C) No. 79 (Aug. 31 2001); IACHR, Report No. 96/03, Case 12.053, *Maya Indigenous Communities of the Toledo District* (Belize), October 24, 2003, ¶ 1.

118. See, e.g., *Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 79 (Aug. 31, 2001).

119. Dinah Shelton, *The Jurisprudence of the Inter-American Court of Human Rights*, 10 AM. U. J. INT'L L. & POL'Y at 333, 367 (1994–1995).

nities by the Inter-American tribunals. In *Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, the IACHR held that:

[O]wnership of the land is not centered on an individual but rather on the group and its community. Indigenous groups, by the fact of their very existence, have the right to live freely in their own territory; the close ties of indigenous people with the land must be recognized and understood as the fundamental basis of their cultures, their spiritual life, their integrity, and their economic survival.<sup>120</sup>

Notably, the Inter-American Commission on Human Rights considered that the right to property exists not only pursuant to the Inter-American Convention, but also arises from contemporary treaty and customary law.<sup>121</sup> The IACHR further held that states have a “sacred compromise to provide special protection for indigenous peoples”<sup>122</sup> and it considered that “the protection of [indigenous peoples’ rights] does not only imply the protection of an economic unit, but also aims at shielding a community from outside interference with their cultural and social development, which is inextricably linked to their relationship with their lands.”<sup>123</sup>

Recently, in the *Yakye Axa* case, the IACHR developed a promising approach to indigenous peoples’ rights, linking basic human rights to the concept of dignity, or, more precisely, the right to live with dignity:

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120. See *Mayagna Awas Tingni Community v. Nicaragua*, Inter-Am. Ct. H.R. (ser. c) No. 79/149.

121. *Mary and Carrie Dan v. United States*, Case 11.140, Inter-Am. Comm’n H.R., Report No. 75/02, OEA/Ser.L./V/II.117, doc. 5 rev. 1 ¶¶ 125, 139 (2002) (The Inter-American Commission pronounced this in the case of *Mary and Carrie Dann v. United States*. The Commission found that measures taken by the United States “were not sufficient to comply with contemporary international human rights norms, principles and standards that govern the determination of indigenous property interests.” These norms require that the “consideration of [indigenous peoples’] particular historical, cultural, social, and economic situation and experience” including special attention to the “connection between communities of indigenous peoples and the lands and resources that they have traditionally occupied and used, the preservation of which is fundamental to the effective realization of the human rights of indigenous peoples more generally and therefore warrants special measures of protection”); see also Alex Page, *Indigenous Peoples’ Free and Informed Consent in the Inter-American Human Rights System*, 4 SUSTAINABLE DEV. L. & POL., 16, 18 (2004) (“To fulfill its obligations under the American Convention, the Commission found that Nicaragua was required to ‘officially delimit, demarcate, and title the lands belonging to the Awas Tingni Community within a maximum period of 15 months, with the full participation of, and considering the customary law, values, usage, and customs of, the Community.’”).

122. See Diana Contreras-Garduño, Diana & Sebastian Rombouts, *Collective Reparations for Indigenous Communities Before the Inter-American Court of Human Rights*, 27 MERKOURIOS-UTRECHT J. INT’L & EUR. L. 1, 13 (2010).

123. *Id.*

Special detriment to the right to health, and closely tied to this, detriment to the right to food and access to clean water, [can] have a major impact on the right to a decent existence and basic conditions to exercise other human rights, such as the right to education or the right to cultural identity.<sup>124</sup>

*Yakye Axa* seems to indicate that further evolution of the right to live with dignity might form the basis of future developments in the IACHR's indigenous peoples jurisprudence.

It is important, however, to remember a major weakness of the Inter-American approach: states are sometimes reluctant, if not openly hostile, to the Court's jurisprudential innovations.<sup>125</sup> One example is the Brazilian boycott of the Organization of the American States to protest a provisional *interim* decision of the IACHR requesting the suspension of construction of the Belo Monte hydroelectric power plant.<sup>126</sup> Marcia Nina Bernardes notes, "Even today, the Brazilian government appears to be resistant to the scrutiny of its public policies by international bodies."<sup>127</sup>

Matters of industrialization or great infrastructural enterprises provide another example. In one case, the Inter-American jurisprudence confirmed the right of indigenous peoples to a consultation.<sup>128</sup> The Court viewed the right to a consultation as necessary to protect the right to property.<sup>129</sup> Such consultations are to be engaged in "with the aim of reaching an agreement or obtaining consent regarding the proposed measures."<sup>130</sup> The consultation should be "active and effective and not scenical."<sup>131</sup> The "free prior informed consent," as Alanis emphasizes, should be taken in conformity with customs and traditions of the concerned indige-

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124. *Yakye Axa Indigenous Community v. Paraguay*, Inter-Am. Ct. H.R. (ser. C) No. 125, ¶ 167 (June 17, 2005).

125. See Aniko Raisz, *Indigenous Communities before the Inter-American Court of Human Rights—New Century, New Era?*, 5 MISKOLC J. INT'L L. No. 2., 45 (2008), <http://epa.oszk.hu/00200/00294/00012/pdf/20082raisz1.pdf>.

126. See Thomas M. Antkowiak, *Rights, Resources and Rhetoric: Indigenous Peoples and the Inter-American Court*, 35 U. PA. J. INT'L L. 113, 119 (2013).

127. See Marcia Nina Bernardes, *Inter-American Human Rights System as a Transnational Public Sphere: Legal and Political Aspects of the Implementation of International Decisions*, SUR INT'L J. HUM. RTS, 131, 136 (Dec. 2011).

128. *Kichwa Indigenous People of Sarayaku v. Ecuador, Merits and Reparations*, Judgment, Inter-Am. Ct. H.R., (ser. C) No. 12,465, ¶ 157–65 (June 27, 2012).

129. See *id.* at 39–40, §§ 159–160.

130. See *id.* at 52, § 185.

131. See Raisz, *supra* note 125, at 45.

nous peoples,<sup>132</sup> “in good faith, through culturally adequate procedures and should have as its aim arriving at an agreement.”<sup>133</sup>

As elegant a jurisprudential innovation as this may be, however, the obligation that the state consult with the interested indigenous community seems to some scholars to be a tool which is both too weak and easily manipulable to the detriment of indigenous peoples.<sup>134</sup> Page argues that the most significant obstacle to the consultation principle is “the unequal bargaining power of the vast majority of indigenous communities.”<sup>135</sup>

One proposed way to address the weaknesses of the IACHR would be to import and promote the friendly settlement procedure.<sup>136</sup> This procedure is frequently applied by states in the Council of Europe, where an accumulation of negative precedents before the European Court of Human Rights has led states to calculate the probable loss from a case and settle with the applicant before the Court can impose steeper damages.<sup>137</sup> A similar mechanism could complement the existing jurisprudential tools of the Inter-American institutions and further strengthen the IACHR’s protection of indigenous peoples’ rights.

Despite the IACHR’s deficiencies, the question remains whether the European Court of Human Rights could (or should) profit from the more developed jurisprudence of the IACHR to tackle European shortcomings in indigenous matters.

## V. A BRIEF DEFENSE OF THE COUNCIL OF EUROPE

Despite the shortcomings of the Council of Europe explained above, and particularly of the ECtHR, the CoE is not wholly deficient in protecting the rights of indigenous peoples. As mentioned in Part I of this Article, two other international treaties were ratified to protect the interest of national minorities in Europe: the European Charter for Regional or Minority Languages and the Framework Convention for the National Minorities (Framework

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132. See Efrén C. Olivares Alanis, *Indigenous Peoples’ Rights and the Extractive Industry: Jurisprudence From the Inter-American System of Human Rights*, 5 GOETTINGEN J. INT’L L. 187, 214 (2013).

133. See Del Toro Huerta, *supra* note 103, at 22.

134. See Antkowiak, *supra* note 126, at 119.

135. See Page, *supra* note 121, at 19.

136. See Sean Burke, *Indigenous Reparations Re-Imagined: Crafting a Settlement Mechanism for Indigenous Claims in the Inter-American Court of Human Rights*, 20 MINN. J. INT’L L. 123, 123–43 (2011).

137. European Human Rights Convention, *supra* note 16, art. 39.

Convention).<sup>138</sup> As the title suggests, the Charter on Regional or Minority Languages was designed to protect use of minority languages in different aspects of life, including education, culture, media, administration, the judiciary, and transboundary cooperation.<sup>139</sup> The Framework Convention addresses not only issues of language, but also non-discrimination and affirmative action, identity protection, minority interest articulation during administrative reforms,<sup>140</sup> and minority participation in decision-making procedures.<sup>141</sup> Although both of these instruments respond to the needs of linguistic, religious, and ethnic minorities, as well as those of the so-called “historical” minorities of Europe,<sup>142</sup> they nevertheless also cover a great many of the desiderata of European indigenous peoples.

It is evident from the reports submitted by the Scandinavian countries to monitoring committees for these two treaties that the instruments deal substantively and regularly with the Sami’s situation,<sup>143</sup> and that evaluation of these reports involves analyzing Sami

138. For details and analysis, see PÉTER KOVÁCS, *INTERNATIONAL LAW AND MINORITY PROTECTION: RIGHTS OF MINORITIES OR LAW OF MINORITIES?* (Budapest ed., 2000).

139. See European Charter for Regional or Minority Languages, Nov. 5, 1992, C.E.T.S. No. 148, <http://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/148>.

140. For example, prohibitions on gerrymandering, see *Framework Convention for the Protection of National Minorities and Explanatory Report*, Ad Hoc Committee for the Protection of National Minorities (CAHMIN), COUNCIL OF EUROPE, 6, art. 16, [https://www.coe.int/t/dghl/monitoring/minorities/1\\_atglance/PDF\\_H\(95\)10\\_FCNM\\_ExplanReport\\_en.pdf](https://www.coe.int/t/dghl/monitoring/minorities/1_atglance/PDF_H(95)10_FCNM_ExplanReport_en.pdf); see also *id.* at 22–23 (“The purpose of this article is to protect against measures which change the proportion of the population in areas inhabited by persons belonging to national minorities . . . [such as] redrawing administrative borders with a view to restricting the enjoyment of such rights and freedoms (“gerrymandering”).”).

141. See generally *Framework Convention for the Protection of National Minorities and Explanatory Report*, CAHMIN, COUNCIL OF EUROPE 142 (Feb. 1995), <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016800c10cf>.

142. See Kovács, *Protection of Minorities*, *supra* note 1, at 337–39.

143. As to the Framework Convention, see, e.g., *Fourth Opinion on Denmark*, Advisory Committee on the Framework Convention for the Protection of National Minorities, COUNCIL OF EUROPE, ACFC/OP/IV(2014)001 (Jan. 20, 2015), <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016801cdeca>; *Fourth Report Submitted by Denmark Pursuant to Article 25, Paragraph 2 of the Framework Convention for the Protection of National Minorities*, COUNCIL OF EUROPE, ACFC/SR/IV(2014)002 (Jan. 29, 2014), <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=0900001680090338>; *Third Opinion on Sweden*, Advisory Committee on the Framework Convention for the Protection of National Minorities, COUNCIL OF EUROPE, ACFC/OP/III(2012)004 (Nov. 16, 2012), [http://www.coe.int/t/dghl/monitoring/minorities/3\\_FCNMdocs/PDF\\_3rd\\_OP\\_Sweden\\_en](http://www.coe.int/t/dghl/monitoring/minorities/3_FCNMdocs/PDF_3rd_OP_Sweden_en); *Third Report Submitted by Sweden Pursuant to Article 25, Paragraph 2 of the Framework Convention for the Protection of National Minorities*, COUNCIL OF EUROPE, ACFC/SR/III(2011)003 (June 1, 2011), [http://www.coe.int/t/dghl/monitoring/minorities/3\\_FCNMdocs/PDF\\_3rd\\_SR\\_Sweden\\_en.pdf](http://www.coe.int/t/dghl/monitoring/minorities/3_FCNMdocs/PDF_3rd_SR_Sweden_en.pdf); *Third Opinion on Sweden*, Advisory Committee on the Framework Convention for the Protection of National Minorities, COUNCIL OF EUROPE, ACFCOP/III(2010)007 (Apr. 13,

grievances.<sup>144</sup> It also bears mentioning that the Framework Convention covers the enormous territorial boundaries of Russia and could be used to protect the rights of the indigenous peoples there as well.<sup>145</sup>

Despite the viability of these two treaties to address many of the grievances of indigenous peoples, however, not all indigenous peoples are satisfied with that approach. The Norwegian Sami, for example, do not want to be covered by the Framework Convention because they identify themselves as an “indigenous people” and not simply as a minority.<sup>146</sup> That said, the Norwegian Sami are likely in the minority of European indigenous peoples, as most would likely prefer to have their cultural identities protected regardless of the particular means used to achieve that end.

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2011), [http://www.coe.int/t/dghl/monitoring/minorities/3\\_FCNMdocs/PDF\\_3rd\\_OP\\_Finland\\_en.pdf](http://www.coe.int/t/dghl/monitoring/minorities/3_FCNMdocs/PDF_3rd_OP_Finland_en.pdf); *Third Report Submitted by Finland Pursuant to Article 25, Paragraph 2 of the Framework Convention for the Protection of National Minorities*, COUNCIL OF EUROPE, ACFC/SR/III(2010)001 (Feb. 17, 2010), [http://www.coe.int/t/dghl/monitoring/minorities/3\\_FCNMdocs/PDF\\_3rd\\_SR\\_Finland\\_en.pdf](http://www.coe.int/t/dghl/monitoring/minorities/3_FCNMdocs/PDF_3rd_SR_Finland_en.pdf).

144. Sami grievances include, especially, land rights and cultural issues. See, e.g., *Third Opinion on Sweden*, supra note 143, §§ 54–59 (discussing Sami land rights and noting Swedish parliamentary recognition of the Sami as an indigenous peoples); *Third Opinion on Finland*, supra note 143, §§ 14, 55–57 (noting the problem of the legal uncertainty of Sami boundaries); *id.* § 52 (“For historical reasons, the Finnish authorities consider that land rights should not be granted personally to the Sami as a people but rather on a territorial basis to all traditional residents of the Sami Homeland. The Sami, however, see themselves entitled as an indigenous people to special land rights, in conjunction with the existing protection mechanisms of their culture and identity.”); see also *Fourth Opinion on Denmark*, supra note 143, §§ 18, 87–88 (expressing concerns about the situation of the Greenlandic language, especially on the Danish mainland).

145. See *Third Opinion on the Russian Federation*, Advisory Committee on the Framework Convention for the Protection of National Minorities, COUNCIL OF EUROPE, §§ 21, 25, 30–33, 80–84, ACFC/OP/III(2011)010 (July 25, 2012), [http://www.coe.int/t/dghl/monitoring/minorities/3\\_FCNMdocs/PDF\\_3rd\\_OP\\_RussianFederation\\_en.pdf](http://www.coe.int/t/dghl/monitoring/minorities/3_FCNMdocs/PDF_3rd_OP_RussianFederation_en.pdf) (criticizing the Russian government for merely partial implementation of its international legal commitments and pieces of domestic legislation protecting indigenous peoples, as well as analyzing the traditional issues facing indigenous peoples in Russia, such as rights to hunting, fishing, or herding on indigenous territories); see *Third Report Submitted by the Russian Federation Pursuant to Article 25, Paragraph 2 of the Framework Convention for the Protection of National Minorities*, COUNCIL OF EUROPE, ACFC/SR/III(2010)005 (Apr. 9, 2010), [http://www.coe.int/t/dghl/monitoring/minorities/3\\_FCNMdocs/PDF\\_3rd\\_SR\\_RussianFed\\_en.pdf](http://www.coe.int/t/dghl/monitoring/minorities/3_FCNMdocs/PDF_3rd_SR_RussianFed_en.pdf).

146. For more on the Norwegian Sami, see *Third Opinion on Norway*, Advisory Committee on the Framework Convention for the Protection of National Minorities, COUNCIL OF EUROPE, §§ 11, 30, ACFC/OP/III(2011)007 (Aug. 31, 2011), [http://www.coe.int/t/dghl/monitoring/minorities/3\\_FCNMdocs/PDF\\_3rd\\_OP\\_Norway\\_en.pdf](http://www.coe.int/t/dghl/monitoring/minorities/3_FCNMdocs/PDF_3rd_OP_Norway_en.pdf) (noting the Sami Parliament’s decision stating that the Sami do not wish to remain under the personal scope of application of the Framework Convention because “legally” the Sami are not minorities); *Third Report Submitted by Norway Pursuant to Article 25, Paragraph 2 of the Framework Convention for the Protection of National Minorities*, COUNCIL OF EUROPE, ACFC/SR/III(2010)009 (July 21, 2010), [http://www.coe.int/t/dghl/monitoring/minorities/3\\_FCNMdocs/PDF\\_3rd\\_SR\\_Norway\\_en.pdf](http://www.coe.int/t/dghl/monitoring/minorities/3_FCNMdocs/PDF_3rd_SR_Norway_en.pdf).

## CONCLUSION

The European system has much to learn from the Inter-American system about how to best understand the needs and legal claims of indigenous peoples. For many years, the Inter-American Court of Human Rights profited from the ECtHR's jurisprudence and widely applied the Court's citations and references in many types of cases, including those addressing the limitations necessary in a democratic society to preserve public order, prevent crime, and ensure the enjoyment of rights and freedoms<sup>147</sup>; recently, a trend in the opposite direction can be observed. The ECtHR already benefits from the Inter-American jurisprudence developed on matters of forced disappearances and collective compensation systems<sup>148</sup>; the Court could similarly benefit from IACHR jurisprudence concerning indigenous peoples.

To date, the Inter-American jurisprudence on indigenous peoples has yet to be cited by the European Court of Human Rights in any case. This begs the question of whether the ECtHR is ready to understand the merits of the indigenous peoples' claims, instead of rejecting them for failure to satisfy formal admissibility requirements.

Despite the Court's failure thus far to decide an indigenous peoples case on the merits, the continued evolution<sup>149</sup> of the ECtHR's jurisprudence cannot be ignored.<sup>150</sup> For the ECtHR to finally reach the merits of an indigenous peoples case and formally recognize the rights of these groups, the ECtHR needs "only" a good

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147. See Péter Kovács, *Developments and Limits in International Jurisprudence*, 31 *DENV. J. INT'L L. & POL'Y* 461, 471 (2002-03).

148. For more on this topic, see generally *id.* (discussing the influence of international tribunals' jurisprudence on one another).

149. See Maja K. Eriksson, *At the Service of Human Rights: The Contribution of the Human Rights Bodies of the OAS to the Protection of Indigenous Peoples' Communal Property*, 63 (Uppsala Faculty of Law, Working Paper No. 2014:5) <http://www.jur.uu.se/LinkClick.aspx?fileticket=YCuKcvmAiyC%3D&tabid=5502&language=sv-SE>.

150. See Asbjørn Eide, *Rights of Indigenous Peoples – Achievements in International Law During the Last Quarter of a Century*, 37 *NETH. Y. B. INT'L L.* 155, 178-79 (2006); Gaetano Pentasuglia, *Towards a Jurisprudential Articulation of Indigenous Land Rights*, 22 *EUROPEAN J. INT'L L.* 165, 198 (2011). Besides the hope for continued jurisprudential evolution, there is also hope that the drafting efforts of a special sub-regional Scandinavian convention for the benefit of the Sami peoples, which has been under inter-governmental and inter-parliamentary negotiations since 2011, will help protect the rights of these indigenous peoples. For the text of the original draft and commentaries, see Mattias Åhrén, Martin Scheinin, & John B. Henriksen, *The Nordic Sami Convention International Human Rights, Self-Determination and other Central Provisions*, 3 *GÁLDU CÁLA J. INDIGENOUS PEOPLES RIGHTS* (2007), [http://www.galdu.org/govat/doc/samekoneng\\_net.pdf](http://www.galdu.org/govat/doc/samekoneng_net.pdf).

case so that it may consider and appropriately apply the Inter-American jurisprudence.