European Court of Human Rights for the Protection of Arctic Indigenous Peoples’ land rights

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European Court of Human Rights for the Protection of Arctic Indigenous Peoples’ land rights

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30 ECTS thesis submitted in partial fulfilment of the degree of Master of Polar Law (LLM)

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Abstract

This study examines how indigenous peoples’ right to property of ancestral land has been interpreted by three international human rights courts; the European Court of Human Rights, the Inter-American Court of Human rights, and the African Court on Human and People’s Rights. The study shows that the European Court is lagging behind the development of international law concerning indigenous peoples' rights, and in relation to its counterparts takes a more conservative position in their interpretation of indigenous peoples’ right to property. In an Arctic context, this means that the only human rights court with the mandate to examine cases concerning indigenous peoples rights fails to take into account the progressive development of international law. However, based on the concepts of rights and property, through the history of the European human rights system, the study shows that the European system contains the necessary elements for the European Court to take into consideration the unique situation of the Arctic indigenous peoples in its interpretation of the indigenous peoples' rights to their ancestral land, under Article 1 of Protocol No. 1 of the European Convention.
To the Memory of My Grandmother Agda Pettersson
Preface

The violation of right lies either in the fact that the holder possesses as proprietor, while he should possess only as usufructuary; or in the fact that he has purchased a thing which no one had a right to transfer or sell.

(P.J Proudhon/St. Paul)

In the past 50 years, the Convention for the Protection of Human Rights and Fundamental Freedoms has been a guiding beacon and a blueprint for international human rights protection. From the theoretical protection introduced in the aftermath of the Second World War in the first half of the twentieth century Strasbourg, the European Court of Human Rights has added substantial materials to develop a comprehensive system for the provision of protection of human rights. During the same time Arctic indigenous peoples, living in the outskirts of the convention’s geographical scope, continues to struggle for recognition of rights that we all take for granted. It could be expected that alongside with a changing climate leading to accessibility to areas in the north for various reasons, and international as well as regional recognition of indigenous peoples’ rights to their traditional land, the question should be in the centre of attention also for the European Court. A question that the European Court recognises is complex not only due to history and legal issues, but also politically. This thesis provides an analysis of the European Court’s approach to the first article of the Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms, by comparing it to the approach taken by the Inter-American Court of Human Rights and the African Court on Human and Peoples’ rights.

Jan Mikael Lundmark
Akureyri, 2017
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**Acronyms / Abbreviations**

ACFC  Secretariat of the Framework Convention for the Protection of National Minorities
ACHPR  African Commission on Human and Peoples’ Rights
ACHR  American Convention on Human Rights
ACtHR  African Court on Human and People's Rights
AFCHR  African Charter on Human and People’s Rights (AFCHR)
AS/Jur  Committee on Legal Affairs and Human Rights (PA)
COE  Council of Europe
EAS  Executive Agreement Series
ECHR  European Convention for the Protection of Human Rights and Fundamental Freedoms
ECommHR  European Commission on Human Rights
ECtHR  European Court of Human Rights
ETS  European Treaty Series
FCNM  Framework Convention for the Protection of National Minorities
IACtHR  Inter-American Court of Human Rights
ICMEU  International Committee of the Movement for European Unity
ILO  International Labour Organization
IWGIA  International working group for indigenous affairs
NJA  Nytt Juridiskt Arkiv (Swedish Court Case Series)
OAS  Organization of American States
PA  Parliamentary Assembly (COE)
RF  Regeringsformen (Instrument of Government)
SFS  Svensk Författningssamling (Swedish Code of Statutes)
SOU  Statens Offentliga utredningar (Swedish Government Official Reports)
UKTS  United Kingdoms Treaty Series
UNGA  UN General Assembly
UNGAOR  UN General Assembly Official Records
UNTS  United Nations Treaty Series
USTS  United States Treaty Series
Table of Treaties

Treaties

International

United Nations
Statute of the International Court of Justice (26 June 1945, EIF 24 October 1945) 59 Stat 1031 USTS 993
International Covenant on Civil and Political Rights (16 December 1966, EIF 23 March 1976) 999 UNTS 171; 1057 UNTS 407

International Labour Organization
Convention Concerning Indigenous and Tribal Peoples in Independent Countries, C196 (27 June 1989, EIF 05 September 1991) 72 ILO Official Bull 59, 28 ILM 1382

Others
Treaty of Peace with Bulgaria (Paris, 10 February 1947) 61 Stat 1915 TIAS 1650
Treaty of Peace with Finland (Paris, 10 February 1947) UKTS 53
Treaty of Peace with Hungary (Paris, 10 February 1947) 61 Stat 2065 TIAS 1651
Treaty of Peace with Italy (Paris, 10 February 1947) 61 Stat 1245 TIAS 1684
Treaty of Peace with Romania (Paris, 10 February 1947) 61 Stat 1757 TIAS 1649
Regional

African Union

Organization of African Unity, Constitutive Act of the African Union (1 July 2000)
Protocol of the Court of Justice of the African Union (11 July 2003)
Protocol on the Statute of the African Court of Justice and Human Rights (1 July 2008)

Council of Europe

Statute of the Council of Europe (5 May 1949, EIF 3 August 1949) ETS 1
Convention for the Protection of Human Rights and Fundamental Freedoms (4 November 1950, EIF 3 September 1953) ETS 5, 213 UNTS 222, as Amended by Protocol Nos 11 and 14, supplemented by protocol Nos 1,4,6,7,12,13
Protocol No 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms, restructuring the control machinery established thereby (11 May 1994, EIF 1 November 1998) ETS 155
Protocol No 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms (4 November 2000, EIF 1 April 2005) ETS 177
European Social Charter (18 October 1961, EIF 26 February 1965) ETS 35
Organization of American States


Organization of American States (OAS), Statute of the Inter-American Court of Human Rights (1 October 1979, EIF 1 January 1980)
# Table of Other Documents

**United Nations**

- Declaration by the United Nations (Washington January 1, 1942) 55 Stat 1600, EAS 236
- The Universal Declaration of Human Rights (10 December 1948) UN doc A/RES/217(III)
- Official Record, UNGAOR, ‘107th plenary meeting’ (13 September 2007) Verbal Recording UN doc A/61/PV107, 24-25
  - Meeting Records; UN doc A/61/PV.107
  - Press release UN doc GA/10612 (143-4-11)

**Council of Europe**

- Committee of Ministers and Associated Bodies
  - COE, CM, Resolution 99(50) – On the Council of Europe Commissioner for Human Rights, 7 May 1999
the control machinery established thereby (Strasbourg 11/V/1994) ETS No 155

ACFC, Advisory Committee, Opinion on Denmark, Adopted on 22 September 2001, ACFC/INK/OP/I(2001)005
ACFC, Advisory Committee, Opinion on Germany, Adopted on 1 March 2002, ACFC/INK/OP/I(2002)008

Parliamentary Assembly (consultative assembly) and Associated Bodies

Secretariat Memorandum, Practical consequences of the decision of the decision of the Assembly to adopt the name “Parliamentary Assembly” (Strasbourg, 26 February 1975)

PA, Recommendation 2079 - Implementation of judgments of the European Court of Human Rights, 30 September 2015
PA, Resolution 2075 - Implementation of judgments of the European Court of Human Rights, 30 September 2015


Commissioner for Human Rights

European Court of Human Rights

ECtHR, ‘Violation of the right to respect for the property of owners of land unlawfully occupied by the government outside of the standard expropriation procedure’ Press Release ECHR 057(9 February 20017)

Organization of American States

Inter-American Commission on Human Rights (IACHR), American Declaration of the Rights and Duties of Man (Bogotá, Colombia, 2 May 1948)

AOS, Fifth Meeting of Consultation of Ministers of Foreign Affairs (Santiago, Chile, 18-19 August 1959)

Other

Cultural Resolution, The Hague Congress, 7-10 May 1948
Economic & Social Resolution, The Hague Congress, 7-10 May 1948
Message to Europeans, The Hague Congress, 7-10 May 1948
Political Resolution, The Hague Congress, 7-10 May 1948

National Legislations

Iceland
The Nature Conservation Act No 44/1999

Russia

Sweden
SFS 1971:437 Rennäringslag (Reindeer Husbandry Act)
SFS 1974:152 Instrument of Government (Regeringsformen)
Table of Cases

International Courts

Permanent Court of International Justice
West Sahara, (Advisory Opinion) [1975] ICJ Reports 12
East Timor Case (Portugal v Australia) (Judgment) [1995] ICJ Report 90

Court on Human and Peoples’ Rights

African Commission on Human and Peoples’ Rights
Social and Economical Rights Action Centre (SERAC) and Centre for Economic and Social Rights (CESR) v Nigeria (Merits), Communication No 155/96 (27 October 2001)
Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya (Merits, Provisional Measures), Communication No 276/2003, African Commission on Human and Peoples' Rights (4 February 2010)
Centre on Housing Rights and Evictions (COHRE) v Sudan (Merits), Communication No 296/2005 (29 July 2010)

European Commission/Court of Human Rights
Case ”Relating to Certain Aspects of the Laws on the Use of Language in Education in Belgium” v Belgium App no 1474/62; 1677/62; 1691/62; 1769/63; 1994/63; 2126/64 (ECHR, 23 July 1968)
Golder v The United Kingdom App no 4451/70 (ECHR, 21 February 1975)
Handyside v the United Kingdom App no 5493/72 (ECHR, 7 December 1976)
Tyrer v United Kingdom App no 5856/72 (ECHR, 25 April 1978)
Marckx v Belgium App no 6833/74 (ECHR, 13 June 1979)
Airey v Ireland App no 6289/73/74 (ECHR, 9 October 1979)
Artico v Italy App no 6694/47 (ECHR, 5 May 1980)
Sporrong and Lönnroth v Sweden App no 7151; 7152/75 (ECHR, 23 September 1982)
G and E v Norway App no 9278/81; 9415/81 (Admissibility), (ECommHR, 3 October 1983)
Van der Mussele v Belgium App no 8919/80 (ECHR, 23 November 1983)
Malone v The United Kingdom App no 8691/79 (ECHR, 2 August 1984)
James and Others v The United Kingdom App no 8793/79 (ECHR, 21 February 1986)
Pressos Compani Navierra S A and Others v Belgium App no 17849/91 (ECHR, 20 November 1986)
From v Sweden App no 34776/96 (Admissibility), (ECommHR, 4 March 1998)
Kruslin v France App no 11801/85 (24 April 1990)
Pine Valley Development Ltd and Others v Ireland App no 12742/87 (ECHR, 29 November 1991)
Olsson v Sweden App no 13441/87 (ECHR, 27 November 1992)
OB and Others v Norway App no 15997/90 (ECHR, 8 January 1993)
MK contre la Grèce App no 20723/92 (ECommHR, 1 December 1993)
Könkämä and 38 Other Saami Villages v Sweden App no 27033/95 (Admissibility), (ECommHR, 25 November 1996)
Loizidou v Turkey App no 15318/89 (ECHR, 18 December 1996)
Larkos v Cyprus App no 29515/95 (ECHR, 18 February 1999)
Iatridis v Greece App no 31107/96 (ECHR, 23 March 1999)
Beyeler v Italy App no 33202/96 (ECHR, 5 January 2000)
Thlimmenos v Greece App no 34369/97 (ECHR, 6 April 2000)
The former king of Greece and Others v Greece App no 25701/94 (ECHR, 23 November 2000)
Gratzinger and Gratzingerova v The Czech Republic App no 39794/98 (ECHR, 10 July 2002)
DOĞAN and others v Turkey App no 8803-8811/02; 8813/02; 8815-8819/02 (ECHR, 29 June 2004)
Kopecký v Slovakia App no 44912/98 (ECHR, 29 September 2004)
Moreno Gomez v Spain App no 4143/02 (ECHR, 16 November 2004)
Johtti Sampelaccat RY and Others v Finland App no 42969/98 (ECHR, 18 January 2005)
Roche v The United Kingdom App no 32555/69 (ECHR, 19 October 2005)
Hingitaq 53 and others v Denmark App no 18584/04 (Admissibility), (ECHR, 12 January 2006)
Scordino v Italy App no 36813/97 (ECHR, 29 Mars 2006)
Stec and Others v The United Kingdom App no 65731/01; 65900/01 (ECHR, 12 April 2006)
Hutten-Czapska v Poland App no 35014/97 (ECHR, 19 June 2006)
Ucci v Italy App no 213/04 (ECHR, 22 June 2006)
Anheuser-Busch Inc v Portugal App no 73049/01 (ECHR, 11 January 2007)
J A Pye (Oxford) Ltd and J A Pye (Oxford) Land Ltd v the United Kingdom App no 44302/02 (ECHR, 30 August 2007)
DH and others v The Czech Republic App no 57325/00 (ECHR, 13 November 2007)
Khamidov v Russia App no 72118/01 (ECHR, 15 November 2007)
Friend and Others v the United Kingdom App no 16072/06/27809/08 (ECHR, 24 November 2009)
DePalle v France App no 34044/02 (ECHR, 29 March 2010)
Handolsdalen Sami Village and Others v Sweden App no 39013/04 (ECHR, 30 March 2010)
Stummer v Austria App no 37452/02 (ECHR, 17 July 2011)
Centro Europa 7 SRL, and Di Stefano v Italy App no 38433/09 (ECHR, 7 June 2012)
Ramaner and Van Willigen v The Netherlands App no 34880/12 (ECHR, 23 October 2012)
Fabris v France App no 16574/08 (ECHR, 7 February 2013)
Chiragova and others v Armenia App no 13216/05 (ECHR, 16 June 2015)
Messana v Italy App no 26128/04 (ECHR, 2 February 2017) (only available in French and Italian)
Maharramov v Azerbaijan App no 5046/07 (ECHR, 30 March 2017)
**Inter-American Court of Human Rights**

Ivcher Bronstein v Peru (Merits, Reparations and Costs), (6 February 2001), Series C No 74

Mayagna (Sumo) Awas Tingni Community v Nicaragua (Merits, Reparations and Costs), (31 August 2001) Series C No 79

Plan de Sánchez Massacre v Guatemala (Merits), (29 April 2004) Series C No 105

Plan de Sánchez Massacre v Guatemala (Reparations), (19 November 2004), Series C No 116

Moiwana Community v Suriname (Preliminary Objections, Merits, Reparations and Costs), (15 June 2005) Series C No 124

Yakye Axa Indigenous Community v Paraguay (Merits, Reparations and Costs), (17 June 2005) Series C No 125

Sawhoyamaxa Indigenous Community v Paraguay (Merits, Reparations and Costs) (29 March 2006) Series C No 146

Saramaka People v Suriname (Preliminary Objections, Merits, Reparations, and Costs), (28 November 2007) Series C No 172

Salvador Chiribago v Ecuador (Preliminary Objections and Merits), (6 May 2008) Series C No 179

Kichwa Indigenous People of Sarayaku v Ecuador (Merits and reparations), (June 27 2012) Series C No 245

Norín Catrimán *et al* (Leaders, members and activist of the Mapuche Indigenous People) v Chile (Merits, Reparations and Costs), (29 May 2014) Series C No 279

**National Courts**

*Sweden*

Taxed Mountain case (Skattefjällsmålet) (Merits), (1981), NJA 1981 p 1

Girjas Sami village v Sweden (Application for Summons), (11 May 2009), District Court of Gällivare no T-323-09

Girjas Sami village v Sweden (Merits), (03 February 2016), District Court of Gällivare no T-323-09
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1 Introduction and Overview

Indigenous peoples’ access to justice for historical wrongdoings tends to have a focus on places and peoples living close and around the equator. Little focus has historically been directed towards the northern hemisphere and the western world. Since the 20th century more attention have been directed towards the north and the Arctic. One might image that the rights of indigenous peoples living within the Arctic would have been better protected as many of the countries they reside in have a long tradition of adhering to the principle of the rule of law, especially since the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) entered into force.¹

ECHR is a political project, rooting back to WWII, and the Congress of Europe (The Hague, 7-10 May 1948). The outcome of the congress provided the political platform upon which a convention could be formed, a convention that would provide safeguards from arbitrary intrusion of the state by providing protection of fundamental human rights. It was nevertheless recognised that a convention was not enough: in order to have an effective protection it was necessary to establish a court where citizens could appeal, and which could provide binding judgments upon the national state.² The negotiation during the years following the congress led to the adoption of the convention in 1950, which then entered into force in 1953. The European Court of Human Rights was established in 1959, pursuance of the ECtHR.³

The Court is in many regards unique, and a part of a larger political and legal system that is trying to preserve peace by creating a unified system for

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¹ Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) (4 November 1950, EIF 3 September 1953) ETS 5, 213 UNTS 222, as Amended by Protocol Nos 11 and 14, supplemented by protocol Nos 1, 4, 6, 7, 12, 13.
² International Committee of the Movement for European Unit (ICMEU), ‘Cultural Resolution’, Congress of Europe – Resolutions (1948) [5]. Pursuant to the entry into force of Protocol No 11 on 1 November 1988 individual application was admissible directly to the Court.
³ The European Court of Human Rights (ECtHR) was permanent established pursuant to Article 19, ECHR. The first session of the Court was held in February 1959.
human rights protection. For this purpose, the court not only considers national legislation when looking into the merit of the case, but also considers how other state parties have dealt with the question. Also, as an international court it is governed by international law and general principles of international law, whose elements are transferred through the court to the national judicial systems where they can be enforced for the benefit of the individual. The Court has an extensive geographical coverage, stretching from Baffin Bay in the west to the Bering Sea in the east, and is the only international human rights court covering a large section of the Arctic Region.

Despite the Court's growing jurisprudence of property law cases, there is still a distrust amongst indigenous peoples that the Court has the capacity to protect their rights in the same way that their rights are protected by the United Nations Human Rights Committee in Geneva; this despite the fact that the former provide legally binding judgment, whereas the latter doesn’t.

This paper will bring about a deeper analysis of the Courts case law concerning the first article in the first protocol to the European Convention for the Protection of Human Rights and Fundamental Freedoms (P1-1), to gain a deeper understanding of the meaning of the court mantra; *Practical and effective, not theoretical and illusory* when it comes to the protection of property.\(^4\)

This paper, also, has the potential to add to the discussion of whether ECtHR could become a viable resort for indigenous peoples of the Arctic to seek reparation when the nation states fail to fulfill their obligations.

### 1.1 European Court of Human Rights in an Arctic context

In 1981, 28 years after the rights in the ECHR came under legal protection, the two first indigenous cases landed at the European Commission on Human Rights (*G and E v Norway* (the *Alta Case*)).\(^5\) The disputes concerned the

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\(^4\) Eg *Artico v Italy* App no 6694/47 (ECtHR, 5 May 1980) [33]; *Airey v Ireland* App no 6289/73/74 (ECtHR, 9 October 1979) [24]; *Hutten-Czapska v Poland* App no 35014/97 (ECtHR, 19 June 2006) [168], *Moreno Gomez v Spain* App no 4143/02 (ECtHR 16 November 2004) [56].

\(^5\) *G and E v Norway* App no 9278/81; 9415/81 (ECtHR, 3 October 1983).
construction of a dam in the Alta Valley in Finmárku in northern Norway, with the result that 2.8 kilometres of the valley would be covered by water, resulting in the loss of pastureland. The applicants argued in particular that the submersion of land is a loss of pastureland, which in turn was a violation of the protection of rights of property under Article 1 of Protocol 1 to the European Convention for the Protection of Human Rights and Fundamental Freedoms. While the Commission cautiously limited their examination to land that was affected by the construction of the dam, they nevertheless noted that ‘the applicants do not appear to have any “Property Rights” to the area in the traditional sense of the concept. Nor have they claimed compensation for any such rights’. Furthermore, as the Norwegian Constitution guaranteed compensation in case of expropriation of rights, and the applicants had not instituted proceeding in order to establish whether they had rights in the meaning of the Norwegian constitution, this part of the application was dismissed, due to lack of exhausted domestic remedies.

Nine years later, the Commission received a similar application regarding questions related to indigenous peoples’ rights (O.B. and Others v Norway (Skolte Sámi Case)). In this case, the question was whether the Skolte Sámi had better right, the exclusive right, to reindeer husbandry in relation to other Sami in the area. Although the Commission confirmed that reindeer husbandry was a right in the meaning of P1-1, they considered that since the Norwegian courts had not found the right to be exclusive, neither did the Commission.

The way the Commission addresses the question of rights, raises in itself questions over the basis of their argument when it comes to indigenous peoples’ rights. To dismiss rights on the basis by reference to, inter alia, the concept of private property without examining it thoroughly in relation to the specific case, its subject as well as objects, makes the reference implausible. References to national courts make little change in this aspect. Overall, it seems that it is this lack of examination of the complex question of indigenous peoples’ rights, how they are created and on what ground, that

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7 G and E v Norway (n 5) 35.
8 ibid.
9 OB and Others v Norway App no 15997/90 (ECHR, 8 January 1993).
10 ibid [2].
continues to haunt indigenous peoples’ access to the rights of ECHR through the ECtHR, an argument that will be clarified below along with the evolvement of P1-1 over the thirty years since the Alta Case.

The point made above is that the question of indigenous peoples’ rights, which is deeply attached to the question of rights connected to land, seems to be a sensitive topic. There may be several reasons why it could be sensitive for the court to adopt a progressive approach in these cases. One aspect close at hand is the increasing economic value indigenous peoples land in the Arctic has for the state due to changing climate patterns and an increased demand for resources, both renewable and non-renewable. That allocation of resources and control of land is a sensitive topic for the Arctic states was made clear during the adoption of the Universal Declaration of the Rights of Indigenous peoples (UNDRIP).11

During the adoption of UNDRIP, Sweden, for example, made it clear that the right to self-determination in Article 19 UNDRIP, inter alia, the right to be consulted, and prior and inform consent did not ‘entail a collective right of veto’.12 Now, this statement must be put into the context of the discussion that followed where Sweden upheld its position regarding any question connected to ownership and control of land; the rights of the Sami living in Sweden are restricted to these entailed under the reindeer herding rights.13 For an outsider one might find this position strange, and Noel Broadbent asks the interesting question what happens when the nomadic herding of the Sami no longer is a viable source of income, and therefore cannot support a large number of Sami, as legal rights and privileges connected to traditional land currently depend on the exercise of nomadic herding.14

The Swedish state, nevertheless, is well aware of what is at stake if the Sami living in Sweden gains control or even ownership of their indigenous lands. This can be seen in the national report concerning land to the High-level Political Forum on Sustainable Development where Sweden expressed that the rights of the Sami, currently ‘affects one-third of Sweden’s total

12 UNGAOR ‘107th plenary meeting’ (13 September 2007) Verbal Recording, UN doc A/61/PV107, 24-25.
13 ibid.
Russia’s position is another Arctic example, although abstaining from voting, they considered that text concerning land, natural resources, and compensation and redress, was a subverting factor. These examples illustrate that questions of rights connected to land are a sensitive area for two important members of the Council of Europe. For the court to be proactive in these cases might be a step they are not prepared to take. The question is if this position is inline with jurisprudence, legal principles, and adheres to court’s case law.

1.2 The Concepts of ‘Indigenous Peoples’, ‘Rights’ and ‘Property’

The terminology used in this paper contains words and terms that we overall seem familiar with and which usually don’t need any deeper explanations. However, especially within the legal discourse, many terms have inherent connotations, which help us understand the deeper context of a legal argument, but which itself is too abstract to define with a single legal definition. There are two purposes with this section. The first purpose it to clarify how those terms are used in this paper. The second purpose is to highlight legal differences between legal concepts, and to emphasize the significance of these differences.

The Notion of ‘Indigenous Peoples’

In his ending chapter in *Identity, Difference and Otherness*, Timo Makkonen quotes Ali A Mazuri saying that the greatest danger to human rights are the bipolar way of dividing the world into ‘us’ and ‘them’ and that there is a need to overcome this dichotomous way of dividing the world as it influences both policy and laws. Bearing this in mind, the term ‘indigenous peoples’, is dichotomous as the term divides ‘them’ from ‘us’, the minority from the

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16 UNGAOR ‘107th plenary meeting’ (n 12) 16.
majority and so on, and for that reason, the use of the term needs to be addressed.

This paper will not try to define the meaning of the term indigenous peoples, or its status in international law; this question is outside the scope of this paper and neither sought after. Considering, however, that the particular focus of this paper is the specific aspect of indigenous peoples’ (groups) right of property under international law to a certain area of land, where the right cannot be individualised but is borne collectively, there are practical reasons for using the term. One reason is that the term contains connotations of prerogatives and rights ascribed to indigenous peoples under international law, which cannot easily be illustrated through a different term. Another reason is that the term, through human right institutions and treaties provides some criteria that can be used as a baseline to evaluate how courts interpret (if they do) and apply human rights in cases concerning indigenous peoples’ rights in relation to land.

The definition adhered to is the one adopted in the perhaps most prominent international agreement concerning indigenous peoples, the International Labour Organizations 1989 Convention concerning Indigenous and Tribal Peoples in Independent Countries (ILO Convention No 169).

‘[P]eoples in independent countries ... are regarded as indigenous on account of their descent from the populations which inhabited the country, or a geographical region to which the country belongs, at the time of conquest or colonisation or the establishment of present state boundaries and who, irrespective of their legal status, retain some or all of their own social, economic, cultural and political institutions.’

Finally, the term ‘Arctic indigenous peoples’ refers only to the geographical limitation of this paper that coincides with the Arctic boundary used in the

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20 A more elaborate definition is found in Federico Lenzerini (ed), Reparations for Indigenous Peoples (OUP 2009) 75.
22 ibid art 1(1).
Arctic Human Development Reports produced by the Arctic Councils Sustainable Development Working Group (SDWG).  

The Notion of ‘Rights’ and ‘Property’

The initial intent here was to try to disentangle the concept of land, especially indigenous lands, and why indigenous land differs in relation to land as we normally perceive it, as a corporeal property, a material resource, disconnected from incorporeal properties, immaterial resources, which derives from material land, but stands alone. However, the original intent is abandoned in favour of the notion of rights, which is used synonymously with claims unless otherwise expressed. The main reason for this is that the notion of rights and what it means legally will have an impact on the kind of legal protection indigenous peoples will have to land, and also plays a role in the interpretation of the jurisprudence, especially as this paper is handling jurisprudence from the ECtHR which to a less degree directly involves indigenous peoples.

In this context, I should confess that the focus of this paper is not whether indigenous peoples have a right to ownership of land or not, instead the focus is on the rights and privileges they might have in connection to land. This consideration is made on several grounds, and I hope this section will clarify this intent to a neutral legal position. The linchpin is that as the Arctic states have a diversity of legal systems when it comes to allocation of, and control over resources. Where the contemporary legal system often benefits those who established the system in the first place, the usage of contemporary concepts, such as ownership, when neutrally trying to evaluate the legal position of the parties, creates a starting point of evaluation that is not neutral at all. The answer for a neutral evaluation is therefore not whether there can be an established ownership over the property in question, but to what extent control of the property can be established through rights and privileges.

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24 Although corporeal and incorporeal is handled as separate objects, they are both protected under the right to property in Article 21 of the American Convention on Human Rights ‘Pact of San Jose, costa Rica’ (ACHR) (22 November 1969, EIF 18 July 1978) B-32, OASTS 36, eg Sawhoyamaxa Indigenous Community v Paraguay (Merits, Reparations and Costs), (29 March 2006) IACtHR, Series C 146, [118].
Property is the most ambiguous of categories. It covers a multitude of rights which have nothing in common except that they are exercised by persons and enforced by the State. Apart from these formal characteristics, they vary indefinitely in economical character, in social effect, and in moral justification. They may be conditional … absolute … terminable … permanent … comprehensive … restricted … intimate … or … remote … It is idle, therefore, to present a case for or against private property without specifying the particular forms of property which reference is made, and the journalist who says that “private property is the foundation of civilization” agrees with Proudhon, who said it was theft, in this respect at least that, without further definition, the words of both are meaningless.  

It is with clarity that Richard Henry Tawney in 1920 pointed out something that is still valid today. The property in question cannot be understood unless you understand other concepts connected to it. Tawney lists the concept of rights as the overall concept, defined by Wesley Hohfeld as a concept that is ‘generically and indiscriminately to denote any sort of legal advantage, whether claim, privilege, power, or immunity.’ This section will focus on the concept of rights and privileges, and only occasionally separate claims from rights. It will highlight the opposites and correlatives that are found in law in general, and human rights in particular, where the opposite and correlatives addressed here are either duties or no-rights. The opposite of rights are no-rights, but the correlatives are duties (opposite: rights – no-rights; correlatives: rights – duties), while the reverse applies to privileges (opposite: privileges – duties; correlatives: privileges – no-rights). As noted, the question of importance is, therefore, not whether the property is owned, but which control over the property a person, or a group of people, has through legal rights or privileges.

27 ibid (n 26) 710.
28 Person will hereinafter be used as a synonym for a group of people, which is to be understood as indigenous peoples.
This paper only briefly addresses collective and group rights, as well as highlights some theories concerning the concept of property and rights. Both areas are complex with a number of theories and literature; only few have been highlighted below.

‘Collective Rights’ vs ‘Group Rights’

Before considering rights and privileges, we must briefly touch upon the more general concept of property. We’ll start with an explanation about the difference of individual rights, collective rights, and group rights.

Generally speaking, one might divide rights between those rights that are in place to protect individuals, and those rights that are in place for specific groups of individuals; groups that require special protection ‘in order to accomplish the effective protection of their individual members’. The exact difference between what is collective rights and what are group rights have not been defined in international law, the words are therefore used synonymously. As many other words in international law, when interpreting the meaning of it, one always has to take into account the specific context in question. In this paper it is also not easy to exactly define in what meaning the term are used, as it examines case law from three different continents, and three different courts. However, group rights have been explained as ‘rights whose beneficiaries are groups and which are vested in the groups as such’, whereas collective rights have been explained as rights where the beneficiaries are ‘individual members of groups or groups themselves’. In this sense, group rights can, therefore, be described as a second level of protection of individual rights belonging to specific groups, where the rights holders are the group, but the purpose is the protection of the rights of its member, not the group per se. Which according to the above would be the opposite in collective rights where it is the rights of the group that are protected, not the rights of individual persons belonging to the group. This

30 Makkonen (n 17) 46, note 249. This is also apparent when you read different textbook on indigenous peoples, eg Rehman (n 101).
31 Makkonen (n 17) 46.
32 Indigenous rights have been described “a species of group rights, [that] by their very nature aspire to trump the generic individual rights of group members”. Anthony J Connolly (ed), Indigenous Rights, (Routledge 2009), xxix (Introduction).
paper agrees with the above definition, where the beneficiary is the group, considering the synonymously use of the words in international law, the context always has to be taken into account. The above can easily be confusing as it is the collective of indigenous peoples that often is highlighted as an aspect that makes indigenous peoples different in comparison with other minorities or groups.33

‘Property’

Although ambiguous, Jeramy Waldron identifies the concept of property as ‘a system of rules governing access to and control of material resources’, which ‘covers a multitude of rights which have noting more in common except that they are exercised by persons and enforced by the state’.34 This means that material things, as land, are not property per se, but merely the subject of property. It is the relationship between the subjects, a person, and the material thing (e.g. land), which is in focus. Property is, therefore, the rights and privileges of a person over that subject.35

The allocation, of course, leads to disagreement about who has access to what resources, under what circumstances they can be accessed, and for what purpose, which was the case of Alta. As noted, there are multiple rules governing access and control over resources, and in an Arctic context, the difference between access to and control over resources for indigenous peoples is like comparing the sun with the moon. There are, nevertheless, some common systems of property rules where access and control attempt to handle the problem of allocation and related conflicts. Three systems will be highlighted: a system of private property, of collective property, and of common property.36 Now, these systems are usually simultaneously applied depending on the object in question and depending on whose rights are the focus of protection: the individual, the groups, or the collective. In Sweden, for example, a person can gather berries on privately owned land for their subsistence need, including extracting and selling, which makes berries in

33 ibid xvi (Introduction); the special importance of the collective nature of indigenous peoples in relation to their traditional land are also been highlighted by the IACtHR, and ACTHR, as well as other institutions such as HRC and CERD, Rehman (n 101), 498-499.
35 Wesley N Hohfeld ‘Some Fundamental Legal Conceptions as Applied in Judicial Reasoning’ (1914) 23 Yale LJ 16, 22.
36 Waldron (n 34) 314-315, 326-333.
Sweden collective property.\textsuperscript{37} Whereas, Iceland and Russia limit this right to gather to consumption \textit{in situ}, which is a limitation on the collective property to the advantage of private property.\textsuperscript{38} In both cases, there are individual rights and collective rights in play. The right to gather berries is in both cases a collective right where the beneficiary is the collective. However, in Iceland, the collective rights are restricted in favour of the landowner’s private rights.

As noted, a right of property does not, by necessity, correspond to ownership, which is one of the reasons that this paper turns away from ownership as most significant for the questions regarding indigenous peoples’ rights to land. Instead, property should be regarded as a concept primarily connected to rights, rather than ownership, and while protection of ownership is limited in scope, protection of property has a more generic application.\textsuperscript{39}

To say that a person \textit{owns} \textit{X} is to say that he is vested by the law with certain rights in respect to \textit{X}. He does not own the rights, rather he \textit{has} them and because he has them he owns the object in question. However, if his rights over \textit{X} are not sufficiently comprehensive, we may want to deny that he is the owner of \textit{X}. If so, it is a mistake then to try and re-introduce the concept of ownership by the backdoor by insisting that the person at least \textit{owns} his limited rights over \textit{X}.\textsuperscript{40}

The text above illustrates the danger of focusing on ownership. There is a possibility that the claimed rights over an object are not sufficiently comprehensive for the purpose for which they are claimed, to get ownership, with the result of losing the case. This was the breaking point in Swedish case of Taxed Mountain (\textit{Skattefjällsmålet}) where several Sami villages in the Jämtland county claimed ownership of an area in the Taxed Mountains of Northern Jämtland.\textsuperscript{41} As they failed to prove that their rights in the area were comprehensive enough to equal ownership, they lost the case.

\textsuperscript{37} SFS 1974:152, Instrument of Government (Regeringsformen) (SV) 2:15.
\textsuperscript{39} Waldron (n 34) 318-320, 325-326.
\textsuperscript{40} ibid 326.
\textsuperscript{41} Taxed Mountain (Skattefjällsmålet) (Merits), (1981), NJA 1981:1.
The gathering of berries is a relatively simple example when discussing the concept of property as rules governing access to and control of material resources connected to land. As noted, Waldron defines property in terms of material resources, for the reason that questions of incorporeal objects only come into question on the basis of material resource allocation. Accordingly, a ‘system of property in land is a set of rules about material resources and nothing more’, however, the concept of land as material and the concept of land as site must be separated from each other rights connected to land as site are not necessarily the same rights connected to land as material. The separate meaning of land as site and land as material is that land as site is defined with the actual location of land, whereas land as material is only concerned with material objects deriving from land. In this context, material can be both minerals and other resources, but also the economic values of the land can be regarded as a material object depending on whether the focus lies on the value of the specific land.

Let’s take the Swedish Reindeer Husbandry Act (Rennäringslag) (RNL) as an example. Comparable to Waldron’s example regarding the English law of real property, the main object of the RNL is not land as a material resource (corporeal object) but with land as site (incorporeal object), as the main function of the RNL is to assign some exclusive rights to the Sami. Also, comparable with the English law of real property, the origin of RNL is a system of collective property, but unlike it, as with most cases of indigenous peoples, the rights holder are the group for the purpose of protecting the rights of its members, therefore the exclusive rights in question cannot be regarded as being anyone’s private right or viewed as a private property. This does not exclude that there can be private rights based on group rights, which is the example under RNL, where for example, the right to reindeer marks is an individual right.

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42 Waldron (n 34) 322.
43 ibid 325.
44 ibid.
45 ibid 324-325.
47 Waldron (n 34) 324-325.
48 RNL, art 1.
49 ibid art 81.
The reindeer herding rights under RNL include the use of land, the use of water,\textsuperscript{50} as well as small game hunting and fishing.\textsuperscript{51} These rights are recognised to the Sami as a group, it is therefore by definition a group right where it is the Sami villages that hold the responsibility and the duties,\textsuperscript{52} whereas it is individuals who exercise them.\textsuperscript{53} Each of the persons belonging to the group therefore has an individual right to exercise the rights. Waldron argues that a legislation that seems to be only concerned with incorporeal objects de facto can be concerned with corporeal objects if the rights and privileges the subject holds over the material land are adequate.\textsuperscript{54} This cannot be the case of RNL.

Although the Sami according to the Act have been allocated some access to and control of material resources, the main concern of the legislation is not the allocation or access to and control of material resources of \textit{land as material}, but of \textit{land as site}.\textsuperscript{55} Neither can allocated access to and control over material resources listed in the Act be regarded as comprehensive enough to equal ownership. This, however, does not mean that access to and control over material resources in the Act cannot be exclusive when it comes to \textit{land as site'}, with the effect of putting constraints on the legal status of other subjects in relation to the same material resource. Consequently, the main concern of the Act is not the allocation of access to and control of \textit{land as material} but with \textit{land as site}. The difference might seem sublime, nevertheless, when legally evaluating question regarding rights and privileges to land as property, it must first be determined if the case concerns \textit{land as material} or \textit{land as site}. Because these two concepts more often tend to be separated legally; to which different legal concepts apply, and where the meaning of rights and privileges might have a totally different implication on relations between subject A and subject B.

In the case of indigenous peoples, the ancestral land becomes, due to the deeper connection and historical ties, \textit{land as site}, and not \textit{land as material}. \textit{Land as site} is also more important as indigenous culture is deeply connected to incorporeal objects deriving from that land. The first question, therefore, is

\textsuperscript{50} ibid art 1.
\textsuperscript{51} RNL, art 25.
\textsuperscript{52} See, inter alia, RNL arts 9, 10, 15.
\textsuperscript{53} RNL, art 1.
\textsuperscript{54} Waldron (n 34) 324.
\textsuperscript{55} ibid 324-325.
what kind of right and privileges the subjects in question have to the land as site. In the context of this paper, the concept of property, therefore, is to be understood as a system of allocation of access to and control over material resources of land as site.

‘Rights’ or ‘Privileges’

Returning to the concept of rights and privileges. In order to make the legal difference between them clearer, the above-mentioned jural conceptions: rights – no-rights/rights – duties, privileges – duties/ privileges – no-rights, will be discussed. As will be seen, it is through the understanding of the difference between the conceptions the opposite and correlative relationship that the legal position of the subjects (people) vis-à-vis each other, becomes clear.

The relationship between two subjects can be divided into relations in personam (paucital relations) and relations in rem (multital relations).\footnote{Hohfeld 1917 (n 26) 712.} In human rights in general, and in indigenous rights in particular, it is important to keep a clear separation between these two concepts. The paucital relation, for example, is important in relation to the state as a legislator, while the multital relation is important in relation to the state as a subject among other subjects, this will be highlighted further below.

Reviewing questions of allocation of access to and control over resources, or for that matter, arguing a case always contains analytic and legal difficulties. If the relationship is unclear, reviewing and arguing will be the same. The effect might be that while you are reviewing the legal relationship of non-rights, you should have been reviewing the legal duties, as in the case of arguing for ownership mentioned above, this might have a bearing on the result. Hohfeld also highlights the importance of these classifications. Not only because they seemingly are not clear for all, neither laymen nor judges, but also considering the specific position of indigenous peoples’ rights connected to land, it is essential to discuss the difference before diving into the rapidly expanding pool of the ECtHR’s case law concerning the right of property.\footnote{See, eg, Hohfeld 1917 (n 26) 712ff, where he highlights numerous examples where the terms are used in a non-clear manner that adds to the confusion of the meaning of the words.}
A relation *in personam* (paucital relation) is defined as the relationship between one person and another defined person, whereas a relationship *in rem* (multital relations) is defined as the relationship between a person, or a group, and people in general.\(^{58}\) The terms say nothing about the right itself, but only about the relationship between two or more subjects. This means that a person can have a right or privileges *in personam*, which he holds against a defined person, or a right or privileges *in rem*, which he holds generally.\(^{59}\) The Swedish reindeer herding rights are, for example, a right held by the Sami *in rem*. This means that people in general have an opposite no-right to reindeer husbandry within the defined area of the law, while at the same time, the Sami hold a right *in personam* towards the Swedish state, which means that the state has a correlative duty to enforce this right. This example is a right *in rem* as well as a right *in personam* established by law.

The question concerned here is rights related to indigenous land, where both sides claim the better right. In this case, the difficulty is the lacking of evidence, for both sides one might add, resulting in neither side successfully having established rights neither *in rem* nor *in personam* concerning the land as a site, nevertheless, both sides have a claim against each other. The indigenous peoples, for example, might claim that the state is under correlative negative duty not to interfere with their rights under international accepted treaties such as the right to culture under Article 27 of the International Covenant on Civil and Political Rights.\(^{60}\) Whereas, for example, the state might claim that the rights to culture have to be weighted against the general interest of the nation and falls within the margin of appreciation of the state under ECHR.

The discussion of rights attached to land leads to the Latin terms *jus in re*, which is often used to indicate legal relations, rights and duties, *in rem*, concerning material objects, such as land, and the term *jus ad rem*, which is a specific kind of *jus in personam*, and indicates a valid claim on a person to take actions that will result in *jus in re*.\(^{61}\) For example, in the above-mentioned case of *Taxed Mountain*, the Sami had a claim against the Swedish state that it should transfer the legal rights to the land. Their claim

\(^{58}\) Hohfeld 1917 (n 26) 718.
\(^{59}\) ibid 728-729.
\(^{61}\) Hohfeld 1917 (n 26) 734-736.
was a *jus ad rem*, they wanted the state to do something which, if it had been successful, would have resulted in a *jus in re*. *Jus in re* would then spawn rights *in rem*, and rights *in personam*, where legal relationships and duties would be established between the subjects in question.

To explain the above further, let’s look at a case pending in the civil court in Sweden (*Girjas Sami village v Sweden*) where the legal question is if the Sami has exclusive rights to small game hunting and fishing. Game and fish are corporal objects, material things, and therefore the Latin term *jus in re* applies. In the *Girjas case*, it is argued that a change of legislation resulted in the infringement of Sami exclusive rights to small game and fishing within their village area. In essence, the claim of the Sami is that the current legislation should change so that exclusive rights are legally re-established in law. As they want the state to act, the claim is a *jus ad rem*, but once the state has (re)acted the claim of the Sami would be transformed to *jus in re* where jural opposites and correlatives no-right, and duties, are legally re-established. It should be noted that in this case, the *jus ad rem* is a secondary paucital right, emanating from the changing of the law in the first place, allegedly infringing already existing exclusive rights, and *jus in re*. The state is, therefore, under a correlative duty to make reparation by retracting the current legislation in question, and the Sami has a legal correlative right to claim such an act.

Lastly, let’s turn to the legal distinction between rights and privileges. The Swedish Reindeer Husbandry Act established both legal rights and legal privileges for the Sami. As noted, the right of reindeer husbandry is a right *in rem* held collectively by the Sami as a group. The Sami, therefore, has a right that no other person should conduct reindeer husbandry within their village area, and these have a duty not to. There are two privileges connected to this right that shall be highlighted: the privileges to use land and water for subsistence needs, and privileges to small game hunting and fishing. In the latter case, it can be noted that the word *privileges* rather than *rights* is used, and this needs an explanation. It is established that neither the Sami nor the state is the current owner of the land in question; they have different rights.

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63 Hohfeld 1917 (n 26) 752ff.
concerning the land, but currently not viewed as comprehensive enough to equal ownership.

In this sense, the Sami, therefore, cannot truly be said to have a right to small game hunting and fish, but only a claim to such a right. Instead, it should be regarded as privileges. Now, in the light of the above-mentioned Girjas Case, where the Sami advocated for exclusive rights to small game hunting and fishing, and which they successfully were awarded by the district court, if the ruling becomes legally binding, the exclusivity could result in a right that could be comprehensive enough to equal ownership, without it bearing that label. In such case, the privileges would legally have the same bearing as rights. For the other privileges, the use of land and water for subsistence needs, there is no right that other people do not use the land and water, which is one main difference between the meaning of rights and privileges. Now, if the Sami has a legal right against the state to small game hunting and fishing, the state has a legal duty against the Sami to respect this right. On the other hand, the legal privileges to use land and water only mean that there is a non-right of the state, which should be respected, but there is no duty to do so. Let’s take the example with the right to use land for reindeer husbandry. This is in a sense a partial right. The Sami rights to conduct reindeer husbandry are recognised in some areas. In these areas, they may use the land for this purpose. This right should be respected. At the same time, a person may use this land for recreational purposes. If someone owns the land in question, the owner can also use the land. The question of whose rights in the end are the strongest depends on the national legislation. The right to use will be further highlighted below in relation to the case law of European Court of Human Rights.

Worth considering is that a state has a non-right to interfere in, let’s say, a right to small game hunting if there is no one having a duty to allow the state to interfere. This means that it would be legally wrong for the state to use its own position as a legislator, as a landowner and as an administrator to establish that duty, and the right to interfere. For if the state as a legislator ascribes the right to small game hunting upon the state as a landowner, regardless of an already existing right, the state as an administrator has the

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64 Girjas Sami village v Sweden (Merits), (03 February 2016) District Court of Gällivare no T-323-09, [6.16]-[6.18].
65 Hohfeld 1917 (n 26) 746-774.
duty to allow the state to interfere with that right, thus giving rise to what can be called conflicting double right to small game hunting, conflicting with the very function of property rules, which is to solve the problem of allocations and reduce conflicts.\footnote{Waldron (n 34) 318.}

As has been illustrated, the understanding of the differences between the concepts mentioned is of importance, regardless whether you are evaluating case law, arguing for access to and control over resources, or simply arguing for your basic human rights or whether they are respected. The difference between rights and privileges as well as legal rights of land as site in situ, or valid claims over people to act in a certain way can have practical and economic consequences for both subjects. Any legal question concerning the protection of property under Article 1 of Protocol 1 to ECHR will have to deal with those definitions one way or another, but the responsibility is dual.

\section*{1.3 Sources of International Law}

The purpose of this section is first to highlight the sources of international law, especially international custom when it comes to indigenous peoples’ rights and privileges. Secondly, to outline the approach of the European Court of Human Rights when it comes to interpretation of the Convention.

\subsection*{Indigenous Rights}

Legal rights and legal privileges in international human rights law are established not only as a result of international treaties, such as, International Covenant on Civil and Political Rights (ICCPR),\footnote{ICCPR, art 1.} the International Covenant on Economic, Social and Cultural Rights (ICESCR),\footnote{International Covenant on Economic, Social and Cultural Rights (ICESCR) (16 December 1966, EIF 3 January 1976) 993 UNTS 3, art 1.} and ILO Convention No 169, but also as a result of international custom and international general principles.\footnote{Article 38 of the Statute of the International Court of Justice outlines how the court should deal with disputes, which are referred to as ‘sources’ of international law. Three primary (formal) sources of international law, a) international conventions, b) international customs and, c) general principles of law recognized by civilized nations; and two secondary (material) sources d) judicial decisions and teachings of most qualified publicists. Statute of} The methodologies by which international custom is established

\footnotesize{\begin{itemize}
\item Waldr I (n 34) 318.
\item ICCPR, art 1.
\item Article 38 of the Statute of the International Court of Justice outlines how the court should deal with disputes, which are referred to as ‘sources’ of international law. Three primary (formal) sources of international law, a) international conventions, b) international customs and, c) general principles of law recognized by civilized nations; and two secondary (material) sources d) judicial decisions and teachings of most qualified publicists. Statute of}
are theoretically quite clear; the presence of a material element, constituting of state practice, and a psychological element, *opinion juris sive neccessitatis*, constituting of the belief of a legal obligation to act in a certain way.\(^70\)

The methodology to establish international principles, on the other hand, can be said to be as inversely unclear both theoretically and practically, and not as elaborated upon by international courts,\(^71\) although acceptance and recognition are mentioned as two elements.\(^72\) This inconsistency and unclear methodology to establish international principles have been proven positive, as it gives contextual flexibility. Michelle Biddulph and Dwight Newman in fact, argue, that the concept of general principles of international law is contextual rather than decontextualized, as in the case of international custom, and reflects the specialisation of international law into different areas where contextual specific general principles are ‘necessary to respond to the policy needs of those areas’.\(^73\) For example, the Inter-American Court of Human Rights confirmed the obligation to consult in *Kichwa Indigenous People of Sarayaku v Ecuador*.\(^74\) The contextual approach to general principles in international law is considered of increasing importance as international law becomes highly specialised, such as international indigenous rights, where there is ‘time-sensitive needs’ to resolve pressing issues that ‘cannot wait for treaties and customs to catch to the issue of the day’.\(^75\)

\(^{70}\) the International Court of Justice (ICJ Statute) (26 June 1945, EIF 24 October 1945) 59 Stat 1031 USTS 993.


\(^{73}\) Biddulph and Newman (n 71) 341-344.

\(^{74}\) *Kichwa Indigenous People of Sarayaku v Ecuador* (Merits and reparations), 27 June 2012), IAC/HR, Series C 245.

\(^{75}\) Biddulph and Newman (n 71) 302, 341-344. It can be noted that the quote is presented in the discussion of International Environment Law. Nevertheless, considering the resent publication of suicide rates of indigenous peoples in the Arctic, the argument is as valid in any discussion of Indigenous peoples’ rights. See, eg, Jon Petter A Stoor et al ‘’We are like lemmings’’: making sense of the cultural meaning(s) of suicide among the indigenous Sami in Sweden (2015, Special issue) *Int J Circumpolar Health* 74 <http://dx.doi.org/10.3402/ijch.v%v.27669> [accessed 28 July 2016]; Jennifer Redverse et
One of the better-known international legal principles concerning indigenous peoples’ rights is the principle of self-determination. The principle is well recognised under international law and is firmly established through the case law of the International Court of Justice. Nevertheless, in a contemporary setting, if one in an Arctic context disregards Greenland, the principle of self-determination is limited to internal self-determination, with respect to the integrity of the state. This section will not go into the important discussion of what internal self-determination of indigenous peoples’ entails, but highlights that principles such as this are of utmost importance when it comes to protection of indigenous land rights and privileges, and it is clear that the content of self-determination is established not only through the establishment of different treaties addressing human rights, but also from human rights established through international custom and context-specific international principles.

Treaty Interpretation

The European Court of Human rights adopts the general principle of treaty interpretation applied in international law. The text of the European


76 See, eg, Rehman (n 101) 473-480; Harris (n 101) 774ff.


78 See the principle of equal rights and self-determination of people in the UNGA

'Declaration on the Principle of International Law Concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations' (24 October 1970) UN doc A/RES/25/2625, where the ‘territorial integrity or political unity of sovereign an independent state’ must be respected. The resolution has also been seen as the reasons for the inclusion of the restricting clause in Article 46(1) of the United Nations Declaration on the Rights of Indigenous Peoples; Asbjörn Eide, 'From Prevention of Discrimination to Autonomy and Self-Determination: The Start of the WGIP, Achievements Gained and Future Challenges’ in Roxanne Dunbar-Ortiz et al (eds) Indigenous Peoples’ Rights in International Law: Emergence and Application (IWGIA 2015), 98-121, 112-113.

79 Rehman (n 101) 478 – 480.

80 Rainey et al (no189) 65-67; Golder v The United Kingdom App no 4451/70 (21 February 1975) [29]-[30] [34]-[35]; Loizidou v Turkey App no 15318/89 (ECHR, 18 December 1996) [43].
Convention on Human rights is therefore interpreted in line with articles 31 to 33 of the Vienna Convention on the Law of Treaties.\textsuperscript{81} Above all, this means that it is the ordinary meaning of the words that form the basis of interpretation when interpreting the text in the specific context, and in line with the object and the purpose of the whole convention, including its preamble and the protocols.\textsuperscript{82} The contextual interpretation method means that the Court sometimes interprets the ordinary meaning of the word in a provision by relating to other provisions of the Convention, its protocols or its preamble, as long as such an interpretation is consistent with the objective and purpose of the whole Convention.\textsuperscript{83} The consequence of this approach is that a more specific provision in a protocol can form a part of a more general provision of the Convention, expanding its scope of protection.\textsuperscript{84} The contextual approach also means that the Court adopts an evaluative interpretation approach for the purpose of providing practical and effective protection of conventional rights in a contemporary setting, where development in national, regional and international law may be taken into account.\textsuperscript{85} This makes the convention a living instrument that ‘must be interpreted in the light of present-day conditions’.\textsuperscript{86} In the context of treaty interpretation, it could be noted that the Court has clarified that the reference to “the general principles of international law” in the first article in the first protocol to the Convention has the same meaning as Article 38(1)(c) of the Statute of the International Court of Justice.\textsuperscript{87} Principles that are common to the major legal systems of the world such as the principle of equity are therefore a part of the process of treaty interpretation.\textsuperscript{88} Nevertheless, the Court has held that only people with other citizenship can rely directly on the general principles of international law if they have been deprived of their possessions.\textsuperscript{89}

\textsuperscript{82} Golder v UK (n 80) [29]-[30] [34]-[35].
\textsuperscript{83} Rainey et al (n189) 70-71.
\textsuperscript{84} ibid.
\textsuperscript{85} ibid 73-78.
\textsuperscript{86} Tyrer v United Kingdom App no 5856/72 (25 April 1978) [31].
\textsuperscript{87} Lithgowen and Others v United Kingdom App no 9006/80; 9262/81; 9263/81; 9265/81; 9266/81; 9313/81; 9405/81 (ECHR, July 1986).
\textsuperscript{88} Wallace and Martin-Ortega (n 70), 23-26.
\textsuperscript{89} Lithgowen and Others v UK (n 87) [111]-[119].
1.4 Aim and Purposes

This paper addresses the jurisprudence of the European Court of Human Rights and the possibilities for indigenous peoples living in the Arctic region to seek reparation through it. The interpretative approaches of the Court are discussed in the context of both a conventional perspective, i.e. correctly apply perspective, and an external perspective to the particular benefit of the indigenous peoples of the Arctic and society. It is based on the knowledge that the development of human rights during the 20th century has created a new branch of the corpus of international law that influences other fields of both international and national law.

The development of international law also influences and develops through jurisprudence, as courts tend to apply new development when analysing and interpreting the meaning of treaties concluded decades earlier. This makes international law a dynamic system, and although this process in many fields is slow, the field of human rights has developed exponentially since the introduction of individual rights in the 1940s.

The developments of indigenous rights have, on the contrary, seemingly gained little from this development, and especially little attention from the European Court of Human Rights. Hence, this paper intends to look closer into the jurisprudence of the Court, to evaluate the degree to which it provides a basis for protection of the rights to property of the Arctic indigenous peoples falling within its geographical limitation, with a specific objective to foster knowledge of the case law in this area.

For guidance, this paper asks the following question: To what extent does the jurisprudence of the European Court of Human Rights contribute to making it a viable resort for the protection of indigenous peoples’ rights of property. The underlying hypothesis of the paper is that the jurisprudence contains elements that contribute to the protection of indigenous peoples’ right of property, but that the system itself contains obstacles that hinder the regime from evolving in line with international law.
1.5 Method and Material

This paper uses a trinity approach by applying a legal dogmatic method, a comparative method,\(^{90}\) as well as an analytic descriptive method. The reason for this approach is that while a legal dogmatic method is useful to ascertain *de lege interpretata* of the European Court of Human Rights in relation to the object in focus, the internal perspective,\(^{91}\) it will not suffice when taking an external perspective of these areas; the indigenous peoples’ rights perspective.\(^{92}\)

Neither is it possible to use a legal dogmatic method to compare positive law from different disciplines, as this paper does, which is essential in order to give a better understanding of how human rights law is applied by the European Court of Human Rights compared to similar institutions.\(^{93}\) Also, the legal dogmatic method has especially been found problematic to apply in an area that is relatively new and where there is a restricted amount of hard law and case law, which is the case of indigenous rights on a European level.\(^{94}\) A dogmatic method would also technically not be applicable when addressing decisions from institutions such as the African Commission on Human Rights, which *per se* does not create hard law, and which uses sources that in the strict meaning falls outside authority sources as defined by the legal dogmatic method. The value of applying a trinity approach further lies both in the critique of legal domestic paper as often unoriginal and irrelevant paper which ‘by definition yields no more new insights’\(^{95}\), and the necessity of a systematic organization of materials in judgments which often are ‘dispersed fragmented, prolix, and rebarbative’.\(^{96}\)

By using authoritative legal sources, the legal dogmatic method is used to describe, systematize, and interpret current positive law.\(^{97}\) This means that in order to ascertain *de lege interpretata* of the courts looked into, this paper


\(^{91}\) Jan Vranken, ‘Exciting Times for Legal Scholarship’ (2012) 2 *LaM* 42, 43.


\(^{93}\) Vranken (n 91) 57.

\(^{94}\) Olsen (n 92) 122.

\(^{95}\) Vranken (n 91) 45-46.

\(^{96}\) ibid.

\(^{97}\) Olsen (n 92) 111-119; Aleksander Peczenik, ‘Juridikens allmänna läror’ (2005) *SvTJ* 249, 249ff.
will address the underlying conventions and the judicial decisions of the courts, as well as international custom and general principles of law. The term *de lege interpretata* is used to advantage over *de lege lata* (the law as it is), or *de lege ferenda* (the law as it should be). These are inline with the approach of Eva-Maria Svensson’s consideration that the term *de lege interpretata* (law as it has been interpreted/construed) is more accurate than current positive law is ‘always interpretations of active subjects (where some interpretations are more accepted than others), and that this has consequences both at an epistemological and practical plan’.  

The dogmatic approach used is, therefore, not a strict one, where the validity of a judgment could not have been questioned. This paper applies a dogmatic approach that enables it to undertake an independent assessment of the rules itself and their application, limiting the restrictions the legal dogmatic method often is connected with.

The comparative and analytic descriptive methods are then used to describe and interpret current positive law, as applied by the European Court of Human Rights, in comparison to the Inter-American Court of Human Rights, the African Court on Human and Peoples’ Rights. The same sources as the legal dogmatic method are used, but not restricted to hard law, enabling the use of other authoritative sources of law, including soft law and highly qualified publicists. As noted, this approach enables this paper to compare how different legal disciplines approach the objects of this study and to evaluate the approach of the European Court of Human Rights, without being restricted by the legal dogmatic method.

There is one restriction in this paper that is important to highlight. Since this paper focuses on legal institutions, it will not address the United Nations Human Rights Committee in Geneva. It is acknowledged that the UN Committee may offer the most effective protection of indigenous peoples in the Arctic, including those living in areas covered by the mandate of the European Court of Human Rights; however, the reason for the decision is

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98 Eva-Maria Svensson, ‘De lege interpretata – om behovet av metodologisk reflektion’ (2014) *Juridisk Publikation Jubileumsutgåva* 211, 214 [authors translation].
99 Olsen (n 92) 119; Peczenik (n 97) 255.
100 Jareborg claims that Legal Dogmatic is ‘associated primarily with the reconstruction of the existing law and therefore also with the limitations imposed by the exercise of power and decision making by regulators and courts,’ [authors translation] this, however, does not means that the argumentation cannot go beyond positive law to find new and better solutions; Nils Jareborg, ‘Rättsdogmatik som vetenskap’ (2004) *SvJT* 1, 4.
that the UN committee is not an institution that provides legally binding judgments. However, although the Committees’ views are not legally binding, states tend to follow them.

1.6 Disposition

This paper begins in chapter two by giving a brief account of the historical background leading to the development of a European Charter of Human Rights and the establishment of a Supreme Court, with emphasis on the political process underlying the Congress of Europe and its outcome documents. Subsequently, the institutional and organisational structure of European human rights law will be addressed.

Chapter three provides an in-depth examination of the case law of ECtHR, to outline contemporary positive law. The focus is on land cases under the protection of property in Article 1 of Protocol 1 to the European Convention for the Protection of Human Rights and Fundamental Freedoms.

Where necessary, in order to foster the understanding of the Courts’ position or argument, other cases will be reviewed and described. Exceptionally, the dissenting opinions will be addressed, and only for explanatory purposes of the Courts’ position or the development of conventional rights.

The fourth chapter follows the same structure as the third. It provides a review of cases and communications related to land rights from the African Court on Human and Peoples’ Rights, and the Inter-American Court of Human Rights.

Chapter five provides an in-depth analysis of the current position of European Court of Human Rights regarding rights connected to land in relation to the position of the African Court on Human and Peoples’ Rights, and the Inter-American Court of Human Rights.

Chapter six, the concluding chapter, discusses the findings of the paper in the context of indigenous rights and considers the wider implication of the Court’s position for Arctic indigenous peoples. This paper is not intended to be a study of the accuracy of the judgments. However, to the extent this paper criticises judgments or the position of the European Court of Human Rights on protecting rights connected to indigenous peoples lands, it is more of an epistemological criticism of the reasoning of the judgments from an external
perspective. In this regard, this paper seeks to contribute to the debate on the effectiveness of the European Court of Human Rights to protect the right of property living outside the metropolitan area of the Court’s jurisdiction.
2 The European Human Rights Regime

2.1 Origin of Modern European Human Rights

One thing that is often emphasized by referring to the text of the European Convention on Human Rights is that the Convention does not provide specific rights for minorities or groups. There is rarely any further explanation for this position, and it is all too often accepted that specific rights for certain groups cannot be interpreted to be included in the current text of the convention. This purpose of this section is, therefore, to highlight the historical reasons why the text of the Convention is silent about specific group rights.

The origin of human rights, commonly referred to when speaking of rights of individual people, has its infancy in the turmoil surrounding the first and foremost Second World War (WWII). Post-world war human rights differ from those existing before. Before human rights were of a more humanitarian nature, and the protection they provided was triggered by the outbreak of state-to-state conflicts.\(^{101}\) The obligation of a state to protect certain groups of people within their territory was nothing new, nevertheless, this obligation was included in the peace treaties following the First World War. The focus was, however, not the welfare of the group per se, but the preservation of international security.\(^{102}\) It was not until the end of WWII that a new branch of international law started to crystallize. A legal order where the rights of the individual person were in focus, and which provided a different function than traditional treaty law, where the centre of attention are states and the function

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\(^{101}\) The initial humanitarian laws from 19\textsuperscript{th} and early 20\textsuperscript{th} century was re-negotiated during the end of the Second World War and codified in the Geneva Conventions; Javaid Rehman, *International Human Rights Law* (2nd edn, Pearson Education 2010) 14-15; David Harris, *Cases and Materials on International Law* (6th edn, Sweet & Maxwell 2004) 654ff.

was to create a reciprocal exchange of rights and benefits between them.\textsuperscript{103} In this regard, the regime for the protection of individual human rights in Europe would in an international sense become unique, as the traditionally strict division of national law and international law became more fluent.\textsuperscript{104} Regardless, the new international legal order of human rights came into being, not because there was a mutual benefit between states signing and ratifying a human rights treaty, but due to internal national political considerations, which also influenced the substantial rules.\textsuperscript{105} As will be seen, nowhere is this more apparent than when it comes to indigenous peoples’ rights. It should, however, be recognised that human rights have since WWII come to play an increasingly important role in preserving international peace and order, and are a key aspect of the work of most international cooperation.\textsuperscript{106}

The idea for a unified Europe is no new idea but gained attention in 1946 when Winston Churchill held a speech at the University of Zurich, \textit{Speech to academic youth}. In this speech, he revived the idea of a united Europe and advocated for the establishment of a council of Europe.\textsuperscript{107} Churchill’s newfound vision gained support much due to the insight that traditional nationalism with strong sovereign countries had made Europe not only weak but had also been a contributing factor to WWII. Especially the rule of non-intervention played a part, as there was no recognised rule that allowed


\textsuperscript{106} In the context of this paper, on of the most prominent inter-governmental organisation, covering the entire Arctic region is the Organization for Security and Co-operation in Europe (OSCE). The organisations’ focus is on security issues and a part of preventing conflict between the member states is to promote the respect of human rights. For this purpose, and to address specific tension involving national minorities, OSCE has a high commissioner on national minorities. The function of the higher commissioner is to assess collected and received information regarding situations of national minorities to evaluate if the situation could develop to a crisis, is so an early warning can be issued. This has only been done twice, 1999 on Yugoslav Republic of Macedonia in 1999, and 2010 on Kyrgyzstan. The basic structure resembles that of the Council of Europe. Decisions are consensus based and binding on a political basis, rather than a legal basis such as the judgments of the ECtHR; <http://www.osce.org/>.

\textsuperscript{107} The speech can be found at <http://www.gold mercury.org/news-and-multimedia/winston-churchills-united-states-of-europe/> [Accessed 2016-06-20].
intervention solely on the basis of protecting the general population of a nation.\textsuperscript{108}

The atrocities during WWII made it clear that the regulation of the protection of the specific groups and minority, which was the guiding principle for protection of ordinary citizens used before and after WWI, was not sufficient to create international stability.\textsuperscript{109} It also became clear that there are limits to how a state may treat its own citizens; where treatment exceeded such limit could not only not be accepted by the international community, but needed a response. As an area of concern of the international community also the rights of the majority, i.e. of the rights of individual people, needed to be regulated on that level.\textsuperscript{110} The protection of individual human rights also became a new mean to set aside the rule of non-intervention to legally intervene in matters that traditionally would have fallen within the sovereignty of the state.\textsuperscript{111} Regardless, the guaranteeing of the protection of human rights does not fall on the international community per se. The peace treaties from WWII clearly acknowledge and re-confirm that it is the national state’s obligation to maintain and guarantee human rights in line with sovereign equality unless they willingly submit themselves to the scrutiny of an international institution.\textsuperscript{112}

The inclusion of human rights and fundamental freedoms in the peace treaties is one thing. Here they serve not only to provide an international legal obligation of the state to protect, guarantee and uphold human rights and


\textsuperscript{109} Wilken (n 102) 93-94.

\textsuperscript{110} Rehman (n 101) 3-5.

\textsuperscript{111} The 1942 declaration of the United Nations for example, uses human rights as one foundation to deploy all means necessary (employ its full resources) to defeat Germany, although it is not clear which human rights they are referring to; Declaration by the United Nations (Washington January 1, 1942) 55 Stat 1600, EAS 236; Harris (n 101) 654.

fundamental freedoms within the political framework of the nation, which must adapt to these obligations, it also provides legal means of exerting pressure upon the states with respect to those rights. This was, for example, used by the United Kingdom and the United States when Bulgaria, Hungary, and Romania applied to become a member of the United Nations.\(^\text{113}\) To create a European charter of human rights that a state willingly signs and ratifies is another matter.

Despite the mixed reaction to Churchill’s speech, the growing movement resulted in the convening of a congress in Hague, May 1948, the Congress of Europe.\(^\text{114}\) The purpose of the Congress was not to negotiate legally binding documents but to function as a unifier of Europe, devastated by two wars. Therefore, it was more of a gathering where different ideas could come together upon which legal binding treaties could be created.\(^\text{115}\) The Congress, in essence, provided the blueprint of Europe as we see it today, where the European Convention on Human Rights and the European Court of Human Rights, is a result of suggestions of the Cultural committee, outlined in one of the three resolutions produced, and summarised in the final declaration, *the Message to European*.\(^\text{116}\) The uniqueness of the European regime of human rights protection lays in these documents. In order for the vision of a European charter of human rights to be realized and adequate protection against state arbitrary intrusion would be created, the states were “forced” to transfer some of their sovereign rights to a supranational supreme court; a court that not only had supranational jurisdiction but also an institution where ordinary ‘citizens and groups…’ could appeal decisions from national courts.\(^\text{117}\)

The term ‘groups’ should not be interpreted as if there were an intention to include the same type of specific rights to groups or minorities that existed before the war. There are several reasons for this. First and foremost the focus on rights of minorities in the First World War did not have the sought


\(^{114}\) The Hague congress was convened by the International Committee of the Movement for European Unity, comprised of the Independent League for European Cooperation, the Union of Europe Federalists and the United Europe Movement (ICMEU), <http://www.cvce.eu/en/recherche/unit-content/-/unit/04bfa990-86bc-402f-a633-11f39e9247c4> [accessed 2017-05-27]; Ritsch (n 108) 75ff; Walton (n 108) 740.

\(^{115}\) Walton (n 108) 738-742.

\(^{116}\) ICMEU, ‘Message to Europeans’, *Congress of Europe – Resolutions* (1948).

\(^{117}\) ICMEU, ‘Cultural Resolution’, *Congress of Europe – Resolutions* (1948) [5].
after effect to contribute to international stability and security.\textsuperscript{118} With regards to minorities, there was at the time a system of treaties for the protection of minorities, under the umbrella of the League of Nations.\textsuperscript{119}

The reluctance to include special rights for specific groups was also diluted by the fact that some groups, for political reasons for the purpose of gaining self-determination, tried to benefit from the German occupation in order to reach this goal.\textsuperscript{120} The new regime in Germany also used the structure of the system providing international protection of minorities under the League of Nations, which also was responsible for monitoring and guaranteeing those rights, for their own political benefit by pushing the idea of what constituted minority rights to the extreme.\textsuperscript{121} The use of rights of minority groups for nationalistic purposes made a new treaty containing such rights politically unfeasible; instead individual human rights offered ‘an attractive and plausible alternative’.\textsuperscript{122} Specific rights to groups and minority were off the table and subsequently, the focus of the negotiations for a European charter of human rights came to be on individual rights, first and foremost on civil and political rights rather than economic, social, or cultural rights, which has been attributed to the diversity of European constitutions.\textsuperscript{123}

The focus on civil and political rights also lies in the view under the drafting process that those rights were fundamental rights for a democratic society, whereas the latter was not.\textsuperscript{124} The latter only becomes relevant if civil and political rights were involved, and the protection of minorities was reduced to the protection from discrimination.\textsuperscript{125}

As noted, human rights treaties function differently than ordinary multilateral treaties, and there are various theories why we have human rights. While the inclusion of human rights in peace treaties can be seen as an


\textsuperscript{119} ibid.

\textsuperscript{120} Wilken (n 102) 95.

\textsuperscript{121} As Mazower held, ‘They [the Nazis] made a mockery of the principle of minority rights by turning the largest minority [Germans] into a fifth column for their own activities’, Mazower (n 118) 381-386.

\textsuperscript{122} Mazower (n 118) 387-388.

\textsuperscript{123} Rehman (n 101) 185; The Social and Economical rights are regulated in the European Social (18 October 1961, EIF 26 February 1965) ETS 35.


\textsuperscript{125} Rehman (n 101) 185; Wilken (n 102) 95.
attempt to involve both international coercion and normative persuasion, this is not the full picture when it comes to the more democratic nations. The evolution of contemporary human rights largely took place in Western Europe democracies. Andrew Moravcsik, however, point out that old democracies like England, Sweden and Norway were equally unwilling to embrace individual human rights like non-democratic nations; especially matters such as mandatory jurisdiction and an ambitious judicial system were dismissed.

Furthermore, opposed to the theories where human rights success is based on international coercion and normative persuasion, the reason why human rights became the success they did, is not due to the fulfilled higher purpose where an altruistic government tries to ‘extend perceived universal norms’, but due to domestic considerations where ‘governments support human rights regimes to advance partisan and public interests in preventing domestic violence and interstate warfare’, and where ‘far the most consistent public justification for the ECHR … was that it might help to combat domestic threats from the totalitarian right and left, and thereby stabilizing domestic democracy and preventing international aggression’. This means that even if human rights law functions differently, the negotiation of the ECHR followed traditional rules of treaty negotiation, where the nations’ self-interest was in focus, and where the outcome was nothing else than a ‘practical compromises that would assure that the system functioned to assure each state its preferred level of sovereign control’. Therefore, ECHR presents merely a framework containing ‘the least controversial among basic political and civil rights’.

From the above, it becomes clear that the considerations that are the basis for the original text of the Convention are based on the context of the time. Since then both European law and international law on human rights have changed a great deal. Therefore, a simple reference to the Convention’s text is not sufficient to come to the conclusion that the Convention does not cover

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126 Moravcsik (n 105) 220-225.
127 ibid 231, at footnote 47.
129 Moravcsik (n 105) 236-238.
130 ibid 235.
certain specific rights protecting groups. A contextual and contemporary consideration must also be included in the interpretation process.

The European human rights system is a coherent system that has been praised for its success. The system has since its establishment been in constant change through its optional protocols and case law. The success of the system lies to a great deal in the willingness of the state to comply with the judgments of the Court. How far the system can change therefore lies not only in the hands of the Court. It also depends on the self-interest of nations and national politicians to abiding by the Courts rulings, which arguably historically have helped governments to retain a ‘domestic political status quo against their non-democratic opponents’.

### 2.2 Council of Europe

The Council of Europe (COE, the Council) was established in 1949 to safeguard democracy through a system of upholding human rights. With its 47 members, including the Arctic States of Norway, Denmark (including Greenland), Sweden, Finland, and Russia, the territorial scope of the Convention is vast. In an Arctic context, this means COE's fundamental instrument and institution, the European Convention on Human Rights, and the European Court of Human Rights covers more than two-thirds of the Arctic region making the Court the only court of human rights in the Arctic with the mandate to protect indigenous peoples’ rights. A court to which the

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131 ibid 244.
133 Norway, Denmark and Sweden where original signatories to the COE Statute. Finland and Russia acceded to the COE Statute respectively in 1989 and 1996.
134 The square miles of Russia, Finland, Sweden, Norway, Denmark, and Iceland together represents about 55 % of the total Arctic area, 6868 of 12 475 sq miles; *AHDR 2004* (n 23) 17-19, 27-29.
majority of the indigenous peoples living in the Arctic (89%) potentially can turn to in the case their human rights have been violated.

Like the European Union, the work of the Council of Europe is performed with an integrative approach to ‘achieve a greater unity’ among their member states. Given that COE unlike the EU is a human rights organisation, the “unity” is the creation of a coherent system of human rights, where human rights and fundamental freedoms do not differ from member states to member states. To this end, the COE, being a complex organisation, has several tools at their disposal. The key instrument, the European Court of Human Rights, is supplemented by several complying mechanisms to ensure that the Courts’ decision is executed by the respondent state.

It is the main organ of COE, the Committee of Ministers that holds the overall responsibility for supervision. It is to the Committee of Ministers that the final judgment is transmitted, and to whom the respondent state submits an action report of its measure taken to correct any violation. The monitoring mechanism of the Committee of Ministers has been described as a secret procedure because it is unclear how this compliance mechanism actually works, and the mechanism has so far escaped deeper analysis. Nevertheless, it is a system of conditionality, teaching and persuasion, where conditionality can lay in the membership itself, teaching is connected to bodies such as the Venice Commission that among others educate newer members states in the rule of law, and classical political persuasion.

135 The number of indigenous peoples in the Arctic will always be estimations, due to the lack of official statistic related to the nations definition, which geographical line is used, as well as the people’s own definition. The total amount of indigenous population in 2006 was estimated to be 336 293, where 299 420 of those live in Russia, Finland, Norway, Sweden, and Greenland; ‘People and Politics of the Arctic’ (2007) 4(7) Journal of Nordregio, 23 <http://www.nordregio.se/en/Metameny/About-Nordregio/Journal-of-Nordregio/2007/> [accessed 2016-07-14].

136 The COE Statute art 1.

137 See, eg, Haaland Matláry (n 132) 127.

138 Established under arts 10, 13-21 of the COE Statute.

139 ECHR art 46(2); In their supervisory function of the execution of judgments the Committee of Ministers are assisted by the Directorate General Human Rights and Rule of Law and its Department for the Execution of Judgments of the European Court of Human Rights. The department also support ‘the member States in their effort to achieve full, effective and prompt execution’ of the Court judgments <https://rm.coe.int/16805a997c > [accessed 2017-05-27].

140 Haaland Matláry (n 132) 118-119.

141 ibid 116-124.
Although the responsibility falls on the Committee of Ministers, since 2000, the Parliamentary Assembly has taken upon them to function as a monitoring body for the implementation of judgments of the European Court of Human Rights.142 Through the publication of official documents, reports,143 resolutions,144 and recommendations,145 the Parliamentary Assembly hopes that the publicity will put pressure on respondent states that fail to execute judgments of the Court and to comply with the judgment.146

Their monitoring work of the Parliamentary Assembly not only work as a name and shame procedure to publicly disclose a nation’s unwillingness to execute a judgment towards other nations, but also provide an important incentive to strengthen human rights on the national level and ensure ‘adherence to the principle of subsidiarity as enshrined in the Convention system’.147

The final piece contributing to the monitoring process is the Council of Europe Commissioner for Human Rights (the Commissioner), established by COE in 1999.148 Being a non-judicial body, it works through its broad

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144 See, eg, COE, PA ‘Resolution 2075 - Implementation of judgments of the European Court of Human Rights’ 30 September 2015.
147 Drzemczewski and Gaughan (n 146) 242.
mandate as a political tool, to highlight different aspects of human rights.\textsuperscript{149} The mandates include, the right to make on-the-spot visits,\textsuperscript{150} but not to receive individual complaints,\textsuperscript{151} to identify shortcomings of member states in the execution of judgments,\textsuperscript{152} and to this end issue recommendation, opinions, and reports.\textsuperscript{153} One relevant example of the Commissioner’s work is MR Alvaro Gil-Robles visit to Sweden in April 2004, where he noted that ‘[c]ertain significant long-standing concerns remain unresolved...notably the question of land rights and the involvement of the Sami in the decision-making affecting their environment and means of subsistence’,\textsuperscript{154} a concern which was repeated in a memorandum to the Swedish government in 2007.\textsuperscript{155}

The above illustrates the keynote made by Andrew Dremszewski and Jame Gaughan, that the protection of human rights, which is the raison d’être of the European Convention on Human Rights, is not secured only through the judgments of European Court of Human Rights. The Convention is built on the principle of subsidiarity; it is the member states that shall guarantee the protection of human rights in their jurisdiction. International monitoring mechanisms are nevertheless essential. The hard thing is to find the right balance between the right to provide national protection without intrusion, and the right of international supervision and scrutiny of national actions in order to put pressure on the national state to enforce conventional rights that they have undertaken to maintain and protect.\textsuperscript{156}

\begin{itemize}
  \item \textsuperscript{149} ibid arts 1, 3.
  \item \textsuperscript{150} The Commissioner for example visited Sweden 21-23 April 2004.
  \item \textsuperscript{151} CM, Resolution 99(50) (n 148) art 1(2).
  \item \textsuperscript{152} ibid art 3(e).
  \item \textsuperscript{153} ibid art 8. Since 1999 the Commissioner have issued the 5 recommendations, 16 opinions, 53 Activity Report, over 1200 Country Monitoring Reports, <https://www.coe.int/en/web/commissioner/>.
  \item \textsuperscript{155} COE, CommDH, ‘\textit{Memorandum to the Swedish Government: Assessment of the Progress Made in Implementing the 2004 Recommendations of the Council of Europe Commissioner for Human Rights’}, 16 May 2007, CommDH(2007)10 [54].
  \item \textsuperscript{156} Dremszewski and Gaughan (n 146) 243-244.
\end{itemize}
2.3 Framework Convention for the Protection of National Minorities

Several treaties have been concluded under the auspice of COE, where some amend the ECHR, and thus falls under the mandate of ECtHR, whereas others are self-standing. The Framework Convention for the Protection of National Minorities (FCNM, Framework Convention),\(^\text{157}\) are one example of the latter. The Framework Convention therefore technically fall outside the context of this paper, nevertheless, a brief comment shall be made.

The aim of FCNM is said to be to protect national minorities in order to maintain peace and stability and therefore resembles treaties that were in place during and after WWI.\(^\text{158}\) Those historical connections are also outlined in the Preamble of FCNM.

Regardless of having 39 states ratified or acceded to the Framework Convention, including, Sweden, Denmark, Norway, Finland and Russia, member states of the COE, the convention has been heavily criticised for several reasons.\(^\text{159}\) In the first place, being a “framework convention” it is general in scope, which makes its application dependent on interpretation made by the state in question.\(^\text{160}\) This, of course, is connected to the self-standing, the disconnected nature of the Framework Convention, in relation to ECHR. As FCNM in itself does not have any individual complaint procedure, which can be used to test the states’ interpretation, this interpretation falls within the margin of appreciation of the state.\(^\text{161}\)

The second major criticism is that FCNM does not define minorities. Although a definition is often not desirable, nor possible,\(^\text{162}\) the Framework Convention is written in such a way that it is within the margin of appreciation of the states also to define which minorities are afforded


\(^{161}\) Rehman (n 101) 465.

\(^{162}\) See, eg, Makkonen (n 17) 51ff, 81-82.
protection by it. In Sweden, for example, only the Sami, Swedish Finns, Tornedalers, Roma and Jews fall within the definition of national minorities which language are recognised and protected, whereas for example those who speak älvdalska (Elfdalian) are not recognised as a specific minority. While in Denmark only German minorities in South Jutland do, excluding language minorities in Greenland or Greenlandic speakers in Denmark itself. The Advisory Committee on the Framework Convention for the Protection of National Minorities has criticised Denmark in this a priori act of excluding minorities, while the position taken by Sweden seems to raise little concern. On the other hand, the Advisory Committee does recognise the margin of appreciation of the state to decide upon the issue, nevertheless, the margin of appreciation must be ‘exercised in accordance with general principles of international law’. Considering that the Framework Convention, and the approach of the Advisory Committee, seems to eradicate the subjective side, the self-identification, and the application of the Framework Convention allows nations not to consider all the relevant circumstances in each case, but at forehand decide to which national minorities the Framework Convention applies to legally, seems that the current approach, in this sense, contradicts the principles of international law.

Thirdly, being a convention for the protection of minorities, it seems odd that group rights are omitted, as they are seen as ‘necessary to guarantee the equal of a number of rights [such as] …identity [and] culture…’.

163 Alfredsson (n 160) 296.
164 For a list of declaration see link at note 159. Considering that the indigenous population in Greenland can be divided in three groups with their own unique languages, where Kalaallit is the largest group and Kalaallisut is the official language. The Tunumiit and Inughuit, speaking respectively, Tunumiit Orassiat, and Inuktun, can be regarded as (linguistic) minorities.
167 Makkonen (n 17) 57-58, 65.
168 Greco-Bulgarian Communities Case (Advisory Opinion) (1930) PCIJ Rep Series B No 17, 22.
169 Makkonen (n 17) 81-82; Rehman (n 101) 463.
170 Alfredsson (n 160) 295.
Finally, Guðmundur Alfredsson highlights structural problems of the monitoring system of FCN M, which contribute to an ineffective protection of minority rights under the convention.\textsuperscript{171} Under this system, the Advisory Committee in charge of the monitoring of the implementation of FCN M is under the political guardianship of the Committee of Ministers, which is a political body rather than a judicial one. The effect is that the system is built upon a final political consideration of documents concerning the members of the committee itself.\textsuperscript{172}

The above not only leads to question over the effectiveness of the system, but also whether the over-flexible text of the convention makes it even possible to make any legal interpretation of the rights, to whom it may apply, and how the states fulfil their obligations.\textsuperscript{173} In a sense of being a regional convention, Timo Makkonen notes the paradox that while regional agreement usually tends to afford wider protection than international once ‘the contrary seems to be true’ in the present case.\textsuperscript{174}

\textbf{2.4 The European Convention for the Protection of Human Rights and Fundamental Freedoms}

In the light of the above, this section will provide a brief examination of some key articles in the European Convention for the protection of human rights and fundamental freedoms (ECHR, the convention), and its protocols. It will not provide a detailed examination, but an overview to outline some basic structures in order to facilitate the understanding of the examination of the right of property in Article 1 of protocol 1 (P1-1).

As noted, the objective of the regime of ECHR is to provide a collective enforcement guarantee of human rights.\textsuperscript{175} Guaranteed rights are listed in the convention and its protocols, such as the right of property in the first protocol. In this sense, the protocol can be either amendatory or

\textsuperscript{171} ibid 295-296.
\textsuperscript{172} ibid.
\textsuperscript{173} Rehman (n 101) 465.
\textsuperscript{174} Makkonen (n 17) 81-82.
\textsuperscript{175} ECHR preamble; also, AS/Jur, ‘Establishment of a collective guarantee of essential freedoms and fundamental rights’, Doc AS/Jur(1949)77 [1(1)].
supplementary. Meaning, they can add to the rights in the convention itself, as Protocol no 6, which expands the meaning of the right to life in Article 2, ECHR, by abolishing the death penalty as an option within the national legal systems. A protocol can also be of structural importance, as Protocol no 11, which reformed the judicial organisation of COE by merging the European Commission of Human Rights with the court, creating a single organ to which individuals directly could apply. Before looking into specific articles, a recap of the historical event must be addressed.

The early draft of the Convention that the Parliamentary Assembly sent to the Committee of Ministers, was ‘as far as possible’, based on the 1948 Universal Human Declaration of Human Rights (UDHR). The latter means that a reference to UDHR is not a reference to the whole article in question, but ‘only to those specifying the conduct of freedom provided for’. This would mean that, if a provision in UDHR contains additional rights, not relating to the specific conduct of freedom, they cannot be interpreted to be included in an article in ECHR. In relation to P1-1, which is based on Article 17 UDHR, this could be interpreted as the text proposed by the Parliamentary Assembly’s, ‘right to own property, in accordance with article 17… [UDHR]’, does not cover ‘the right to own property …in association with others’ which is a separate right covered by Article 17 UDHR; a thoughtful consideration in the light of the collectiveness of indigenous property. This could, however, be an obsolete example, since, for political reasons, there are no rights to own property under P1-1. The right of property will be discussed in length below, but it can be noted that Mr Pierre-Henri Teitgen in his report

179 Doc AS/Jur(1949)77 (n 175) [2(6)].
181 ibid Doc AS/Jur(1949)77 (n 175) [2(7)].
182 ibid Doc AS/Jur(1949)77 (n 175) [3.1].
listed 12 human rights to be included in a European convention, inter alia, the right to own property.

The right to own property had, however, raised split opinions, whether it was too social and economical to fit in the convention, which as noted, primarily covers civil and political rights.\(^\text{183}\) The right was eventually lifted from draft proposal, not because of the discussion whether or not it was a ‘fundamental requirement of a democratic society’, but due to a concern that the right to own property would conflict with the political structure of socialist nations, where there was a need for a possibility to nationalise property, and therefore could have become an obstacle for the signing of the convention.\(^\text{184}\) The question was not totally dropped but send back to the Committee on legal affairs and Administrative Questions for further study.\(^\text{185}\) In their attempt to define the right to own property, they came to the conclusion that there is a need to take into consideration the ‘social concept’ of property, which would allow it to be used for the public good, as a result the right to own property and not have it take away by arbitrary means, became a right of property.\(^\text{186}\) Before addressing the right of property placed in the Protocol to the ECHR some article in the convention itself will be addressed.

**Article 1 – General obligations**

Now, turning to the substantial rules in the convention. Article 1 of the Convention outlines the general obligation principle that each member state ‘shall secure to everyone within their jurisdiction the rights and freedoms’ in the convention, including the rights set forth in the protocols to which that member state is a party to.\(^\text{187}\) As noted, the obligation to provide protection of conventional rights instantaneously, it follows from the words *shall secure*, consequently, that there is no implementation period for any of the rights. In

\(^\text{183}\) ibid [2(10)].
\(^\text{184}\) Robertson and Merrills (n 124) 8, 11-12.
\(^\text{187}\) Those protocols which adds rights and freedoms to the conventions contain a ‘relationship to the Convention’ clause outlining which provisions in the protocol that ‘shall be regarded as additional articles to the Convention and [that] all the provisions of the Convention shall apply accordingly. Protocol 1, art 5; Protocol 4, art 6, Protocol 6, art 6, Protocol 7, art 7, Protocol 12, art 3, Protocol 13, art 5.
this context, it could be reminded that all five Arctic states with indigenous peoples, Sweden, Norway, Denmark, Finland, and Russia, have ratified the convention. The rights protected are, consequently, only the rights listed in the Convention or Protocols thereto.

Article 14 – Prohibition of Discrimination

The first section of ECHR contains substantive rights and freedoms. As mentioned, for historical reasons group rights, in the meaning that there is no need to identify each individual, were not included in ECHR. It has therefore been held that it is not possible, even through dynamic interpretation in the light of development, to interpret that the convention would include collective rights. In the context of group protection, Article 14 – prohibition of discrimination, is of interest and needs further consideration.

Article 14 in conjunction with Article 1 per means that conventional rights shall be secured without distinction to, inter alia, race, colour, language, national or social origin, and association with a national minority, property, birth, or another status. Considering the historical context and the current rights and freedoms in the convention and protocols, there are no direct provisions that provide security for indigenous rights, what Article 14 provides is a right not to be discriminated directly or indirectly on the based on status. Now, Article 14 does not provide a general prohibition of discrimination. Protocol No 12 provides this, however, none of the Arctic States has ratified Protocol no 12. Article 14, therefore, in relation to the Arctic states, does not have a self-standing position. It is still a “…normative provisions of the Convention and the Protocols…” and as such it must be read in conjunction with an article which rights allegedly have been...
There are consequences of this. One consequence was highlighted in *Gratzinger and Gratzingerova v The Czech Republic*.

‘The Court considers that it must first determine whether Article 1 of the Protocol No. 1 is applicable in the instant case, as Article 14 of the Convention complements the other substantive provisions of the Convention and its Protocols. It has no independent existence since it has effect solely in relation to the enjoyment of the rights and freedoms safeguarded by the Convention; there can be no room for its application unless the facts in issue fall within the ambit of one or more of its provisions…’

In this case the primary article was not applicable, consequently, Article 14 could neither be applied. Furthermore, if Article 14 prima facie seems applicable, the application still needs to indicate the presence of discrimination if the article is to be considered. In the case *G and E v Norway*, there was no such indication; as a result, the application of Article 14 was found inadmissible.

The above does not *per se* entail a requirement of a violation of the primary article. A measure interfering with a right or freedom, which has been considered permissible under the primary provision, can still be regarded as discriminatory. In the case *Marckx v Belgium*, ECtHR was faced with questions regarding a Belgian law that gave legitimate children wider rights to inheritance than children born out of wedlock. The court held that despite being in conformity with the primary article, the legislation could still be discriminatory under Article 14 of the convention. The prerequisite was that the differential treatment of two persons in similar situations lacked a legitimate objective for why the measures were taken and that there were no ‘…reasonable relationship of proportionality between the means employed and the aim sought to be realized…’

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194 See, eg, *G and E v Norway* App no 9278/81;9415/81 (ECHR, 3 October 1983) [38].
195 *Gratzinger and Gratzingerova v The Czech Republic* App no 39794/98 (ECHR, 10 July 2002).
196 *ibid* [68].
197 *ibid* [76].
198 *G and E v Norway* (n 194) [38].
199 *Marckx v Belgium* (n 193).
200 *ibid* [32-33] [63-65].
The “similar situation”-criteria can be problematic if there is no such obvious similar situation. This may be of little concern for the objectives of this paper, but it will nevertheless be addressed. In *Larkos v Cyprus*, there was no obvious similar situation, and therefore seemingly no ground to assess if any discrimination was present. In the case, a civil worker, based on his work as a civil servant, had been allocated a house by the Cypriot state under a contract-like relationship. The man and his family lived in the house for twenty years. In 1986, the Cypriot state informed him that he had to leave the premises. The applicant contested this. He held that he was protected from eviction, on the basis argued by the government, as he was to be regarded as a statutory tenant holding a tenancy agreement under the Cypriot Rent Control law. The Rent Control law, however, only regulated tenancy in relation to private landlords and therefore did not cover situations where the landlord was the state. Consequently, the domestic courts found that the applicant did not enjoy the same security to the right of occupation as a person renting from a private landlord. The argument of the applicant was that his relation to the state was a contract-like relationship and he was, therefore ‘…in an analogous situation to that of a private tenant renting accommodation from a private landlord’. The differential treatment therefore violated his right not to be discriminated under Article 14 of the convention. The Cypriot state contested the appearance of a relevantly similar situation, but the court considered that the terms of the agreement clearly indicated that the state acted as a landholder in a private-law capacity and that the applicant, therefore, was in a relevantly similar situation to that of a person renting from a private landlord. The state then failed to convince the court that there was an objective legitimate reason for the difference in treatment, and the court found in favour of the applicant. As noted, Article 14 does not prohibit discriminatory measures per se. A discriminatory measure can be in conformity with the convention if it can be excused under the primary article. For example, the right to respect for

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201 *Larkos v Cyprus* App no 29515/95 (ECHR, 18 February 1999).
202 ibid [25].
203 ibid [30].
204 ibid [31].
205 ‘The restrictions permitted under this convention to the said rights and freedoms shall not be applied for any purposes other than those for which they have been prescribed’, Article 18 ECHR.
private and family life under Article 8 may be restricted in the interest of national security.

A second consequence is connected to the states’ margin of appreciation to restrict the rights and freedoms in the convention, which, at present, is not mentioned in the convention but developed through the courts’ case law. This will be changed once Protocol 15 enters into force when it will be inserted into the preamble, together with the principle of subsidiarity.206 Briefly, the notion can be explained as the ‘outer limits of schemes of protection which are acceptable under the Convention.’207 According to this, it is the state that primarily takes and evaluates measures that might be considered discriminatory. Whether or not they are discriminatory depends on the circumstances in each case. Where measures important for the nation as a whole may widen the margin of appreciation.208 And where the existence of a common ground between the laws, measures, or approaches of the member state may restrict it.209 It is, however, up to the state, in line with the principle of subsidiarity, to initially assess whether the consequences can be regarded as justified in relation to the purpose of the measure taken,210 or if there is a similar situation that proves that it cannot be justified, and calls for another measure.211 To give one example relating to groups, such as indigenous peoples, it is often seen as an objectively reasonable justification to correct inequalities through differential treatment. On the other hand, a failure to correct what de facto is an inequity may in itself be a breach of Article 14 and regarded as a discriminatory measure.212 Consequently, a differential treatment in the enjoyment of rights in the convention or its protocol, between two different groups, is discriminatory if it cannot be justified as

206 Protocol No 15 amending the Convention for the Protection of Human Rights and Fundamental Freedoms (24 June 2013) CETS 213. According to Article 7, all parties to ECHR, needs to consent before the protocol enters into force.
207 Rainey et al (n 189) 80.
208 ibid 69.
209 Stummer v Austria App no 37452/02 (ECHR, 17 July 2011) [104].
210 Marckx v Belgium (n 193) [61-64]; James and Others v The United Kingdom App no 8793/79 (ECHR, 21 February 1986) [46]; J A Pye (Oxford) Ltd and J A Pye (Oxford) Land Ltd v the United Kingdom App no 44302/02 (ECHR, 30 August 2007) [55]; Larkos v Cyprus (n 201) [29].
211 Stec and Others v The United Kingdom App no 65731/01 65900/01 (ECHR, 12 April 2006) [13-14].
212 ibid.
reasonable, and as proportional in relation to the objective of the measure, although the aim itself can be regarded as a legitimate one.\footnote{Robertson and Merrills \textit{(n 124) 179.}}

**Article 17 and 18 Safeguard Clauses**

Articles 17 – prohibition of abuse of rights, and Article 18 – limitation on use of restrictions on rights are two safeguarding clauses, aimed to restrict any abuse allowable exceptions. Article 17, for example, although it primarily is used as a safeguard clause aimed at preventing that the freedoms in the convention to be used to destroy human rights could be used as a base for questioning if the restrictions or limitations on conventional rights are ‘more far-reaching than those contemplated’.\footnote{Sporrong and Lönnroth \textit{v} Sweden App no 7151;7152/75 (ECHR, 23 September 1982) [76]; Robertson and Merrills \textit{(n 124) 191-193.}} Lastly, Article 18, which has the function to be a safeguard towards misuse of the permissible restrictions: to use them as a smokescreen for another purpose. One problem with the article is the need to prove that the official motive is not the real motive for the restrictions.\footnote{Robertson and Merrills \textit{(n 124) 194.}}

**Article 53 – Safeguard for existing human rights**

Article 53 (ex-article 60) – Safeguard for existing human rights, is an Article seldom addressed by ECtHR, and therefore the true function of it seems unclear.\footnote{According to Jonas B Liisberg there case law of the court seems to indicate a reluctance of the European Court of Human Rights to refer to the article. Jonas Bering Liisberg, ‘Does EU Charter of Fundamental Rights Threaten the Supremacy of Community Law? – Article 53 of the Charter: a fountain of law or just an inkblot?’, Harvard Jean Monnet Working Paper 4/01, ISSN 1087-2221, [3.2.2].} What has been established is that the article does not grant the Court the competence to evaluate whether there has been a violation of national law or an agreement to which the nation is a member.\footnote{eg \textit{MK contre la Grèce} App no 20723/92 (Commission, 1 December 1993) [4].} Therefore, it has been held that Article 53 cannot be used as a ground to support an individual claim, a position that has been taken by the European Commission of Human Rights.\footnote{Liisberg \textit{(n 216) [3.2.2].}} Nevertheless, Bruno de Witte, who has examined a similar article in the EU Charter, highlights circumstances where national legislation offers more protection than ECHR. In these circumstances, the
national rights cannot be applied so there is an infringement upon conventional rights. For this reason, Article 53 has been held to be a minimum standard clause. Furthermore, it has also been argued in dissenting opinions of the Court that the convention cannot be used to lower the obligations under national law or international agreements to which the nations is a member. According to judge Pinto De Albuquerque in his dissenting opinion in Vallianatos and Others v Greece, as a result of the existence of Article 53, ‘national courts have to adopt the most convention-friendly interpretation of the national law in order to comply with the international obligations to prevent a breach of the Convention’. Article 53, therefore, seems to set not only a minimum standard but also a limit for how ECHR can be used, i.e. it cannot be used as a mean to lower rights and freedoms to which a nation is obligated to uphold under an agreement. At the European level, this means that ECtHR will not evaluate if the state has violated an obligation under another treaty, but whether the interpretation of a right under ECHR is compatible with the obligations under that treaty. At national level, Article 53 is instead to be regarded as a guiding tool in the instance that two different standards applies, and should in those circumstances be regarded as a most favourable provision clause.

221 Vallianatos and Others v Greece App no 29381/09 and 32684/09 (ECHR, 7 November 2013) [47].
222 Concurring Opinion of Judge Pinto De Albuquerque in Fabris v France App no 16574/08 (ECHR, 7 February 2013) 38 at not 28.
223 Liisberg (n 216) [3.2.3].
3 The First Protocol

3.1 Article 1 – Protection of Property

Introduction

The starting point for a development of a strong right of property began at the same time as ECHR, the historical reason for it to be lifted from the convention was, as noted, connected to the post-war political landscape and the concern that the right would clinch with the political structure of socialist nations at the time. Since then the protection of property has gradually become one of the most important aspects of economic development and with the exception of two, all parties to ECHR have since ratified the protocol. Since Russia’s ratification of the protocol in 1998, 55 % of the Arctic area is now covered with what can be considered a well-established right to protection of peaceful enjoyment of possessions. Nevertheless, the text of the provision remains general and therefore has been subjected to the scrutiny of ECtHR on several occasions, where the meaning and scope of the provision gradually have been clarified.

There have been several applications submitted to ECtHR, concerning indigenous peoples’ rights; most of them have been declared manifestly ill-founded under Article 35, ECHR. This section will below address the most relevant cases in the context of this paper.

Structure

The structure of P1-1 reflects the political reality of its time; as a result, it contains a broad mandate for the state to interfere with the rights provided. Nevertheless, ECtHR also views the convention and its protocols as living instruments that must be evaluated in the current in relation to present
circumstances. In other words, in order to fulfill the aim of the provision to protect the right to a peaceful enjoyment of possessions by safeguarding from arbitrary interference from the state the protection of the provision must be practical and effective and not theoretical or illusory. This principle of practical and effective protection has been stressed by the Court on several occasions when evaluating which interference is in line with the convention and which goes beyond its aim and objective. The frequent use of practical and effective protection in the assessment of the convention’s rights have therefore been considered to as a general principal in assessing the protection of conventional rights. P1-1 provides:

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.

The structure of the provision differs somewhat from the other provisions in ECHR where the exception of rights expressed in the first paragraph of a provision is usually outlined in the second paragraph. This became an issue in Marckx v Belgium in 1975. Based on the second sentence in the first paragraph, the Court extended the coverage of P1-1 from possessions already within your grasp, to cover possessions to which there was a genuine claim, which in itself becomes a possession within the meaning of P1-1, and consequently protection under it. In other words, P1-1 does not guarantee the right to property. Nor does it provide an absolute right to protection of

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224 Tyrer v United Kingdom (n 86) [31].
225 James and Others v UK (n 210) [42].
226 Airey v Ireland App no 6289/73/74 (ECHR, 9 October 1979) [24]; Artico v Italy App no 6694/47 (ECHR, 5 May 1980) [33]; Hutten-Czapska v Poland App no 35014/97 (ECHR, 19 June 2006) [168], Moreno Gomez v Spain App no 4143/02 (ECHR 16 November 2004) [56].
227 See, Marckx v Belgium (n 193) (63]
228 Rainey et al (n 189) 74.
229 See, Marckx v Belgium (n 193), dissenting Opinion of Judge Sir Gerald Fitzmaurice.
230 See, Marckx v Belgium (n 193) [50]
property, as the provision provides two exceptions to the right. This was clarified in *Sporrong and Lönnroth v Sweden* in 1982.\(^\text{231}\)

The first rule, which is of a general nature, enounces the principle of peaceful enjoyment of property; it is set out in the first sentence of the first paragraph. The second rule covers deprivation of possessions and subjects it to certain conditions; it appears in the second sentence of the same paragraph. The third rule recognises that the states are entitled, amongst other things, to control the use of property in accordance with the general interest, by enforcing such laws, as they deem necessary for the purpose; it is contained in the second paragraph.

As will be seen, according to the ECtHR, a measure can violate either rule, a measure that does not constitute a deprivation under the second rule, or control of use under the third rule, can still constitute a violation under the first rule. In the light of Arctic indigenous peoples’ rights, which seldom are based on ownership in the western sense, the following section will focus on possessions in relation to land and resources.

### Possession and Rights

The true scope of defining the applicability of P1-1 is an on-going progress and although the Court always had the position that for the article to be applicable, there must be an existing possession, the meaning of what is considered a possession, has changed considerably over the years.

When the first indigenous peoples’ cases, *G and E v Norway*,\(^\text{232}\) landed in the hands of the Commission at the time, in 1981, the position in Strasbourg on what fell within the meaning of possession can be considered to have been restricted to how the concept of property rights traditionally had been applied in any conflict.\(^\text{233}\) The Commission took little consideration of the applicant’s indigenous status or their historical connection to the land in question. In the

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\(^{231}\) *Sporrong and Lönnroth v Sweden* (n 214) [61]; See, also, *Pressos Compani Navierra S, A, and Others v Belgium* App no 17849/91 (ECHR, 20 November 1986) [33]; *Beyeler v Italy* App no 33202/96 (ECHR, 5 January 2000) [98] [111]; *James and Others v UK* (n 210) [37].

\(^{232}\) *G and E v Norway* (n 5).

\(^{233}\) ibid 35.
case, the Norwegian state commenced the construct a hydroelectric plant in the Alta valley, where the applicants were born, with the result of a loss of pastureland. The Commission was prepared to accept that the measure interfered with the right to private life under Article 8, ECHR. However, the Commission eventually came to the conclusion that it did not interfere with the right to private life, as only 2.8 kilometre of their pasture land was effected and there was plenty of other areas that the applicants could use for reindeer herding and hunting.\(^{234}\)

As for P1-1, the applicant failed to “substantiate that they have any property rights of claims”.\(^{235}\) Neither had they initiated any procedures to claim compensation, which was possible under Norwegian law. Consequently, the complaint under P1-1 was founded manifestly ill founded, due to the lack of exhausted domestic remedies.\(^{236}\) As noted, the Commission took little consideration of the applicant’s indigenous status, or what kind of land was lost. The Commission followed the economical consideration that the Norwegian supreme court focused on; what effect does the construction of the dam have on the applicant’s business, and if the applicant could use other areas which would minimize the economic loss.\(^{237}\)

The Court has since then on several occasions outlined that the meaning of the term possessions in the first rule is autonomous. The position of the Court is now that the term possession is not restricted to traditional ownership over physical goods; other rights and interests, such as use or economic interests, may be regarded as a possession in the meaning of the word.\(^{238}\) To establish the presence of possession is, therefore, the key aspect in the initial proceedings where ‘the issue that needs to be examined in each case is whether the circumstances of the case, considered as a whole,
conferred on the applicant title to a substantive interest protected by [P1-1].

In the Arctic region, activities such as hunting and fishing are more than a leisure activity; these activities are a part of one of the three pillars of the Arctic economy. It represents an important part of people’s subsistence living, their social relationships, and their cultural identity.

The Court has addressed hunting and fishing rights in different European countries on several occasions. In these cases, ownership of the land in question usually plays a role in determining the existence of a possession, as hunting and fishing rights normally go hand in hand with ownership of land. On the other hand, in Königmä and 38 Other Saami Villages v Sweden 1996, the European Commission of Human Rights, at the time, considered that a claim for exclusive hunting and fishing rights by several Sami villages, where national legislation does not recognise Sami ownership of their indigenous land, was as a possession within the meaning of P1-1. The Commissions position is a development in comparison to the possession of the Commission in OB and Others v Norway, where the Commission, although recognizing that the applicant had some rights, found the application manifestly ill-founded by referring to the national courts, where the applicants, under national legislation, could not be perceived to have exclusive rights to reindeer husbandry in the claimed area. Neither were the merits tried in Königmä and 38 Other Saami Villages v Sweden, as the Commission found the application manifestly ill founded on the grounds of lack of exhausting all domestic remedies.

239 Anheuser-Busch Inc v Portugal (n 238) [63] [75]; Beyeler v Italy (n 231) [100].
241 Chassagnou and Others v France App no 25088/94, 28331/95, 28443/95 (ECHR, 29 April 1999); Posti and Rahko v Finland App no 27824/95 (ECHR, 24 September 2002); Alatulkila and Others v Finland App no 33538/96 (ECHR, 27 July 2005); Nilsson v Sweden App no 11811/05 (ECHR, 26 February 2008); Herrmann v Germany App no 93000/07 (ECHR, 26 June 2012).
242 Chassagnou and Others v France (n 241) [74]; Posti and Rahko v Finland (n 241) [74]; Alatulkila and Others v Finland (n 241) [66].
243 Königmä and 38 Other Saami Villages v Sweden App no 27033/95 (ECHR, 25 November 1996); See, also, Johtti Sampelaccat RY and Others v Finland App no 42969/98 (ECHR, 18 January 2005).
244 OB and Others v Norway (n 9) [proceedings before the Commission, the law (2)].
Since *OB and Others v Norway*, ECtHR has clearly stated that the lack of formal recognition does not affect whether or not there is an existing possession within the meaning of P1-1.\(^{245}\) Accordingly, the Court takes the position that the lack of recognised ownership is not a prerequisite for a possession to arise in the meaning of the provision. Interests can also fall within the meaning of possession if there is a legitimate expectation, a substantive interest.\(^{246}\)

In *Johtti Sampelaccat RY and Others v Finland*,\(^{247}\) a piece of legislation expanding the public fishing rights in water where the applicants traditionally have been fishing. The increasing right to access to fishing that the public gained by the legislation was considered by the applicants to conflict with their substantive interest. The applicant did not own the waters in question but had Sami fishing rights based on customs from time immemorial. The argument of the applicants was that by expanding public fishing rights to places where their families traditionally had been fishing, weakened not only their legal protection but also interfered with their traditional livelihood and could affect the traditional culture of the Sami. Again the Court failed to address the argument of the applicant that they had a connection to a specific place where families traditionally have been fishing, as a part of their livelihood. The Court came to the conclusion that the applicants, despite expanding public fishing rights, could still exercise their traditional fishing rights, and that they failed to “appreciably shown the adverse impact” of the legislative changes.\(^{248}\) The Court makes no examination of any future risk of being affected by the legislative changes, or what the value of fishing, in this case, represents for the applicants.

In relation to the above, the principle of substantive interest means that the limitation of P1-1 to cover only existing possessions does not exclude the possibility of future possessions if there exists a substantive interest based on “at least a reasonable and “legitimate expectation” of obtaining effective

\(^{245}\) *Doğan and others v Turkey* App no 8803-8811/02 8813/02 8815-8819/02 (ECHR, 29 June 2004) [137]-[138]; *DePalle v France* (n 238) [62] [68]; *Beyeler v Italy* (n 231) [100]; *Iatridis v Greece* (n 238) [54]; *Anheuser-Busch Inc v Portugal* (n 238) [63].

\(^{246}\) *Pine Valley Development Ltd and Others v Ireland* App no 12742/87 (ECHR, 29 November 1991) [42] [51]; *Kopecký v Slovakia* App no 44912/98 (ECHR, 29 September 2004) [35]: *Anheuser-Busch Inc v Portugal* (n 238) [65].

\(^{247}\) *Johtti Sampelaccat RY and Others v Finland* (n 243).

\(^{248}\) *ibid* 18.
enjoyment of a property right. In *Johtti Sampelaccat RY and Others v Finland*, the applicant failed to show that they had a legitimate expectation to have their traditional fishing grounds protected from outsiders because they represented a specific (economic) value for them, as Sami, and therefore in the future, risked being affected if the area was opened up for other people. The relevance of this must be put in the context of the Court’s statement in *Handolsdalen Sami Village and Others v Sweden*. As Péter Kovács points out, there is an interesting statement by the Court, that indicates that the Court recognizes not only specific rights the Sami has as indigenous peoples, but also the economic values of those rights. In the section where the Court presents the *Reindeer Husbandry Act*, it states that:

> The reindeer herding right is a usufruct of economic value founded on prescription from time immemorial (section 1, subsection 2). It is to be exercised irrespective of contracts and free of charge, without limitations in time and space…

The reference to section 1, subsection 2 of the *Reindeer Husbandry Act* may indicate that this is what the law says, which is not the case. Neither does the law say that there are no limitations in time and space. The writings are clearly the words of the Court. Perhaps the most important section is the economic value section. As if there are economic values, there can also be expectations for future economical values, and therefore these economical values run the risk of being directly or adversely affected by a measure taken, which then would constitute a violation of the right of property. In *Johtti Sampelaccat RY and Others v Finland* the applicant failed to indicate the presence of this risk.

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249 Öneriyildiz v Turkey App no 48939/99 (ECHR, 30 November 2004) [124].
250 *Handolsdalen Sami Village and Others v Sweden* App no 39013/04 (ECHR, 30 March 2010).
252 SFS 1971:437 Rennäringslag (RNL).
253 *Handolsdalen Sami Village and Others v Sweden* (n 250) [34].
254 RNL section 1, subsection 2 reads: The right under the first paragraph (reindeer husbandry) is attributable to the Sami population and is based on time immemorial [Authors translation], (Rätten enligt första stycket (renskötselrätten) tillkommer den samiska befolkningen och grundas på urminnes hävd).
As other indigenous peoples, those who live in the Arctic region have an on-going struggle for getting their indigenous rights connected to their native lands recognised, and the recognition of rights is often limited to the rights of use. The Court has on several occasions recognised that the question of rights connected to indigenous people is a complex legal, historical and also a political issue.\textsuperscript{255}

The complexity is clearly visible in \textit{Hingitaq 53 and others v Denmark}.\textsuperscript{256} The background to the case is a "weather station" built in 1941 by the United States in the Thule district, as a part of an agreement with Denmark. Ten years later a military base was established resulting in the removal of people from the Thule Tribe; for which Danish national courts offered some compensation. As they were forced to settle in another area they lost connection to their native land and their hunting grounds. In describing the circumstances in the case the Court recognises the environmental effect the base had on the wildlife in the area, and that access to hunting and fishing had been ‘increasingly restricted’.\textsuperscript{257} ECtHR agreed with the Supreme Court of Denmark that the act was to be regarded as an expropriation.\textsuperscript{258} The Court also took the view that the effects of the establishment of the military base, the eviction and consequently the substantial restrictions of access to hunting and fishing were instantaneous acts.\textsuperscript{259} Consequently, there was no continuing deprivation of land, or access to land, as the applicants argued.\textsuperscript{260} Finally, the Court came to the conclusion that as there had been compensation and new houses had been built in another area, there was a fair balance between the general interest of the community under P1-1, and the need to protect conventional rights. It should be noted that the Court in this part of the application examined P1-1, in correlation with Article 8, ECHR, - Right to respect for private and family life. Neither in this case, did the Court consider the specific connection the applicants had to the land that was lost. The failures of the Court to take into consideration the specific relation indigenous peoples have to land have been criticised, and as Koivurova stresses, the concept of property rights as used in Europe today ‘do not

\textsuperscript{255} OB and Others v Norway (n 9) [proceedings before the Commission, the law (b)]; Johtti Sampmelaccat RY and Others v Finland (n 243) [ii].
\textsuperscript{256} Eg Hingitaq 53 and others v Denmark App no 18584/04 (ECHR, 12 January 2006).
\textsuperscript{257} ibid 2.
\textsuperscript{258} ibid 19.
\textsuperscript{259} ibid 18.
\textsuperscript{260} ibid 16.
correspond with the community-based understanding of what “property” means for indigenous people’.  

The Court has tried cases where the right to use without an underlying ownership raised questions, such as if a title of the right of use constituted a title to a substantive interest and thus protected by P1-1. This was addressed i.e. in Chiragova and others v Armenia. The applicant did not own land they used, their rights were limited to the title of right of use, and the Court came to the conclusion that the right to use constituted possession within the meaning of P1-1, as well as ‘that the “right to use” conferred on the applicants was a strong and protected right which represented a substantive economic interest.’ In relation to the above-mentioned writings of the Court in Handolsdalen Sami Village and Others v Sweden it shows that the economic interest that derives from other rights than ownership of land is a strong interest. The economic issue also had a bearing on the Courts’ decision in Doğan and others v Turkey. Here the Court saw no reason to look into the question of title deeds, but recognized the lack of such, the question instead focused on whether or not economic activities the applicant carried out constituted a possession. As the Court noted that ‘the applicant had unchallenged rights over common lands in the village, such as the pasture, grazing and the forest land’ from which they earned their living ‘all the economical resources and the revenue that the applicants derived from them may qualify as “possessions” for the purpose of [P1-1], despite the lack of national recognition.

Now, the breaking point between hope and legitimate expectation is the foundation from which they emanate, and a legitimate expectation must “be of a nature more concrete than a mere hope and be based on a legal provision

\[262\] <http://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=1136&context=yhrdlj> [accessed 2017-09-10].
\[263\] Chiragova and others v Armenia App no 13216/05 (ECHR, 16 June 2015).
\[264\] ibid [147].
\[265\] Doğan and others v Turkey (n 245).
\[266\] ibid [139].
or a legal act such as a judicial decision”. This has been clarified in several rulings where a legitimate expectation does not exist if it is based on a right of past possession was the right have been legally extinguished through a legitimate act of the state, and that act has not been contested. By contrast, it means that legitimate expectation at least should have existed at the time of the alleged violation. Consequently, an act that meets the criteria set by the Court, and adheres to the rule of law, will be regarded as an instantaneous act that removes any residual rights upon which any expectation of a right of possession may be based; such an expectation then becomes a belief rather than on a legitimate expectation.

**Regulatory Application**

Once ECtHR has arrived at the conclusion that there is an possession within the meaning of the provision, the question turns to what rule is applicable for the process of evaluation of the alleged interference; the second, the third or the first.

What the case law shows is that pure economic loss tends to be regarded as a control of use, rather than a deprivation. In *Pine Valley Development Ltd and Others v Ireland*, the question was whether a decision of the Irish Supreme Court, which removed a right to develop a land in accordance with a valid planning permission at the time of acquisition of the land, was to be regarded as a deprivation of property or a control of use. The economic loss was substantial: 91% of the value of the land was lost as a result of land no longer possible to develop. Like in *Sporrong and Lönnroth v Sweden*, the Court evaluated if the measure, despite of the lack of formal deprivation

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267 Ramaner and Van Willigen v The Netherlands App no 34880/12 (ECHR, 23 October 2012) [81]; Kopecký v Slovakia (n 246) [49].
268 Anheuser-Busch Inc v Portugal (n 238) [64]-[65]; Kopecký v Slovakia (n 246) [35] [50] [52]; Roche v The United Kingdom App no 32555/69 (ECHR, 19 October 2005) [129]; Centro Europa 7 SRL and Di Stefano v Italy App no 38433/09 (ECHR, 7 June 2012) [173]; Chiragova and others v Armenia App no 13216/05 (ECHR, 16 June 2015) [149] (e contrario).
269 Pine Valley ltd v Ireland (n 246) [42] [51]; Kopecký v Slovakia (n 246) [35]; Anheuser-Busch Inc v Portugal (n 238) [65].
270 G and G v Czech Republic (n 195) [69] [73]; Kopecký v Slovakia (n 246) [35].
271 Pine Valley ltd v Ireland (n 246).
272 ibid [12].
273 ibid [8]-[11].
could be considered as a de facto deprivation of property; meaning if the circumstances, taken together, curtail the right holder from exerting their right in a practical and effective way. The conclusion of the Court was that as the land could be leased or farmed, and therefore had some meaningful value, the measure could not be regarded as a deprivation under the second rule, but instead as a control of use under the third rule. The decision of the Irish Supreme Court did interfere with the right of property, but it was not a deprivation, as it did not curtail the rights altogether, it only amounted to a reduction of the substance of property rights.

In Sporrong and Lönnroth v Sweden, where the Court came to the same conclusion and found the second rule non-applicable, it also came to the conclusion that neither was the third rule. The Court came to this conclusion by looking into the aim of the measure, the expropriation permits, and found that as they “were not intended to limit or control such use. Since they were an initial step in a procedure leading to a deprivation of possessions”, they could not fall under the third rule but had to be examined under the first rule. There were dissenting opinions on the applicability of the third rule: that it should have been applicable, as the property still could be used, even if the intention of the measure was to deprive of ownership in the future. In Loizidou v Turkey, the interference was also found to fall outside deprivation and control of use and evaluated under the first rule. In the case, the applicant was refused access to her property and therefore lost not only all control over it but also the possibility to use and enjoy it. The Court found that the hindrance in itself could be regarded as a violation of the right of peaceful enjoyment.

As noted, there is no absolute protection from interference from the state. The provision gives the state the right to interfere if the aim or the purpose of the interference is in the public or general interest, or to secure the payment

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274 Pine Valley Ltd v Ireland (n 246) [56]; Sporrong and Lönnroth v Sweden (n 214) [63] See, also, Ucci v Italy App no 213/04 (ECHR, 22 June 2006)[69] (only available in French).
275 Pine Valley Ltd v Ireland (n 246) [56].
276 Sporrong and Lönnroth v Sweden (n 214) [65].
277 Sporrong and Lönnroth v Sweden (n 214) Joint dissenting Opinion of Judges Zekia, Cremona, Thör Vilhjálmsson, Lagergren, Sir Vincent Evans, Macdonald, Bernhardt and Gersing with Regard to Article 1 of Protocol no 1 (P1-1) [3].
278 Loizidou v Turkey (n 80).
279 ibid [63].
280 ibid.
of taxes or other contributions or penalties. The drafting of the article clearly indicates that there is some difference between the first and the second paragraph. The Court has nevertheless held that there is no difference in the latitude of which the state can control the use of property or deprive it.\(^{281}\) Similarly, the Court has also clarified that the meaning of “law” is not restricted to written law, but also entails unwritten law, although interference must have some basis in domestic law and that this law must fulfil the qualities and requirements compatible with the rule of law.\(^{282}\)

In *James and Others v The United Kingdom*,\(^ {283}\) the Court addressed the question of “public interest”. The applicants had been deprived of their property due to an act that transferred private property from one person to another person, a measure that the applicant considered interfered with their right to peaceful enjoyment, and that could not be excused under the second rule, as the only beneficiary was another private person and not the public.\(^ {284}\) The Court agreed that a deprivation of property that only had the effect of transferring property for the benefit of a private party fell outside the meaning of public interest, but if the aim was to promote a public interest, it could still fall within the meaning.\(^ {285}\) In the case, the Court examined the jurisprudence of the Contracting States, in order to evaluate whether or not they could find a common ground for a view that compulsory transfer of property between two private parties would fall outside the understanding of in the public interests, but found no evidence of this.\(^ {286}\)

This way of addressing a question is a special feature connected with the aim of the Convention to achieve a greater unity between the member states.\(^ {287}\) The Courts mandate therefore includes examining whether there is common ground between the laws or the way member states act that can affect not only the interpretation of whether a measure can be exempt, but also limit the margin of appreciation of a state.\(^ {288}\) The inclination to do so, however, seems to depend on the matter in question, where questions of

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\(^ {281}\) *James and Others v UK* (n 210) [43].
\(^ {282}\) *Malone v The United Kingdom* App no 8691/79 (ECHR, 2 August 1984) [66]-[67].
\(^ {283}\) *James and Others v UK* (n 210).
\(^ {284}\) ibid [10]-[11] [38]-[39].
\(^ {285}\) ibid [40].
\(^ {286}\) ibid [40].
\(^ {287}\) ECHR, Preamble.
\(^ {288}\) *Stummer v Austria* App no 37452/02 (ECHR, 17 July 2011) [104]-[105].
national property law seem to reduce that inclination.\textsuperscript{289} In \textit{James and Others v The United Kingdom}, the Court also held that the public does not need to directly benefit from the deprived property, or be given the opportunity to use it, if the aim of the measure is to enhance for example, social justice, or pursue other social or economic goals, which very well could be of interest to the public.\textsuperscript{290} However, the government must provide a reasonable explanation how the public or general interest is served by the measure taken.\textsuperscript{291} As well as a convincing explanation that there is a reasonable foundation for the measure, it can only be justified as long as there is a fair balance between the interest of the public and the general, and interest of the person, to have a practical and effective protection of her or his property.\textsuperscript{292}

The Commission in \textit{From v Sweden}\textsuperscript{293} addressed the matter of general interest. Although the case was found manifestly ill-founded, and, therefore, the merits of the case was never tried, the Commission indicated that the term general interest has an autonomous meaning, and that benefits of the interference can be attributable to a particular group in society and still fall within the meaning general interest. In the case, a hunting area was registered to the benefit of the members of the Sami village of Ran. The private landowner contested the registration and held that it was an interference with his property rights. The Commission confirmed that the measure interfered with the right to property in P1-1, in the form of control of use. The measure was nevertheless regarded as excusable in the name of the general interest:

The Commission finds it to be in the general interest that the special culture and way of life of the Sami be respected, and it is clear that reindeer herding and hunting are important parts of that culture and way of life. The Commission is therefore of the opinion that the challenged decision was taken in the general interest.

As Timo Koivurova argues, the position of the Commission is more in line with the position and the development of international law, as the Commission takes consideration of the special features of Sami culture and

\textsuperscript{289} Cees van Dam, \textit{European Tort Law} (2nd ed, OUP, 2013) 204-205.
\textsuperscript{290} \textit{James and Others v UK} (n 210) [41] [45].
\textsuperscript{291} \textit{Chassagnou and Others v France} (n 241) [92].
\textsuperscript{292} Dissenting opinion of Judges Bratza, Valje and David Thór Björgvinsson and Kalaydjева, \textit{DePalle v France} (n 238) 35; See, also, \textit{Sporrong and Lönnroth v Sweden} (n 214) [68]-[69].
\textsuperscript{293} \textit{From v Sweden} App no 34776/96 (Admissibility), (ECommHR, 4 March 1998).
livelihood, and represents a change of view in comparison with the position of the Commission in the cited case from 1981, *G and E v Norway*. Although it has been held that the Commission already in 1981 opened up for a more positive position towards protecting indigenous peoples' ethical identity and that the importance of reindeer herding for Sami identity was acknowledged by the Commission in *From v Sweden*, the statement in *From v Sweden* also indicates that the position of the Commission was that special treatment of the Sami is to be considered a general interest, within the meaning of article P1-1, for the purpose of protecting their culture and way of life, regardless of whether the property in question is considered theirs or not.

As noted, for nationals, the reasonable foundation is the constitution, and the laws and regulations of the contracting states, or international law in the case of deprivation and non-nationals. The foundation upon which the measure is taken must comply with the fundamental principle of rule of law, including accessibility, comprehensibility, and predictability for the persons concerned. The three latter elements are nevertheless not always sufficient in order to fulfil the rule of law requirement, as the quality of the law also has to be taken into account and where a risk of an arbitrary and unpredictable application can influence whether the law adheres to the rule of law or not. Failing to fulfil the requirements, a measure is not only incompatible with P1-1; it cannot be justified on the basis that it does not live up to the rule of law in the first place. In these circumstances, the fair balance evaluation is not necessary, as there is no reasonable foundation for the interference.

For the fair balance evaluation, the Court evaluates whether there is a ‘...reasonable relationship of proportionality between the means employed and the aim sought to be realised’. The basis for this is that it is only the national state that has knowledge about the needs of its society. For the

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295 *G and E v Norway* (n 5).
296 Kovács (2016) (n 251), 786-787; 790.
297 *Krutilin v France* App no 11801/85 (ECHR, 24 April 1990) [27]; *James and Others v UK* (n 210) [67]; *Maharramov v Azerbaijan* App no 5046/07 (ECHR, 30 March 2017) [60].
298 *Ucci v Italy* (n 274) [73]-[86].
299 *Iatridis v Greece* (n 238) [62]; *Beyeler v Italy* (n 231) [108].
300 *Iatridis v Greece* (n 238) [58]; *The former king of Greece and Others v Greece* App no 25701/94 (ECHR, 23 November 2000) [79].
301 *Pressos Compania v Belgium* (n 231) [38]; *James and Others v UK* (n 210).
302 *Beyeler v Italy* (n 231) [112]; *James and Others v UK* (n 210) [46]; *J A Pye v UK* (n 210) [55]; *Larkos v Cyprus* (n 201) [29]; *Pressos Compania v Belgium* (n 231) [37].
same reason, political, economic, and social questions are left within the competence of the national government. Consequently, unless a measure is taken manifestly without reasonable foundation, the Court upholds the principle of the margin of appreciation of the state. The width of the margin of appreciation, however, depends on the issue at stake, and a large-scale development such as a city development in Sporrong and Lönnroth v Sweden widens the margin of appreciation.

As noted, the Court does not test whether the measure itself is of necessity, or within the interest of the public or the general, as this falls within the margin of appreciation of the state. Neither do they consider that a measure is disproportionate solely on the fact that less dramatic measures were available for the state, but not chosen, because the choice of which measure to take also fall within the margin of appreciation of the state. Nevertheless, the Court has reflected upon the term necessary in relation to Article 11 ECHR:

The Court reiterates that in assessing the necessity of a given measure a number of principles must be observed. The term “necessary” does not have the flexibility of such expressions as “useful” or “desirable”. In addition, pluralism, tolerance and broadmindedness are hallmarks of a “democratic society”. Although individual interests must on occasion be subordinated to those of a group, democracy does not simply mean that the views of a majority must always prevail: a balance must be achieved which ensures the fair and proper treatment of minorities and avoids any abuse of a dominant position.

As the Convention limits the restriction a state may impose on convention rights, through Article 18, ECHR, the Court have pointed out that although a measure does not fall within the exceptions allowed, deprivation, under the

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303 Khodorkovskiy and Lebedev v Russia App no 11082/06, 13772/05 (ECHR, 25 July 2013) [870].
304 Beyeler v Italy (n 231) [112]; James and Others v UK (n 210) [46]; J A Pye v UK (n 210) [55]; Larkos v Cyprus (n 201) [29]; Pressos Compania v Belgium (n 231) [37].
305 Sporrong and Lönnroth v Sweden (n 214) [69].
306 James and Others v UK (n 210) [51]; J A Pye v UK (n 210) [55]; The former king v Greece (n 300) [87-91]; Beyeler v Italy (n 231) [114]; Pressos Compania v Belgium (n 231) [38]; James and Others v UK (n 231); Handyside v the United Kingdom App no 5493/72 (ECHR, 7 December 1976) [62].
307 Chassagnou and Others v France (n 241) [112].
second rule, or control, under the third rule, it doesn’t mean that it per se violated the rights of peaceful enjoyment of possession under the first rule.\textsuperscript{308} A fair balance evaluation, between the ‘demand of the general interest of the community’ and peaceful enjoyment of possession, was needed in order to evaluate whether there was an interference in-breach of conventional rights.\textsuperscript{309} The demand of the general public is not found in P1-1. It is an inherent part of the whole convention, and the purpose to ‘search for a fair balance between the demands of the general interest of the community and the requirements of the protection of the individual’s fundamental rights’.\textsuperscript{310}

One of the central discussions of the Court in \textit{Sporrong and Lönroth v Sweden}\textsuperscript{311} was how a measure, which fell neither under the second nor the third rule, should be evaluated. The Court referred to the case “\textit{Relating to Certain Aspects of the Laws on the use of Languages in Education in Belgium}” v \textit{Belgium},\textsuperscript{312} in which the Court held that:

\begin{quote}
[T]he general aim set for themselves by the Contracting Parties through the medium of the European Convention on Human Rights, was to provide effective protection of fundamental human rights, and this, without doubt not only because of the historical context in which the Convention was concluded, but also of the social and technical developments in our age which offer to States considerable possibilities for regulating the exercise of these rights. The Convention therefore implies a just balance between the protection of the general interest of the Community and the respect due to fundamental human rights while attaching particular importance to the latter.\textsuperscript{313}
\end{quote}

Therefore, a measure that falls within the meaning of the demand of the general public not only have to take into account the need of development, social or technical, but attach particular importance to the rights and freedoms as defined in the convention and its protocol, when doing so.\textsuperscript{314} As

\begin{quote}
\textsuperscript{308} \textit{Sporrong and Lönroth v Sweden} (n 214) [69].
\textsuperscript{309} ibid.
\textsuperscript{310} \textit{Soering v The United Kingdom}, App no 14038/88 (ECHR, 7 July 1989) [89].
\textsuperscript{311} \textit{Sporrong and Lönroth v Sweden} (n 214) [63].
\textsuperscript{312} ibid [69].
\textsuperscript{313} \textit{Relating to Certain Aspects of the Laws on the Use of Language in Education in Belgium}” v \textit{Belgium} (n 191) [B5].
\textsuperscript{314} ECHR, Art 1.
\end{quote}
the measure in *Sporrong and Lönnroth* had to be evaluated under the first rule, there was a need to assess the presence of a fair balance; as noted, the fair balance prerequisite is an inherent part of the Convention.\textsuperscript{315} In the determination of whether there was a fair balance, by exercising their limited power of review of national legislation,\textsuperscript{316} the Court emphasised that it is not compatible with the Convention that the lack of legal possibility to address difficulties in a situation, and results being that a person is left in a limbo as regards to the fate of their possessions and what rights they have over it, if this situation puts the individual and excessive burden. In these situations, the fair balance requirement is not met, and the measure in question is a violation of conventional rights.\textsuperscript{317}

### Concluding observations

Since the establishment of the Court, the right to property under Article 1 of the First Protocol has been one of the most common rights the Court has found a violation of.\textsuperscript{318} It is, however, not always clear to know exactly when the right of property has been violated, especially in the presence of creeping expropriation. This can be the case when the state takes measures that interfere with the right of property, but not clearly in the sense of, for example, expropriation. This was the case in *Messana v Italy*.\textsuperscript{319}

The case was concerned with indirect expropriation of property following the occupation of the land by the municipal authorities.\textsuperscript{320} The Court found that the right of property in P1-1 had been violated, due to the breach of the principle of legality.\textsuperscript{321}

In the present case, the Court observes that, by applying the principle of indirect expropriation, the domestic courts considered the applicants

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\textsuperscript{315} *Sporrong and Lönnroth v Sweden* (n 214) [69].

\textsuperscript{316} ibid; *Beyeler v Italy* (n 231) [108].

\textsuperscript{317} *Sporrong and Lönnroth v Sweden* (n 214) [70]-[73], *Findings* [1].


\textsuperscript{319} *Messana v Italy* App no 26128/04 (ECtHR, 2 February 2017) (only available in French and Italian).

\textsuperscript{320} ECtHR, ‘Violation of the right to respect for the property of owners of land unlawfully occupied by the government outside of the standard expropriation procedure’ *Press Release ECHR 057* (9 February 20017).

\textsuperscript{321} *Messana v Italy* (n 319) [38]-[43].
deprived of their property from the date of the cessation of the legitimate occupation. However, in the absence of a formal act of expropriation, the Court considers that this situation can not be regarded as "foreseeable", since it is only by the final judicial decision that the principle of Indirect expropriation as having actually been applied and that the acquisition of the land by the public authorities was consecrated. Consequently, the applicants had no legal certainty regarding the deprivation of the land until 12 January 2004, the date on which the judgment of the Palermo Court of Appeal became final.

The Court then observes that the situation in question enabled the administration to take advantage of an illegal occupation of land. In other words, the administration was able to appropriate the land in disregard of the rules governing expropriation in due form. 322

The Court highlights the importance of the rule of law. The lack of legal certainty in the present case made the outcome of the situation unforeseeable, and therefore there was a breach of the rule of law. More importantly, the Court explained that it is not compatible with the Convention to avoid taking the legislative measure required, to make it clear under which circumstances your rights can be limited, and what rights you have when they are. Legal uncertainty is never compatible with the Convention.

322 ibid [40]-[41].
4 Non-European Instruments

The European Convention for the Protection of Human Rights and Fundamental Freedoms is the first regional system, established under the principles of international law, that has a court with the task of reviewing and giving legally binding judgments in individual persons’ cases of an alleged state violation of rights set out in an international treaty, enforceable directly on the national level. Since then two other regional systems for the protection of human rights have emerged, one in the Americas and one in Africa. This section will highlight cases from these two systems, with the focus on indigenous peoples and their rights connected to the ancestral land.

After the European system, a second system was established as a result of the adoption of the American Declaration of the Rights and Duties of Man in Bogotá in 1948. To ensure effective protection, the Inter-American Commission on Human Rights was created during the fifth meeting of Consultation of Ministers of Foreign Affairs in Santiago, Chile, in 1959. Ten years later the American Convention on Human Rights (ACHR/American Convention) was signed in San José, Costa Rica in 1969. Following the entering into force of the American Convention in 1978, the Inter-American Court of Human Rights (American Court/IACtHR) was established in 1979. Neither Canada nor America has ratified the convention, subsequently the American Court lack jurisdiction in the American or Canadian Arctic. The American Court has dealt with a

324 AOS, Fifth Meeting of Consultation of Ministers of Foreign Affairs (Santiago, Chile, 1959) VIII (II), <http://www.oas.org/council/MEETINGS%20OF%20CONSULTATION/minutes.asp> [accessed 20 June 2017].
A number of cases concerning indigenous peoples; therefore Inter-American Commission on Human Rights will not be addressed further.

The second non-European system entered into force in 1986, as a result of the adoption of the African Charter on Human and Peoples’ Rights (AFCHR/African Charter) in 1981. The African system also has a commission, the African Commission on Humans and Peoples’ Rights (African Commission), and a court, the African Court on Human and Peoples’ Rights (African Court). As other human rights commissions, the African Commission does not provide legally binding decisions. Their mandate is, amongst others, to interpret provisions of the African Charter.

Historically, the Commission has been viewed as more proactive than the African Court, and the court has been criticised for their lack of progress during its first ten years in power. However, the reputation of the Court has since then been improved, amongst others, through their judgment in the recent case concerning the Ogeik peoples in Kenya, which will be discussed below.

For the reason that the African Court only has finalised one case concerning rights held collectively by indigenous peoples, including the right to property, communications from the African Commission will be highlighted next to the decision of the African Court.

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328 On 1 July 2008 the Protocol on the Statute of the African Court of Justice and Human Rights was signed to create the African Court of Justice and Human Rights, by merging the African Court on Human and Peoples’ Rights (ACtHR) and the Court of Justice of the African Union. The protocol has not entered into force as only five of the required 15 countries, Art 2, have ratified the protocol, <https://au.int/web/en/treaties> [accessed 15 May 2017].


330 AFCHR, art 45(3).


4.1 African Charter on Human and Peoples’ Rights and the African Court on Human and People’s Rights

Group Rights and Rights to Property

It is clear from the wording of the African Charter on Human and Peoples’ Rights, that the African Charter offers different kinds of protections than the European counterpart. For example, while the European Convention on Human Rights does not offer group rights, the Bajun Charter does, Articles 19 to 24, AFCHR. As explained by the African Commission on Human and Peoples’ Rights (ACHPR/the Commission) in Communication 155/96 – Social and Economical Rights Action Centre (SERAC) and Centre for Economic and Social Rights (CESR) v Nigeria:

The uniqueness of the African situation and the special qualities of the African Charter imposes upon the African Commission an important task…Clearly, collective rights, environmental rights, and economic and social rights are essential elements of human rights in Africa.334

The African Charter does not provide a definition of the word “peoples”, or which groups are to be regarded as indigenous peoples, and the African Commission, depending on the case, has adopted the definition differently.335 In Communication 276/03 - Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v. Kenya (Endorois v Kenya),336 the African Commission referred to a set of criteria, to evaluate whether or not the Endorois could be regarded as indigenous peoples under the African Convention. Criteria established by their own working group, the Working Group of on Indigenous

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334 Social and Economical Rights Action Centre (SERAC) and Centre for Economic and Social Rights (CESR) v Nigeria (Merits) Communication No 155/96, ACHPR, (27 October 2001) [68], <http://www.achpr.org/communications/> [accessed 2017-04-16].
336 Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya (Merits), Communication No 276/2003, ACHPR, (4 February 2010), [144]-[162].
WGIP has, amongst others, upheld the importance of the criteria the ‘voluntary perpetuation of cultural distinctiveness’.

With reference to the work of WGIP and the jurisprudence of the Inter-American Court of Human Rights, the African Commission came to the conclusion that Endorois had such distinctive characters required, and therefore was to be regarded as peoples within the meaning of the African Convention. Consequently, the collective rights under Articles 19-24 were applicable in the case.

The African Court confirmed the approach taken by the African Commission, on how to evaluate whether or not a group of people fell within the meaning of the term peoples under the Convention, in the recent case *African Commission on Human and Peoples’ Rights v the Republic of Kenya*. In this case, the respondent side first questioned the indigenous status of the Ogeik. Then they argued that although being an indigenous population, the Ogieks had adapted to modern life, like other nationals, and therefore had ‘transformed their way of life through time’. As the African Commission, the African Court cited the works of the WGIP, but it also relied on contemporary normative standards in international law on how to identify indigenous peoples, and especially highlighted the importance of the ‘voluntary perpetuation of cultural distinctiveness’ in the identification process. The conclusion of the African Court was that the Ogieks within the meaning of the African Convention was an indigenous population and held a special status within the Kenyan society and therefore had the right to protection as such.

The collective rights of peoples, when it comes to property, is regulated in Article 21, AFCHR, and reads as follows:

All peoples shall freely dispose of their wealth and natural resources. This right shall be exercised in the exclusive interest of the people. In no case shall a people be deprived of it.

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337 ibid [149].
338 ibid [150].
339 ibid [144]-[162].
340 ibid [162].
342 ibid [110].
343 ibid [112].
In case of spoliation, the dispossessed people shall have the right to the lawful recovery of its property as well as to an adequate compensation.

The free disposal of wealth and natural resources shall be exercised without prejudice to the obligation of promoting international economic cooperation based on mutual respect, equitable exchange and the principles of international law.

State Parties to the present Charter shall individually and collectively exercise the right to free disposal of their wealth and natural resources with a view to strengthening African Unity and solidarity.

State Parties to the present Charter shall undertake to eliminate all forms of foreign exploitation particularly that practised by international monopolies so as to enable their peoples to fully benefit from the advantages derived from their national resources.

Communication 276/03 is one of the most important communications from the African Commission. It covers many of the areas that are important for indigenous peoples, inter alia, the right to property, the right to religion, the right to cultural life, and the right to development. The right to property, which is in focus here, is regulated in Article 14 AFCHR:

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

The connection between Article 14 and Article 21, AFCHR, seem to be that under the latter, it is the collective who carries the right to property, whereas under the former it is the individual.

The African Court clarified this in 2017, the case of the African Commission on Human and Peoples’ Rights v the Republic of Kenya:

The Court observes that, although addressed in the part of the Charter which enshrines the rights recognised for individuals, the right to
property as guaranteed by Article 14 may also apply to groups or Communities; in effect, the right can be individual or collective.  

This position is in line with the view of WGIP that ‘the notion of “peoples” is closely related to collective rights’. 

**Indigenous Peoples’ Property Rights**

The African Commission has addressed the right to collective property in several communications, amongst other Communication 276/03. In this case, a game reserve that was created around the Lake Bogoria, in Kenya, and the question was whether the reserve had violated the property rights of the Endorois, under Article 14, AFCHR. In the case, it was not contested that the land around the lake was the ancestral land of the Endorois, and, as noted, the African Commission came to the conclusion that the Endorois were to be regarded as indigenous peoples within the meaning of the African Charter. The key question was whether there was a property right within the meaning of Article 14, AFCHR, which could have been violated, since the Endorois did not have a formal title to the land.

Through the examination of its own jurisprudence, the African Commission first found that the land in question was to be regarded as property and that the right to property connected to land includes ‘the right to have access to one’s property and not to have one’s property invaded or encroached upon…the right to undisturbed possession, use and control of such property however the owner(s) deem fit.’ The African Commission then went on and examined the jurisprudence of its European and American counterparts in accordance to Articles 60 and 61, AFCHR. Articles that give the African Commission the mandate to take into account other sources of international law when examining cases, and to examine each case in the light of ‘relevant international and regional human rights instruments and principles’. According to the African Commission, a state has not only an

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344 ACHR v Kenya (n 341).
345 Communication No 276/03 (n 336) [149].
346 ibid [21].
347 ibid [183].
348 ibid [186].
349 Communication No 155/96 (n 334) [49].

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obligation to respect human rights but also an obligation to protect them.\footnote{Communication No 276/03 (n 336) [191].} There was a similar situation in Communication 296/2005 – \textit{Centre on Housing Rights and Evictions (COHRE) v Sudan},\footnote{\textit{Centre on Housing Rights and Evictions (COHRE) v Sudan} (Merits) Communication No 296/2005, ACHPR, (29 July 2010).} where Sudan failed to protect the homes and the possessions of the applicant,\footnote{ibid [201].} although they had no property title to the land. The African Commission held that:

\begin{quote}
It doesn’t matter whether they had legal titles to the land, the fact that the victims cannot derive their livelihood from what they possessed for generations means they have been deprived of the use of their property under conditions which are not permitted by Article 14.\footnote{ibid [209].}
\end{quote}

As for traditional African Communities, the African Commission have stated that the only possibility to protect and respect the rights of those communities is to ‘acknowledgement that the rights, interests and benefits of such communities in their traditional lands constitute ‘property’ under the African Charter and that special measures may have to be taken to secure such ‘property rights’’.\footnote{Communication No 276/03 (n 336) [187].} According to the Commission, this is only possible if there is recognition of actual title to ancestral land, as opposed to the partial rights, where there is a beneficial title in place, which still haunts indigenous peoples, as partial rights easily can be changed or taken away and therefore leave indigenous peoples vulnerable.\footnote{ibid [199] [206].}

\begin{quote}
The jurisprudence under international law bestows the right of ownership rather than mere access. The African Commission notes that if international law were to grant access only, indigenous peoples would remain vulnerable to further violations/dispossession by the State or third parties. Ownership ensures that indigenous peoples can engage with the state and third parties as active stakeholders rather than as passive beneficiaries.\footnote{ibid [204].}
\end{quote}
The Commission based their argument on jurisprudence from the European and Inter-American courts together with other international human rights instruments, and came to the conclusion that for a nation not to grant indigenous peoples the title to ancestral land, but merely grant privileges, is an approach that does not live up to the requirements of recognised international norms.\textsuperscript{357}

In Communication 317/206 – \textit{The Nubian Community in Kenya vs The Republic of Kenya}, the African Commission repeated the need to give legal recognition and protection of rights over land that had been accessed, occupied, and used over a lengthy period of time.\textsuperscript{358}

Furthermore, in Communication 276/03, the African Commission came to the conclusion that the Endorois’ rights had been violated based on judgments from the Inter-American Court of Human Rights; \textit{Mayagna (Sumo) Awas Tingni Community v Nicaragua},\textsuperscript{359} \textit{Sawhoyamaxa Indigenous Community v Paraguay},\textsuperscript{360} \textit{The Moiwana Community v Suriname}.\textsuperscript{361} First of all the Commission stated that ‘traditional possession of land by indigenous peoples has the equivalent effect as that of a state-granted full property title’,\textsuperscript{362} and that this possession gives them the right to ‘demand official recognition and registration of property title’.\textsuperscript{363} The African Commission recognised that there could be cases where rights have been legally extinguished, but held that indigenous peoples could maintain property rights if they have been evicted from their traditional land and that they in these cases still could be ‘entitled to restitution thereof or to obtain other lands of equal extension and quality.\textsuperscript{364} According to the African Commission, indigenous peoples, like the Endorois, do not require recognition from the state in order to have full property title to their ancestral land. Neither in the

\textsuperscript{357} ibid [206].
\textsuperscript{358} \textit{The Nubian Community in Kenya v The Republic of Kenya} (Merits), Communication No 317/2006, ACHPR, (30 May 2016), [160].
\textsuperscript{359} \textit{Mayagna (Sumo) Awas Tingni Community v Nicaragua} (Merits, Reparations and Costs), (31 August 2001), IACtHR, Series C No 79.
\textsuperscript{360} \textit{Sawhoyamaxa Indigenous Community v Paraguay} (Merits, Reparations and Costs), (29 March 2006) IACtHR, Series C 146.
\textsuperscript{361} \textit{Moiwana Community v Suriname} (Preliminary Objections, Merits, Reparations and Costs), (15 June 2005), IACtHR, Series C No 124.
\textsuperscript{362} Communication No 276/03 (n 336), [209].
\textsuperscript{363} ibid.
\textsuperscript{364} ibid.
case of unwilling eviction, does it matter that they don’t have the land in possession in order to demand restitution.\textsuperscript{365}

The view of the African Court is mostly in line with the views of the African Commission. However, the Court does not go as far as the African Commission when it comes to the question if there is a right to official recognition and registration of property title.

In \textit{African Commission on Human and Peoples’ Rights v the Republic of Kenya}, where the Ogieks were evicted from the Mau Forest as means to protect the ecosystem of the forest, the African Court explains the elements of the right to property.

The African Court explained that the right to property includes the right to use the property (\textit{usus}), and the rights enjoy it. The latter includes the right to enjoy what comes of it (\textit{fructus}). The last part of property rights is the right of disposition (\textit{abusus}).\textsuperscript{366} The conclusion of the African Court was that in the case of indigenous peoples’ rights to ancestral land, there was no rule of international law providing a basis that a recognition of indigenous peoples’ rights to ancestral land ‘entailed the right of ownership in its classical meaning, including the right to dispose therefor (abusus).’\textsuperscript{367} Therefore the rights the Ogieks had to their ancestral land were only rights to occupy, to use (\textit{usus}), and to enjoy (\textit{fructus}).\textsuperscript{368}

\textbf{Legal Limitations}

Like the protection of property under the European Convention on Human Rights, a measure taken by the state to limit the right to property is not in itself a violation of that right, as long as the limitation is compatible with the rule of law. As noted, there are two purposes for which a state may limit the rights of property under Article 14, AFCHR, in the interest of public need and in the general interest of the community. The African Commission addressed both these exceptions in Communication 276/03.

In this case, the African Commission goes further than the European Court of Human Rights, by emphasizing the need to take only those measures that violate the right to property in the least possible way. In indigenous

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{365} ibid.
\item \textsuperscript{366} \textit{ACHPR v Kenya} (n 341) [124].
\item \textsuperscript{367} ibid [127].
\item \textsuperscript{368} ibid [128].
\end{enumerate}
\end{footnotesize}
peoples’ cases, this is essential and any measures that fail to meet this criteria could not be regarded as proportionate.\(^{369}\)

The African Commission sets the bar higher when it comes to limiting the rights of indigenous peoples for the reason that indigenous peoples’ connection to their traditional land is essential for their existence as a people, their right to life, and their right to self-determination.\(^{370}\) Also, any limitation imposed on indigenous peoples’ rights to land needs to be necessary for the result sought, in the meaning that there can be no other means available that would restrict the rights less but will reach the same result.\(^{371}\) Therefore, the establishment of a game reserve resulting in the effect that indigenous peoples lost their rights to access and use their traditional land, falling within the boundaries of the newly established game reserve, were regarded as disproportionate under the African Convention.\(^{372}\)

As for the position of the African Court, they made a remark regarding proportionality and necessity in *African Commission on Human and Peoples’ Rights v the Republic of Kenya*, which is especially interesting in the context of indigenous peoples and their special connection to their ancestral land. As a measure to preserve the natural ecosystem of the Mau Forest, the state evicted the Ogieks from their ancestral land. The African Court simply noted that measures, which affected and contributed to the degradation of the Mau Forest mostly, were external, such as ‘ill-advised logging concessions’.\(^{373}\) The measure to evict and deny Ogieks access to ancestral land could not be considered ‘necessary or proportionate to achieve the purported justification of preserving the natural ecosystem of the Mau Forest.’\(^{374}\)

Lastly, in Communication 276/03, the African Commission addresses the question of what was to be regarded as *in accordance with the law*. In the case, the Endorois were forcefully removed from their land, which in itself is a violation of the right to property.\(^{375}\) To be noted is that any removal under the African Charter must be compatible both with national law as well as international law,\(^ {376}\) which is a different approach than that taken by the

\(^{369}\) Communication No 276/03 (n 336), [212]-[214].
\(^{370}\) ibid [212].
\(^{371}\) ibid [213].
\(^{372}\) ibid [212]-[215] [218].
\(^{373}\) *ACHPR v Kenya* (n 341) [130].
\(^{374}\) ibid. The choice of words in this sentence are interesting.
\(^{375}\) Communication No 276/03 (n 336), [218].
\(^{376}\) ibid [219].
European Court of Human Rights where, as noted above, international law only applies to non-nationals. The burden of proof lies on the state. Besides the legal requirement, the African Commission highlights the need to fulfil two other requirements in order for the prerequisite of in accordance with the law to be fulfilled.

First of all the African Commission held that any consultation with indigenous peoples always falls ‘in favour of the indigenous peoples, as it also requires that consent be accorded’. Thus, any failure to consult or seek consent is a de facto violation of the right to property. To assure that the right to property is not violated, the African Commission highlighted three elements of safeguards test explained in the case of the Saramak People v Suriname from the Inter-African Court of Human Rights. In this case, the question was whether the restriction imposed on the right to property amounted ‘to a denial of their survival as a tribal people’. The conclusion of the Inter-American Court was first that there would be no breach of the property rights of the indigenous peoples, if the participation of the people in any development, or plans for development, concerning, or affecting their land, was effective. Second, the indigenous peoples must benefit from activities the state allows on their traditional land. Third, prior to any plans or actions; an environmental and social impact assessment (ERM) must be undertaken. The African Commission held that failing any of these requirements amounts up to a violation of the right to property under Article 14, AFCHR. In this context, the African Court confirms the right to prior consultation. It also highlights that the conditions of expulsion must be evaluated in the interest of the public, without elaboration on exactly what that means.

Concluding observations

African Commission on Human and Peoples’ Rights v the Republic of Kenya is the first case by the African Court on Human and Peoples’ Rights where

377 ibid [226].
378 Saramaka People v Suriname (Preliminary Objections, Merits, Reparations, and Costs), (28 November 2007), IACtHR, Series C No. 172.
379 Communication No 276/03 (n 336), [227].
380 ibid.
381 ibid [228].
382 ACHPR v Kenya (n 341) [131].
they examined the merits of a case concerning indigenous peoples. It took the African Court five years to finalise the case. Concerning the examination of an alleged violation of Article 14 – Right of property, AFCHR, the African Court refers considerably to the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP). The Court clearly takes the position that when it comes to evaluate and interpret indigenous peoples’ rights to ancestral land, other (international) principles have to be taken into account. Now, the African Court relies on Article 26 of UNDRIP to interpret what rights Ogeik have to their indigenous land, despite the lack of official ownership of land. The African Court came to the conclusion that as the Ogeik under Article 14, AFCHR, in accordance with the criteria set out in Article 26 of UNDRIP, had a right to the land in question; their rights had been violated under the African Convention.

This is interesting, first of all, on the basis that although UNDRIP in itself is not legally binding, the Court uses it for its arguments. The final conclusion of the Court, that the Ogeik have ‘the right to occupy their ancestral lands, as well as use and enjoy the said lands’, is also based on interpreting the meaning of Article 14 of the African Charter, by taking into account a non-legally binding declaration, which Kenya abstained from voting for. This clearly indicates that when it comes to indigenous peoples’ rights to land, the African Court takes the position that the Article 26 of UNDRIP have reached the status of international customary law, and therefore, despite Kenya abstaining from voting for the declaration, must be applied in accordance with Article 38 of ICJ Statute, into the interpretation of the African Convention. In this context, it can be added that there are arguments on both sides whether or not UNDRIP has reached the status of customary law, whereas others have argued that is simply represents the

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384 ACHPR v Kenya (n 341) [125]- [131].
385 Ibid [128].
387 ICJ Statute (n 69).
existing international customary law.\textsuperscript{388} Regardless, the position of the Court also puts weight on the arguments that specific articles in UNDRIP have reached the status of international customary law.

4.2 Inter-American Court of Human Rights

Group Rights and Rights to Property

Like the European Convention on Human Rights, the American Convention on Human Rights does not \textit{per se} contain any group rights. The Inter-American system is, therefore, more similar to the European system than the African one. The lack of group rights has, however, as will be seen, not been an obstacle for the Inter-American Court of Human Rights (Inter-American Court/IACtHR) as they adopt an evolutionary interpretation method. This will be explained further below.

The Inter-American Court, in particular, relies on three articles when examining cases of indigenous peoples right to land, Articles 1 – \textit{Obligation to Respect Rights}, 21 – \textit{Right to Property}, and 29 - \textit{Restriction Regarding Interpretation}, ACHR. These three articles play a vital role in the evolutionary interpretation method that calls for differential treatment of indigenous peoples’ cases concerning land rights. The Articles reads as follows:

\textit{Article 1 – Obligation to Respect Rights}

1. The States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition.

2. For the purposes of this Convention, "person" means every human being.

*Article 21 – Right to Property*

*Article 21 – Right to Property*

(Paragraph 3 omitted)

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 case(s) and according to the forms established by law.

*Article 29 – Restrictions Regarding Interpretation*

No provision of this Convention shall be interpreted as:

a. permitting any State Party, group, or person to suppress the enjoyment or exercise of the rights and freedoms recognized in this Convention or to restrict them to a greater extent than is provided for herein;

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;

c. precluding other rights or guarantees that are inherent in the human personality or derived from representative democracy as a form of government; or

d. excluding or limiting the effect that the American Declaration of the Rights and Duties of Man and other international acts of the same nature may have.

**Land Rights Cases**

The landmark decision under international law for the protection indigenous peoples’ right to property connected to traditional land is *Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, decided by the Inter-American Court in 2001. The case is unique in many respects. First of all, it was the first

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389 *Mayagna (Sumo) Awas Tingni Community v Nicaragua* (n 359).
international judgment protecting the collective rights of indigenous peoples to traditional land.\textsuperscript{390} Secondly, it established a blueprint for the Inter-American Court in how to deal with similar cases. It also created a unique method of interpretation of international human rights treaties in a contemporary setting. Here the Court outlined how to interpret human rights treaties in relation to indigenous peoples.

In \textit{Mayagna (Sumo) Awas Tingni Community v. Nicaragua}, the Inter-American Court clarified the autonomous meaning of the concept of property from \textit{Ivcher Bronstein v Peru}.\textsuperscript{391} And how this concept should be applied in relation to indigenous peoples. The Court noted that the term property included both ‘corporal and incorporeal elements and any other intangible object capable of having values’.\textsuperscript{392} It then explained that, especially in cases concerning indigenous people, the meaning of the concept could not be based simply on national law. Also international law relevant to the specific case needed to be considered, such as international human rights law in the case of indigenous peoples.\textsuperscript{393}

The Inter-American Court, therefore, applied what they call an evolutionary interpretation approach.\textsuperscript{394} This means that when interpreting the meaning of a human rights treaty, unlike the interpretation of most other international treaties, it is, besides the importance to study the preparatory work and the purpose of the treaty, also important to study how the area has developed internationally.\textsuperscript{395}

Although the Inter-American Court makes a reference to Article 31(3) of the Vienna Convention on the Law of Treaties,\textsuperscript{396} which is to be regarded as customary law when it comes to treaty interpretation, that article does not \textit{per se} provide a solid basis for such an evolutionary interpretation approach.\textsuperscript{397} Instead, the basis for the Court’s approach is to be found in Article 29(b) ACHR, which states that:

\begin{itemize}
  \item[391] \textit{Ivcher Bronstein v Peru} (Merits, Reparations and Costs), (6 February 2001), IACtHR, Series C No 74.
  \item[392] \textit{The Mayagna (Sumo) Awas Tingni Community v Nicaragua} (n 359), [144].
  \item[393] ibid [146].
  \item[394] ibid [148].
  \item[395] ibid [145]-[148].
  \item[396] Vienna Convention on the Law of Treaties (n 81).
  \item[397] \textit{Kichwa Indigenous People of Sarayaku v Ecuador} (n 74), [161].
\end{itemize}
No provision of this Convention shall be interpreted as …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.

By adopting Article 29(b), ACHR, the Inter-American Court came to the conclusion in *Mayagna (Sumo) Awas Tingni Community v Nicaragua*, that there was no basis for such a restrictive interpretation of who was to be protected by the right to property in Article 21, ACHR, that they could not exclude indigenous communities from the right to such protection, merely on the basis that their traditional form of “ownership” was not ‘centred on an individual but rather on the group and its community’.

The Inter-American Court then made one of their perhaps most important statements that permeates all the following decisions. A statement that explains the very foundation for the differential treatments between cases concerning indigenous peoples’ rights to land and non-indigenous peoples’ cases:

Given the characteristics of the instant case, some specifications are required on the concept of property in indigenous communities. Among indigenous peoples there is a communitarian tradition regarding a communal form of collective property of the land, in the sense that ownership of the land is not centred 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. For indigenous communities, relations to the land are not merely a matter of possession and production but a material and spiritual element which they must fully enjoy, even to preserve their cultural legacy and transmit it to future generations.

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398 *The Mayagna (Sumo) Awas Tingni Community v Nicaragua* (n 359), [148]-[149].
399 *Yakye Axa Indigenous Community v Paraguay* (Merits, Reparations and Costs), (17 June 2005), IACtHR, Series C No 125, [131]; *Kichwa Indigenous People of Sarayaku v Ecuador* (n 74), [145] [161]; *Sawhoyamaxa Indigenous Community v Paraguay* (n 360), [118] [122].
400 *The Mayagna (Sumo) Awas Tingni Community v Nicaragua* (n 359), [149].
The Inter-American Court acknowledged that Mayagna (Sumo) Awas Tingni Community did not have recognised title to the land in question. The Community only had partial rights, limited to the right to use and to benefit from work they put into the land. However, the Inter-American Court came to the conclusion that the particular characteristics of indigenous peoples and the historical possession of land were enough in order to have the right to claim the title to the land, and accordingly get this title registered and officially recognised. This position of the Inter-American Court was repeated and clarified in Sawhoyamaxa Indigenous Community v Paraguay. Where the Inter-American Court declared that in cases of undue loss of land, indigenous peoples could still possess the property rights of that land and that in such cases, possession was not a requirement.

As the Inter-American Court highlighted Yakye Axa Indigenous Community v Paraguay, the basis for differential treatment of cases concerning indigenous peoples’ rights, and other cases is the ‘particular characteristics of indigenous peoples that distinguish the member of indigenous peoples from the general population and that constitutes their cultural identity’. It is this difference which also obligates the state to treat cases where the measure may affect indigenous peoples differently from other cases in order to live up to the need of equality before the law, in line with the obligation to respect conventional rights according to Article 1, ACHR.

In Mayagna (Sumo) Awas Tingni Community v Nicaragua, the Inter-American Court also address the problem of the lack of clear delimitation and the lack of formal demarcation of the land. As a result, to grant concessions to a third party to utilize resources in the area was a part of the violation. The Inter-American Court did not explain why this was part of the violation. This becomes clearer in following judgments and is connected to the obligation to respect right under Article 1, ACHR.

In Kichwa Indigenous People of Sarayaku v Ecuador, the Inter-American Court highlights that an inherent part of the obligation to respect
rights in Article 1, ACHR, is the obligation of the state to guarantee the right to prior consultation, as the obligation to consult is an established general principle of international law.\textsuperscript{408}

As the Inter-American Court explained in previous judgments, the relationship of indigenous peoples to their traditional land is an essential component of their culture. In order to be able to respect indigenous peoples’ rights under the American Convention, and to provide effective and meaningful protection of those rights, the right to consultation in any cases regarding measures that may affect their rights under the American Convention is, therefore, a requirement.\textsuperscript{409} It does not matter that there is a lack of title to the land in question; the right to culture is a generally recognised under international law, and as the Inter-American Court explained, this puts an obligation upon every state to take positive actions in relation to any indigenous peoples in order to ensure that they can ‘enjoy the full and equal exercise of their right to the land that they have traditionally used and occupied.\textsuperscript{410}

The essence of the problem with the lack of delimitation and demarcation of the land in \textit{Mayagna (Sumo) Awas Tingni Community v Nicaragua}, was that by not clearly establishing the boundaries of the community, the community could not fully use and enjoy their property, and was not granted the respect, including the right to consultation, as it were not clear whether the concessions was granted on their land or not. Therefore, the state failed to take the necessary positive actions to protect the rights of the community as obligated under Article 1 of the Convention.\textsuperscript{411}

\textbf{Legal Limitations}

Like its African and European counterparts, the American Convention contains exceptions to the right to property. According to Article 21, the right to property may be subject to limitations due ‘to the interest of society’, and deprivation of property is only possible ‘for reasons of public utility or social interests’. In this sense, ACHR is quite similar to ECHR.

\begin{thebibliography}{99}
\bibitem{408} ibid [164].
\bibitem{409} ibid [159]-[160] [166].
\bibitem{410} ibid [171].
\bibitem{411} \textit{The Mayagna (Sumo) Awas Tingni Community v Nicaragua} (n 359) [153]-[155].
\end{thebibliography}
It could be noted that the Inter-American Court has not given any greater attention to neither of these limitations or discussed their meaning in above-mentioned cases concerning indigenous peoples’ rights to their ancestral land. This has been addressed elsewhere.

In *Salvador Chiriboga v Ecuador*, the Inter-American Court explained that public utility and social interests;

‘(C)omprise all those legally protected interests that, for the use assigned to them, allow a better development of the democratic society. To such end, the States must consider all the means possible to affect as little as possible other rights and therefore, undertake the underlying obligations in accordance with the Convention.’

The view of the Inter-American Court is that the measure to be chosen is that which affects other rights in the American Convention the least. In this context, the Inter-American Court has been said to be more demanding when it comes to requiring that the national states provide evidence that the most appropriate measure was chosen, which is the measure that reaches the goal of the measure but affects the rights of the American Convention the least.

As for the established by law criterion, the Court held in *Salvador Chiriboga v Ecuador*, that any law that interferes with the right to property and any application of that law, must at least ‘respect the essential content of the right to property’. Now, the case *Salvador Chiriboga v Ecuador* was about public utilization of property for the creation of a park for the benefit of social needs, and there is little ground to draw far-reaching conclusions based on that case in relation to indigenous peoples, as it is clear that the Inter-American Court adheres to their own wording that cases concerning indigenous peoples must be addressed differently than other cases. Whether or not this is the reason why the limitations have played such marginal meaning in cases concerning indigenous peoples and their right to land is therefore not an unthinkable conclusion.

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412 *Salvador Chiribago v Ecuador* (Preliminary Objections and Merits), (6 May 2008), IACtHR, Series C No 179.
413 Ibid [73].
414 Ibid [74]-[75].
416 *Salvador Chiribago v Ecuador* (n 412).
417 Ibid [65].
Concluding observations

The Inter-American Court is the most progressive court when it comes to indigenous peoples’ cases. For that reason, and the limitations of this paper, only a few of the cases from the Inter-American Court concerning indigenous peoples’ rights to their ancestral land have been addressed in this section. One more case will be addressed, the case of the *Norin Catrimán et al. (Leaders, members and activist of the Mapuche Indigenous People) v Chile*.\(^{418}\) The background of the case is the exploitation of the traditional land of the Mapuche community.\(^{419}\) However, the case was not regarding an alleged violation of indigenous peoples’ rights. Consequently, the Inter-American Court could not make a judgment on that. It didn’t stop the Court from addressing the matter, and repeat the criteria it has established through its case law and which states must ‘observe when respecting and ensuring the rights of the indigenous peoples and their members in the domestic sphere’.\(^{420}\)

The Court has ruled on the State obligations to ensure this right, such as the official recognition of ownership by land delimitation, demarcation and titling, the return of indigenous lands, and the establishment of an effective remedy to decide the corresponding claims. The Court has also indicated that “the obligation to consult [the indigenous and tribal communities and peoples], in addition to constituting a treaty-based norm, is also a general principle of international law” and has emphasized the importance of the recognition of that right as “one of the fundamental guarantees to ensure the participation of the indigenous communities and peoples in the decisions concerning measures that affect their rights and, in particular, their right to communal property.”\(^{421}\)

Although this seems as a statement, it confirms the Court’s robust position that the rights of indigenous peoples to their ancestral land are strong rights, which stands apart from the rights of other groups of society, and that these

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\(^{418}\) *Norin Catrimán et al (Leaders, members and activist of the Mapuche Indigenous People) v Chile* (Merits, Reparations and Costs), (29 May 2014) Series C No 279.

\(^{419}\) ibid [80].

\(^{420}\) ibid [155].

\(^{421}\) ibid.
rights are well-established rights not only under the American Convention but that they also have a solid foundation in contemporary international law.
5 Conclusive Notes: Cultural Considerations of the Autonomous Meaning of Right to Property in Contemporary International Law

Indigenous peoples' ancestral land has always been inseparable from their human rights, regardless if it is the right to life, the right to culture, or the right to development. The right to traditional land is a right which predates that of the colonial states, and which needs to be recognised in contemporary legislation. Perhaps, it is the common understanding of the word colonialism that results seemingly in a separation of rights, we ascribe to different indigenous peoples depending on if they live in the old world or the new world. Perhaps this is also the reason why the approach of the European Court of Human Rights seems to differ from the Inter-American Court of Human rights, and the African Court on Human and People’s Rights, as the former can be viewed as belonging to the old world, while the two latter can be attributed to the new world. Whatever the reason, there is a difference in approach between the institutions.

Starting Point

The main difference between the courts’ approach to the right of/to property is the starting point. The European system focuses on the rights of a legal person. What rights does the person have to the object in question, and what kind of object is it; is it corporeal or incorporeal, is it land as material or land as a site? The answer to the latter question is important because depending on the answer different legal aspects apply. The initial approach of the European Court, is, therefore, what object is in focus, and what rights does the person have to that object from a western perspective. They apply a traditional civil law approach. To a large degree, the court follows Jeremy Waldron’s definition in their approach, that property is the rights and privileges of a person over a subject. Therefore, the question of ownership is only a variable
to take into consideration when deciding a case, but it is not a breaking point. This has also been established through the case law of the European Court.

The Inter-American and African courts have a different starting point when they deal with cases concerning indigenous peoples. They don’t, as clearly as the European Court, divide the corporeal from the incorporeal, or land as material from the land in site. From their point of view, they are one and the same, that needs to be considered at the same time. You cannot divide the cultural aspects of indigenous peoples from the material aspects on which their culture and identity are created. The Inter-American and African courts, therefore, have an approach the more resembles the one that Richard Henry Tawney outlined, that property in question cannot be understood unless you understand other concepts connected to it. This point of view, or approach, is also clearly visible in the case law of the Inter-American and the African courts, where they highlight the need to approach indigenous peoples’ cases differently than other cases.

**Particular Characteristics of Indigenous People**

The European Court has truly never tried the merits of an indigenous peoples’ land case, so we really don’t know what approach they will take; if they will treat such a case as any other case, or make a contextual and historical consideration, and treat indigenous peoples' land cases differently from other land cases or not.

The cases that have gone to the European Court give no indication to either direction. There are, however, dissenting opinions in *Handolsdalen Sami Village and Others v Sweden*, as noted, the case is not about the right of property. However, in her dissenting opinion, Judge Ziemele emphasises the development of indigenous peoples’ rights under international law and highlights the right to property in Article 26, of the Universal Declaration of the Rights of Indigenous Peoples, to explain why the specific situation of indigenous peoples must be taken into account in cases concerning them. The African Court took the same approach when examining the rights of the Ogeik to their ancestral land. They evaluated the meaning of the right to property in the African Convention in the light of Article 26 of the Universal Declaration of the Rights of Indigenous Peoples, in a sense; they treated it as customary law. In this context, it is interesting to note that all the Arctic

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422 *Handolsdalen Sami Village and Others v Sweden* (n 250).
nations in Europe, with the exception of Russia, voted in favour of the Declaration.

*The Influence of development in International Law*

The African Court and the Inter-American Court highlight the particular characteristics of indigenous peoples, and as noted, they explain that the basis for this special treatment can be found in contemporary international human rights law. The two courts also refer to this development in their judgments; they also refer to each other, and to the European Court.

The development of international human rights law is not only about declarations and treaties. The case law of the Inter-American Court and the African Court is, as much as the case law of the European Court, part of the corpus of international law. The Inter-American Court and the African Court acknowledges this and they use it. The Inter-American Court relies on Article 29, AFCHR in order to do this. The African Court does not, in the above-mentioned case, explain which article they rely on when referring to the above mentioned declaration, however, this is irrelevant here. The European Court has Article 53 (60), ECHR, which is similar to Article 21, of the American Convention. The European Court has seemingly never addressed Article 53, ECHR, to any length, and it has been argued that the article cannot be used in the fashion as used by the Inter-American Court. There have been dissenting opinions about the meaning of Article 53 ECHR, but it is not possible to draw any far-reaching conclusions about it, more than that it is applied ex officio. The question is if the European Court needs to rely on it or simply apply traditional treaty interpretation principles?

The European Court may take the development of international human rights law into account under Article 38, of the Statute of International Court of Justice, which the European Court does apply when it interprets the text of the Convention. The application of the approach of other international courts is also a part of the contextual contemporary interpretation of the European Convention, which is necessary in order to provide practical and effective protection of rights, especially of indigenous peoples, in line with Article 31, of the Vienna Convention. Such an interpretation is not an expansion of treaty rights but lies within the existing development of the case law concerning the right of property.
Proportionality and Necessity

The last differences that shall be highlighted are which measures the courts accept as proportionate or of necessity.

The position of the Inter-American Court is that the measure to be chosen is the one that affects rights in the American Convention the least. In this context, the Inter-American Court, as well as the African Commission, have been said to be more demanding when it comes to the nation states to prove that the most appropriate measure was chosen, meaning the one that affects rights in respective convention the least. Although the African Court takes a similar position, it does not express it as clearly in the mentioned case. Their statement, that to evict the Ogiek from the Mau Forest, as a measure to preserve the natural ecosystem of the forest, was not ‘necessary or proportionate to achieve the purported justification of preserving the natural ecosystem of the Mau Forest’,\(^{423}\) indicates that there were less dramatic measures that could have been taken to reach the purpose, and which had not been a violation of the Ogieks right to property.

The European Court takes another position; it is within the margin of appreciation of the state to choose which measures are the most appropriate ones, and the mere fact that there is a less dramatic measure available does not make the measure taken disproportionately.

Structural Obstacles?

The initial hypothesis of this paper, that the European system of the protection of human rights contains obstacles that hinder the regime from evolving in line with international law when it comes to the protection of Artic indigenous peoples’ rights, has been proven wrong. The structure of the system, the text of the European Convention, together with the Courts’ own jurisprudence, in focus in this paper, as well as the development of international law, show that there is an underlying legal basis for this development.

\(^{423}\) *ACHPR v Kenya* (n 341) [130].
6 Future Aspects

In the case of the Sami living in Norway, Sweden, Finland, and Russia, there are national differences in what rights the national law recognises, and how these rights are protected. What they have in common is the nature of their development. How they have adapted and created their culture and way of life in relation to the nature and the condition of the land they originate from. In this case, it is interesting to note that the first case of the African Court highlights that it is usually not indigenous communities who are the main causes for depletion of the natural environment in areas they live, but external forces. Therefore, to deny indigenous peoples the right to prior consultation and the get their voice heard prior to any measure potentially affecting their traditional land and their way of life is a violation of their human rights.

In relation to the pending *Girja Sami case*, the question whether the Swedish legislation offers effective protection for the Sami people to culturally survive in the future may be questioned. As noted, Noel Broadbent, for example, asks the question what protection is there when the possibility of herding reindeer ceases to exist, or when they are encroached upon by external source for the purpose of resource extractions, where indigenous peoples’ rights to resources of traditional land is connected to herding reindeer and limited to household consumption, and where the law restricts specific legal persons, such as the Sami village, from developing alternative sources of income? In the words of the jurisprudence of the European Courts, it can be questioned that there is a reasonable relationship of proportionality between the means employed and the aim sought to be realised. What is the reasonable foundation upon which the State restricts the Sami, and Sami villages, from creating earnings from other resources than reindeer herding? Although there is no legal basis at present to argue that the Sami have a right of property that includes the right to transfer it, the jurisprudence from the European Court contains the legal basis for a strong right of property that includes a strong right to use traditional land and the right to enjoy the fruit thereof. This is a fundamental element of the contemporary law.
References


Anaya J, ’The Case of Awas Tingni v Nicaragua: A New Step in International Law for Indigenous People’, (2002) 19 Arizona Journal of International and Comparative Law 1


Arctic Human Development Report (TeamNord 2004)

Arctic Human Development Report II (TeamNord 2014:567)


Broadbent N D, Lapps and Labyrinths – Saami Prehistory, Colonization and Cultural Resilience (Arctic Studies Centre 2010)

Connolly AJ (ed), Indigenous Rights (Routledge 2009)

Davis M, ‘To bind or not to bind: The United Nations declaration on the rights of indigenous peoples five years on’ (2012) 19 Australian International Law Journal


Fogelklou A and Spaak T (eds), Festskrift till Åke Frändberg (Iustus 2003)


Hohfeld W, ‘Some Fundamental Legal Conceptions as Applied in Judicial Reasoning’ (1914) 23 *Yale LJ* 16

Hohfeld W, ‘Fundamental Legal Conceptions as Applied in Judicial Reasoning’ (1917) *Faculty Scholarship Series Paper* 4378


Kertesz S, 'Human Rights in the Peace Treaties’ (1949) 14 *LCP* 640


Nordic Council of Ministers (2015), Polar Law and Resources (Nordic Council of Ministers, Copenhagen)

Nordic Council of Ministers (2010), Polar Law Textbook (Nordic Council of Ministers, Copenhagen)

Nordic Council of Ministers (2013), Polar Law Textbook II (Nordic Council of Ministers, Copenhagen)


Petaux J, Democracy and human right for Europe – The Council of Europe’s contribution (Council of Europe Publishing 2009)


Peers S, Hervey T, Kenner J, and Ward A (eds), The EU charter of fundamental Rights: A commentary (Hart Publishing Ltd 2014)


Stoor J P A, Kaiser N, Jacobsson L, Salander Renberg E, and Silviken A, ‘“We are like lemmings”: making sense of the cultural meaning(s) of suicide among the indigenous Sami in Sweden (2015, Special issue) *Int J Circumpolar Health* 74


Vranken J, ‘Exciting Times for Legal Scholarship’ (2012) 2 *LaM* 42


Appendix A

Convention for the Protection of Human Rights and fundamental Freedoms
(as amended by Protocols Nos. 11 and 14, supplemented by Protocols Nos. 1, 4, 6, 7, 12 and 13)

Rome, 4.XI.1950

The Governments signatory hereto, being Members of the Council of Europe,
Considering the Universal Declaration of Human Rights proclaimed by the General Assembly of the United Nations on 10 December 1948;
Considering that this Declaration aims at securing the universal and effective recognition and observance of the Rights therein declared;
Considering that the aim of the Council of Europe is the achievement of greater unity between its Members and that one of the methods by which the aim is to be pursued is the maintenance and further realization of Human Rights and Fundamental Freedoms;
Reaffirming their profound belief in those Fundamental Freedoms which are the foundation of justice and peace in the world and are best maintained on the one hand by an effective political democracy and on the other by a common understanding and observance of the Human Rights upon which they depend;
Being resolved, as the Governments of European countries which are like-minded and have a common heritage of political traditions, ideals, freedom and the rule of law to take the first steps for the collective enforcement of certain of the Rights stated in the Universal Declaration,
Have agreed as follows:

ARTICLE 1 – Obligation to respect human rights
The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention.

SECTION I – Rights and Freedoms

ARTICLE 2 – Right to Life
(1) Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.
(2) Deprivation of life shall not be regarded as inflicted in contravention of this article when it results from the use of force which is no more than absolutely necessary:
(a) in defence of any person from unlawful violence;
(b) in order to effect a lawful arrest or to prevent escape of a person lawfully detained;
(c) in action lawfully taken for the purpose of quelling a riot or insurrection.

ARTICLE 3 – Prohibition of torture
No one shall be subjected to torture or to inhuman or degrading treatment or punishment.

ARTICLE 4 – Prohibition of Slavery and forced labour
(1) No one shall be held in slavery or servitude.
(2) No one shall be required to perform forced or compulsory labour.
(3) For the purpose of this article the term forced or compulsory labour shall not include:
(a) any work required to be done in the ordinary course of detention imposed according to the provisions of Article 5 of this Convention or during conditional release from such detention;
(b) any service of a military character or, in case of conscientious objectors in countries where they are recognized, service exacted instead of compulsory military service;
(c) any service exacted in case of an emergency or calamity threatening the life or well-being of the community;
(d) any work or service which forms part of normal civic obligations.

ARTICLE 5 – Right to liberty and security
(1) Everyone has the right to liberty and security of person.
No one shall be deprived of his liberty save
in the following cases and in accordance with a
procedure prescribed by law:
(a) the lawful detention of a person after
conviction by a competent court;
(b) the lawful arrest or detention of a
person for non-compliance with the lawful
order of a court or in order to secure the
fulfilment of any obligation prescribed by law;
(c) the lawful arrest or detention of a
person effected for the purpose of bringing him
before the competent legal authority of
reasonable suspicion of having committed and
offence or where it is reasonably considered
necessary to prevent his committing an offence
or fleeing after having done so;
(d) the detention of a minor by lawful order
for the purpose of educational supervision or
his lawful detention for the purpose of bringing
him before the competent legal authority;
(e) the lawful detention of persons for the
prevention of the spreading of infectious
diseases, of persons of unsound mind,
alcoholics or drug addicts, or vagrants;
(f) the lawful arrest or detention of a person
to prevent his effecting an unauthorized entry
into the country or of a person against whom
action is being taken with a view to deportation
or extradition.
(2) Everyone who is arrested shall be
informed promptly, in a language which he
understands, of the reasons for his arrest and
the charge against him.
(3) Everyone arrested or detained in
accordance with the provisions of paragraph
1(c) of this article shall be brought promptly
before a judge or other officer authorized by
law to exercise judicial power and shall be
entitled to trial within a reasonable time or to
release pending trial. Release may be
conditioned by guarantees to appear for trial.
(4) Everyone who is deprived of his liberty
by arrest or detention shall be entitled to take
proceedings by which the lawfulness of his
detention shall be decided speedily by a court
and his release ordered if the detention is not
lawful.
(5) Everyone who has been the victim of
arrest or detention in contravention of the
provisions of this article shall have an
enforceable right to compensation
ARTICLE 6 – Right to a fair trial
(1) 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. Judgment shall be pronounced publicly
by the press and public may be excluded from
all or part of the trial in the interest of morals,
public order or national security in a
democratic society, where the interests of
juveniles or the protection of the private life of
the parties so require, or the extent strictly
necessary in the opinion of the court in special
circumstances where publicity would prejudice
the interests of justice.
(2) Everyone charged with a criminal
offence shall be presumed innocent until
proved guilty according to law.
(3) Everyone charged with a criminal
offence has the following minimum rights:
(a) to be informed promptly, in a language
which he understands and in detail, of the
nature and cause of the accusation against him;
(b) to have adequate time and the facilities
for the preparation of his defence;
(c) to defend himself in person or through
legal assistance of his own choosing or, if he
has not sufficient means to pay for legal
assistance, to be given it free when the interests
of justice so require;
(d) to examine or have examined witnesses
against him and to obtain the attendance and
examination of witnesses on his behalf under
the same conditions as witnesses against him;
(e) to have the free assistance of an
interpreter if he cannot understand or speak the
language used in court.
ARTICLE 7 - No punishment without law
(1) No one shall be held guilty of any criminal
offence on account of any act or omission
which did not constitute a criminal offence
under national or international law at the time
when it was committed. Nor shall a heavier
penalty be imposed than the one that was
applicable at the time the criminal offence was
committed.
(2) This article shall not prejudice the trial
and punishment of any person for any act or
omission which, at the time when it was
committed, was criminal according the general
principles of law recognized by civilized
nations.
ARTICLE 8 – 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 well-being 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.

ARTICLE 9 – Freedom of thought, conscience and religion
(1) Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.

(2) Freedom to manifest one’s religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or the protection of the rights and freedoms of others.

ARTICLE 10 – Freedom of expression
(1) Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

(2) The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or the rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

ARTICLE 11 – Freedom of assembly and association
(1) Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.

(2) No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, 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. This article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State.

ARTICLE 12 – Right to marry
Men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right.

ARTICLE 13 – 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.

ARTICLE 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.

ARTICLE 15 – Derogation in time of emergency
(1) In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law.

(2) No derogation from Article 2, except in respect of deaths resulting from lawful acts of war, or from Articles 3, 4 (paragraph 1) and 7 shall be made under this provision.

(3) Any High Contracting Party availing itself of this right of derogation shall keep the Secretary-General of the Council of Europe fully informed of the measures which it has taken and the reasons therefor. It shall also inform the Secretary-General of the Council of Europe when such measures have ceased to operate and the provisions of the Convention are again being fully executed.

ARTICLE 16 – Restrictions on political activity of aliens
Nothing in Articles 10, 11, and 14 shall be regarded as preventing the High Contracting Parties from imposing restrictions on the political activity of aliens.

ARTICLE 17 – Prohibition of abuse of rights
Nothing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction on any of the rights
and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention.

ARTICLE 18 – Limitation on use of restrictions on rights
The restrictions permitted under this Convention to the said rights and freedoms shall not be applied for any purpose other than those for which they have been prescribed.

SECTION II – European Court of Human Rights

[Articles 19 to 31 are omitted]

ARTICLE 32 – Jurisdiction of the Court
(1) The jurisdiction of the Court shall extend to all matters concerning the interpretation and application of the Convention and the Protocols thereto which are referred to it as provided in Articles 33, 34, 46 and 47.

(2) In the event of dispute as to whether the Court has jurisdiction, the Court shall decide.

ARTICLE 33 – Inter-State cases
Any High Contracting Party may refer to the Court any alleged breach of the provisions of the Convention and the protocols thereto by another High Contracting Party.

ARTICLE 34 – Individual applications
The Court may receive applications from any person, non-governmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the protocols thereto. The High Contracting Parties undertake not to hinder in any way the effective exercise of this right.

ARTICLE 35 – Admissibility criteria
(1) The Court may only deal with the matter after all domestic remedies have been exhausted, according to the generally recognised rules of international law, and within a period of six months from the date on which the final decision was taken.

(2) The Court shall not deal with any application submitted under Article 34 that:

(a) is anonymous; or

(b) is substantially the same as a matter that has already been examined by the Court or has already been submitted to another procedure of international investigation or settlement and contains no relevant new information.

(3) The Court shall declare inadmissible any individual application submitted under Article 34 if it considers that:

(a) the application is incompatible with the provisions of the Convention or the Protocols thereto, manifestly ill founded, or an abuse of the right of individual application; or

(b) the applicant has not suffered a significant disadvantage, unless respect for human rights as defined in the Convention and the Protocols thereto requires an examination of the application on the merits and provided that no case may be rejected on this ground which has not been duly considered by a domestic tribunal.

(4) The Court shall reject any application which it considers inadmissible under this Article. It may do so at any stage of the proceedings.

ARTICLE 36 – Third party intervention
(1) In all cases before a Chamber or the Grand Chamber, a High Contracting Party one of whose nationals is an applicant shall have the right to submit written comments and to take part in hearings.

(2) The President of the Court may, in the interest of the proper administration of justice, invite any High Contracting Party which is not a party to the proceedings or any person concerned who is not the applicant to submit written comments or take part in hearings.

(3) In all cases before a Chamber or the Grand Chamber, the Council of Europe Commissioner for Human Rights may submit written comments and take part in hearings.

ARTICLE 37 – Striking out applications
(1) The Court may at any stage of the proceedings decide to strike an application out of its list of cases where the circumstances lead to the conclusion that:

(a) the applicant does not intend to pursue his application; or

(b) the matter has been resolved; or

(c) for any other reason established by the Court, it is no longer justified to continue the examination of the application.

However, the Court shall continue the examination of the application if respect for human rights as defined in the Convention and the protocols thereto so requires.
(2) The Court may decide to restore an application to its list of cases if it considers that the circumstances justify such a course.

**ARTICLE 38 – Examination of the case**
The Court shall examine the case together with the representatives of the parties and, if need be, undertake an investigation, for the effective conduct of which the High Contracting Parties concerned shall furnish all necessary facilities.

**ARTICLE 39 – Friendly settlements**
(1) At any stage of the proceedings, the Court may place itself at the disposal of the parties concerned with a view to securing a friendly settlement of the matter on the basis of respect for human rights as defined in the Convention and the Protocols thereto.

(2) Proceedings conducted under paragraph 1 shall be confidential.

(3) If a friendly settlement is effected, the Court shall strike the case out of its list by means of a decision which shall be confined to a brief statement of the facts and of the solution reached.

(4) This decision shall be transmitted to the Committee of Ministers, which shall supervise the execution of the terms of the friendly settlement as set out in the decision.

**ARTICLE 40 – Public hearings and access to documents**
(1) Hearings shall be in public unless the Court in exceptional circumstances decides otherwise.

(2) Documents deposited with the Registrar shall be accessible to the public unless the President of the Court decides otherwise.

**ARTICLE 41 – Just satisfaction**
If the Court finds that there has been a violation of the Convention or the protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party.

**ARTICLE 42 – Judgments of Chambers**
Judgments of Chambers shall become final in accordance with the provisions of Article 44, paragraph 2.

**Article 43 – Referral to the Grand Chamber**
(1) Within a period of three months from the date of the judgment of the Chamber, any party to the case may, in exceptional cases, request that the case be referred to the Grand Chamber.

(2) A panel of five judges of the Grand Chamber shall accept the request if the case raises a serious question affecting the interpretation or application of the Convention or the protocols thereto, or a serious issue of general importance.

(3) If the panel accepts the request, the Grand Chamber shall decide the case by means of a judgment.

**ARTICLE 44 – Final judgments**
(1) The judgment of the Grand Chamber shall be final.

(2) The judgment of a Chamber shall become final:

(a) when the parties declare that they will not request that the case be referred to the Grand Chamber;

(b) three months after the date of the judgment, if reference of the case to the Grand Chamber has not been requested;

(c) when the panel of the Grand Chamber rejects the request to refer under Article 43.

(3) The final judgment shall be published.

**ARTICLE 45 – Reasons for judgments and decisions**
(1) Reasons shall be given for judgments as well as for decisions declaring applications admissible or inadmissible.

(2) If a judgment does not represent, in whole or in part, the unanimous opinion of the judges, any judge shall be entitled to deliver a separate opinion.

**ARTICLE 46 – Binding force and execution of judgments**
(1) The High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties.

(2) The final judgment of the Court shall be transmitted to the Committee of Ministers, which shall supervise its execution.

(3) If the Committee of Ministers considers that the supervision of the execution of a final judgment is hindered by a problem of interpretation of the judgment, it may refer the matter to the Court for a ruling on the question of interpretation. A referral decision shall require a majority vote of two thirds of the representatives entitled to sit on the Committee.

(4) If the Committee of Ministers considers that a High Contracting Party refuses to abide by a final judgment in a case to which it is a party, it may, after serving formal notice on that Party and by decision adopted by a majority vote of two thirds of the representatives entitled to sit on the Committee, refer to the Court the question whether that Party has failed to fulfil its obligation under paragraph 1.

(5) If the Court finds a violation of paragraph 1, it shall refer the case to the Committee of Ministers for consideration of the measures to be taken. If the Court finds no violation of paragraph 1, it shall refer the case
to the Committee of Ministers, which shall close its examination of the case.

**ARTICLE 47 – Advisory opinions**

(1) The Court may, at the request of the Committee of Ministers, give advisory opinions on legal questions concerning the interpretation of the Convention and the protocols thereto.

(2) Such opinions shall not deal with any question relating to the content or scope of the rights or freedoms defined in Section I of the Convention and the protocols thereto, or with any other question which the Court or the Committee of Ministers might have to consider in consequence of any such proceedings as could be instituted in accordance with the Convention.

(3) Decisions of the Committee of Ministers to request an advisory opinion of the Court shall require a majority vote of the representatives entitled to sit on the Committee.

**ARTICLE 48 – Advisory jurisdiction of the Court**
The Court shall decide whether a request for an advisory opinion submitted by the Committee of Ministers is within its competence as defined in Article 47.

**ARTICLE 49 – Reasons for advisory opinions**

(1) Reasons shall be given for advisory opinions of the Court.

(2) If the advisory opinion does not represent, in whole or in part, the unanimous opinion of the judges, any judge shall be entitled to deliver a separate opinion.

(3) Advisory opinions of the Court shall be communicated to the Committee of Ministers.

**ARTICLE 50 – Expenditure on the Court**
The expenditure on the Court shall be borne by the Council of Europe.

**ARTICLE 51 – Privileges and immunities of judges**
The judges shall be entitled, during the exercise of their functions, to the privileges and immunities provided for in Article 40 of the Statute of the Council of Europe and in the agreements made thereunder.

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**SECTION III – Miscellaneous provisions**

**ARTICLE 52 – Inquiries by the Secretary General**

On receipt of a request from the Secretary General of the Council of Europe any High Contracting Party shall furnish an explanation of the manner in which its internal law ensures the effective implementation of any of the provisions of the Convention.

**ARTICLE 53 – Safeguard for existing human rights**

Nothing in this Convention shall be construed as limiting or derogating from any of the human rights and fundamental freedoms which may be ensured under the laws of any High Contracting Party or under any other agreement to which it is a Party.

**ARTICLE 54 – Powers of the Committee of Ministers**

Nothing in this Convention shall prejudice the powers conferred on the Committee of Ministers by the Statute of the Council of Europe.

**ARTICLE 55 – Exclusion of other means of dispute settlement**
The High Contracting Parties agree that, except by special agreement, they will not avail themselves of treaties, conventions or declarations in force between them for the purpose of submitting, by way of petition, a dispute arising out of the interpretation or application of this Convention to a means of settlement other than those provided for in this Convention.

**ARTICLE 56 – Territorial application**

(1) Any State may at the time of its ratification or at any time thereafter declare by notification addressed to the Secretary General of the Council of Europe that the present Convention shall, subject to paragraph 4 of this Article, extend to all or any of the territories for whose international relations it is responsible.

(2) The Convention shall extend to the territory or territories named in the notification as from the thirtieth day after the receipt of this notification by the Secretary General of the Council of Europe.

(3) The provisions of this Convention shall be applied in such territories with due regard, however, to local requirements.

(4) Any State which has made a declaration in accordance with paragraph 1 of this article may at any time thereafter declare on behalf of one or more of the territories to which the declaration relates that it accepts the competence of the Court to receive applications from individuals, non-governmental organisations or groups of individuals as provided by Article 34 of the Convention.
Article 57 – Reservations
(1) Any State may, when signing this Convention or when depositing its instrument of ratification, make a reservation in respect of any particular provision of the Convention to the extent that any law then in force in its territory is not in conformity with the provision. Reservations of a general character shall not be permitted under this article.
(2) Any reservation made under this article shall contain a brief statement of the law concerned.

Article 58 – Denunciation
(1) A High Contracting Party may denounce the present Convention only after the expiry of five years from the date on which it became a party to it and after six months’ notice contained in a notification addressed to the Secretary General of the Council of Europe, who shall inform the other High Contracting Parties.
(2) Such a denunciation shall not have the effect of releasing the High Contracting Party concerned from its obligations under this Convention in respect of any act which, being capable of constituting a violation of such obligations, may have been performed by it before the date at which the denunciation became effective.
(3) Any High Contracting Party which shall cease to be a member of the Council of Europe shall cease to be a Party to this Convention under the same conditions.

Article 59 – Signature and ratification
(1) This Convention shall be open to the signature of the members of the Council of Europe. It shall be ratified. Ratifications shall be deposited with the Secretary General of the Council of Europe.
(2) The European Union may accede to this Convention.
(3) The present Convention shall come into force after the deposit of ten instruments of ratification.
(4) As regards any signatory ratifying subsequently, the Convention shall come into force at the date of the deposit of its instrument of ratification.
(5) The Secretary General of the Council of Europe shall notify all the members of the Council of Europe of the entry into force of the Convention, the names of the High Contracting Parties who have ratified it, and the deposit of all instruments of ratification which may be effected subsequently.

Done at Rome this 4th day of November, 1950, in English and French, both text being equally authentic, in a single copy which shall remain deposited in the archives of the Council of Europe. The Secretary-General shall transmit certified copies to each of the signatories.

(*) This page contains the text of the Convention as amended by its Protocol No. 14 (CETS No. 194) as from the date of its entry into force on 1 June 2010. The text of the Convention had been previously amended according to the provisions of Protocol No. 3 (ETS No. 45), which entered into force on 21 September 1970, of Protocol No. 5 (ETS No. 55), which entered into force on 20 December 1971 and of Protocol No. 8 (ETS No. 118), which entered into force on 1 January 1990, and comprised also the text of Protocol No. 2 (ETS No. 44) which, in accordance with Article 5, paragraph 3 thereof, had been an integral part of the Convention since its entry into force on 21 September 1970. All provisions which had been amended or added by these Protocols were replaced by Protocol No. 11 (ETS No. 155), as from the date of its entry into force on 1 November 1998. As from that date, Protocol No. 9 (ETS No. 140), which entered into force on 1 October 1994, was repealed and Protocol No. 10 (ETS no. 146) had lost its purpose.

Source: Treaty Office on http://conventions.coe.int
Appendix B

Protocol to the Convention
for the Protection of Human
Rights and Fundamental
Freedoms
(as amended by Protocols Nos. 11*)
Paris, 20.III.1952

The governments signatory hereto, being
members of the Council of Europe,

Being resolved to take steps to ensure the
collective enforcement of certain rights and
freedoms other than those already included in
Section I of the Convention for the Protection
of Human Rights and Fundamental Freedoms
signed at Rome on 4 November 1950
(hereinafter referred to as "the Convention"),

Have agreed as follows:

ARTICLE 1 – 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.

ARTICLE 2 – Right to education
No person shall be denied the right to
education. In the exercise of any functions
which it assumes in relation to education and to
teaching, the State shall respect the right of
parents to ensure such education and teaching
in conformity with their own religious and
philosophical convictions.

ARTICLE 3 – Right to free elections
The High Contracting Parties undertake to hold
free elections at reasonable intervals by secret
ballot, under conditions which will ensure the
free expression of the opinion of the people in
the choice of the legislature.

ARTICLE 4 – Territorial application
Any High Contracting Party may at the time of
signature or ratification or at any time
thereafter communicate to the Secretary
General of the Council of Europe a declaration
stating the extent to which it undertakes that the
provisions of the present Protocol shall apply to
such of the territories for the international
relations of which it is responsible as are named
therein.

Any High Contracting Party which has
communicated a declaration in virtue of the
preceding paragraph may from time to time
communicate a further declaration modifying
the terms of any former declaration or
terminating the application of the provisions
of this Protocol in respect of any territory.

A declaration made in accordance with this
article shall be deemed to have been made in
accordance with paragraph 1 of Article 56 of
the Convention.

ARTICLE 5 – Relationship to the Convention
As between the High Contracting Parties the
provisions of Articles 1, 2, 3 and 4 of this
Protocol shall be regarded as additional articles
to the Convention and all the provisions of the
Convention shall apply accordingly.

ARTICLE 6 – Signature and ratification
This Protocol shall be open for signature by the
members of the Council of Europe, who are the
signatories of the Convention; it shall be
ratified at the same time as or after the
ratification of the Convention. It shall enter into
force after the deposit of ten instruments of
ratification. As regards any signatory ratifying
subsequently, the Protocol shall enter into force
at the date of the deposit of its instrument of
ratification.

The instruments of ratification shall be
deposited with the Secretary General of the
Council of Europe, who will notify all
members of the names of those who have
ratified.
Done at Paris on the 20th day of March 1952, in English and French, both texts being equally authentic, in a single copy which shall remain deposited in the archives of the Council of Europe. The Secretary General shall transmit certified copies to each of the signatory governments.

(*) Headings of articles added and text amended according to the provisions of Protocol No. 11 (ETS No. 155) as of its entry into force on 1 November 1998.

Source: Treaty Office on http://conventions.coe.int

The essential element of reparation is disclosure of truth.  
Federico Lenzerini