UNIVERZITA KARLOVA

Právnická fakulta

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Právo domorodých národů v Latinské Americe k půdě

Diplomová práce

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Katedra: Katedra mezinárodního práva

Datum vypracování práce: 18. 5. 2020

CHARLES UNIVERSITY

Faculty of Law

Nela Černota

Indigenous Peoples' Land Rights in Latin America

Master's thesis

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Department of Public International Law

Date of submission: 18 May 2020

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Acknowledgements

I would like to express my gratitude to my supervisor prof. JUDr. Pavel Šturma, DrSc. for all his invaluable advice. I am also genuinely grateful to Petr Manoušek for having sparked my interest in this topic. Particular thanks are due to Petra for her tips and observations, and mainly her ever-present encouragements. I would also like to thank Sammy for all his linguistic help. Finally, I am especially grateful to Fabian for his constant support.

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List of Abbreviations

ACHR	American Convention on Human Rights
ADRDM	American Declaration on the Rights and Duties of Man
ADRIP or American Declaration	American Declaration on the Rights of Indigenous Peoples
CBD	Convention on Biological Diversity
CERD	Committee on the Elimination of Racial Discrimination
CESCR	Committee on the Economic, Social and Cultural Rights
Cobo's study	Study of the Problem of Discrimination against Indigenous Populations
CRC	Convention on the Rights of the Child
DADRIP	Draft American Declaration on the Rights of Indigenous Peoples
DRM	Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities
ECOSOC	UN Economic and Social Council
GC(s)	General Comment(s)
GR(s)	General Recommendation(s)
HR Council	Human Rights Council
HRC	Human Rights Committee
IACmHR or Commission	Inter-American Commission of Human Rights
IACtHR or Court	Inter-American Court of Human Rights
IASHR	Inter-American System of Human Rights
ICCPR	International Covenant on the Civil and Political Rights
ICERD	International Convention on the Elimination of All Forms of Racial Discrimination
ICESCR	International Covenant on the Economic, Social and Cultural Rights
ILO	International Labour Organisation
ILO Convention 107	International Labour Organisation's Convention No. 107, the Indigenous and Tribal Populations Convention

ILO Convention 169	International Labour Organisation's Convention No. 169, Indigenous and Tribal Peoples Convention
OAS	Organization of American States
OAS GA	General Assembly of the Organizarion of American States
Sub-Commission	UN Commission on Human Rights' Sub-Commission on Prevention of Discrimination and Protection of Minorities
UNCHR	UN Commission on Human Rights
UNDRIP or UN Declaration	United Nations Declaration on the Rights of Indigenous Peoples
UNGA	United Nations General Assembly
WB	World Bank
WGIP	UN Working Group on Indigenous Populations

Introduction

Lands play a central role in the culture, customs, religion, health and subsistence of indigenous peoples and, ultimately, in their collective survival as distinct peoples.[1] Indigenous peoples[2] live in harmony with nature and care about the ecological integrity of their territories.[3]

For indigenous peoples, lands, territories, and resources do not represent a mere source of livelihood. Indigenous peoples possess a unique, profound spiritual and material relationship with their ancestral lands. This relationship is collective and intergenerational.[4]

Paradoxically, lands also are a crucial factor in human rights violations with which indigenous peoples are faced. As a result of colonisation, indigenous peoples have endured grave historical injustices, including cultural assimilation and dispossession of their lands.[5]

At present, they are still frequently subject to interferences with a variety of their rights when asserting their rights to their ancestral territories.[6] This is often the result of a conflict between their ancestral lands claims and private property rights.[7] Oftentimes, it is also in connection with development projects which may have an adverse effect on their territories.[8] They are faced with forced evictions,[9] criminalisation,[10] death threats[11], and attacks.[12] Also,

1 DAES, Erica-Irene. *Indigenous people and their relationship to land*. ECOSOC, Sub-Commission on Prevention of Discrimination and Protection of Minorities, 1999, UN Doc. E/CN.4/Sub.2/1999/18, paras 10-18.

2 This text refers to both indigenous and tribal peoples as 'indigenous' following the newest standards of international law, namely the United Nations Declaration on the Rights of Indigenous Peoples and the American Declaration on the Rights of Indigenous Peoples. The paper only employs the word 'tribal' when necessary for the purpose of clarity. For more information on the definition of indigenous peoples see Chapter 1.

3 DANNENMAIER, Eric. Beyond Indigenous Property Rights: Exploring the Emergence of a Distinctive Connection Doctrine. *Washington University Law Review*. 2008, **86**(1), 86-7, 103-4.

4 DAES, Erica-Irene. *Indigenous people and their relationship to land*. ECOSOC, Sub-Commission on Prevention of Discrimination and Protection of Minorities, 1999, UN Doc. E/CN.4/Sub.2/1999/18, paras 10-18.

5 KREIMER, Osvaldo. *REPORT OF THE RAPPORTEUR: Traditional Forms of Ownership and Cultural Survival, Right to Land and Territories*. Working Group to Prepare the Draft American Declaration on the Rights of Indigenous Peoples, 2003, OEA/Ser.K/XVI, GT/DADIN/doc.113/03 rev. 1, p. 2.

6 IACmHR. *Medida Cautelar No. 458-19: Miembros de la comunidad Guyraroká del Pueblo Indígena Guarani Kaiowá respecto de Brazil.* 29 December 2019, para 5.

7 *ibid.*

8 IACmHR. *Medida cautelar No. 487-19: Quelvin Otoniel Jiménez Villalta respecto de Guatemala*. 3 July 2019, paras 7, 14, 16.

9 IACmHR. *Medida cautelar No. 872-17: Familias desalojadas y desplazadas de la Comunidad Maya Q'eqchi "Nueva Semuy Chacchilla" respecto de Guatemala*. 10 February 2018, Para 17.

frequently, their natural resources are adversely affected, and their traditional way of life made impossible.[13]

One of the root causes for the occurrence of these conflicts over lands is insufficient (or no) legislation which would anchor indigenous peoples' rights to their ancestral lands.[14] Indigenous peoples' collective land tenure differs from the concept of private property.[15] Therefore, recognising indigenous peoples' communal land title poses a challenge to the established concepts of human rights.[16]

In the second half of the 20th century, indigenous peoples started reclaiming their rights, and in the 1980s, indigenous peoples' movements gained strength.[17] This phenomenon was also reflected in international law regarding indigenous peoples' land rights – their rights started gradually gaining recognition.

Indigenous peoples began increasingly participating in the negotiations of international instruments addressing their rights, namely International Labour Organisation Convention No. 169, the Indigenous and Tribal Peoples Convention[18] (hereinafter ILO Convention 169) and the United Nations Declaration on the Rights of Indigenous Peoples[19] (hereinafter UNDRIP or UN Declaration).[20]

10 *ibid.*

11 IACmHR. *Medida Cautelar No. 458-19: Miembros de la comunidad Guyraroká del Pueblo Indígena Guarani Kaiowá respecto de Brazil.* 29 December 2019, paras 6, 8, 9, 28.

12 *ibid.*

13 IACtHR. *Case of the Indigenous Communities of the Lhaka Honhat Association (Our Land) v. Argentina*. Judgment of February 6, 2020 *(Lhaka Honhat Association),* para 289.

14 DAES, Erica-Irene. *Indigenous people and their relationship to land*. ECOSOC, Sub-Commission on Prevention of Discrimination and Protection of Minorities, 1999, UN Doc. E/CN.4/Sub.2/1999/18, paras 34-37;

15 GILBERT, *Jérémie. Indigenous Peoples' Land Rights under International Law: From Victims to Actors.* Netherlands: Brill | Nijhoff, 2007, p. 88.

16 *ibid.*

17 STAVENHAGEN, Rodolfo. Las organizaciones indígenas: actores emergentes en América Latina. *Revista de la CEPAL*. Santiago de Chile: Naciones Unidas, 1997, **62**, p. 63.

18 *C169 - Indigenous and Tribal Peoples Convention.* International Labour Organisation, 27 June 1989, 1650 U.N.T.S. p. 383 (hereinafter ILO Convention 169).

19 *United Nations Declaration on the Rights of Indigenous Peoples*. 13 September 2007, UNGA Res. 61/295, U.N. Doc. A/RES/61/295, (hereinafter UNDRIP).

20 ANAYA, S. James a Robert A. WILLIAMS JR. The Protection of Indigenous Peoples' Rights over Lands and Natural Resources under the Inter-American Human Rights System. *Harvard Human Rights Journal*. 2001, 14(33), p. 34.

ILO Convention 169 is the most recent binding instrument of international law specifically addressing indigenous peoples' land rights. Despite its low number of ratifications, this Convention has been widely accepted in the region of Latin America. [21] Out of its 23 ratifications, 14 are of Latin-American States.[22]

Latin America has, in fact, become the pioneer in laying the groundwork for the international legal framework of indigenous peoples' land rights. One of the examples which reflect this trend is the adoption of the American Declaration on the Rights of Indigenous Peoples[23] (hereinafter ADRIP or American Declaration) at the Organization of American States (hereinafter OAS) in 2016.

Above all, indigenous peoples' land rights have been widely addressed within the case-law of the Inter-American Court of Human Rights (hereinafter IACtHR or Court). The main basis for this protection has been Article 21 of the American Convention on Human Rights[24] (hereinafter ACHR or American Convention), which anchors the right to property.

The present work seeks to analyse this development of international law providing protection to indigenous peoples' land rights in Latin America from the 1980s until the present. It compares its cornerstone instruments and examines the case-law of the IACtHR addressing this issue.

Methodology

Research questions

1. What are the instruments of international law anchoring indigenous peoples' land rights in the region of Latin America?

[21] The term 'Latin America' comprises a group of countries where languages which are derived from Latin (*i.e.* French, Portuguese and Spanish) are spoken. *Real Academia Española.: Diccionario panhispánico de dudas [online]. Madrid: Real Academia Española, 2005. (accessed on 13 May 2020) Available at: https://www.rae.es/dpd/Latinoam%C3%A9rica*.

[22] Ratifications of C169 - Indigenous and Tribal Peoples Convention, 1989 (No. 169) [online]. *International Labour Organisation.* (accessed on 10 March 2020) Available at: www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11300:0::NO:11300:P11300_INSTRUMENT_ID:312314:NO.

[23] *American Declaration on the Rights of Indigenous Peoples.* 15 June 2016, (XLVI-O/16) AG/RES.2888 (hereinafter ADRIP).

[24] *American Convention on Human Rights "Pact of San Jose, Costa Rica".* 22 November 1969, 1144 U.N.T.S. p. 123 (hereinafter ACHR).

2. Between the first and most recent, how have the instruments specifically addressing indigenous peoples' land rights developed?
3. What specific rights of indigenous peoples and relevant obligations of States concerning indigenous peoples' traditional lands stem from the jurisprudence of the Inter-American Court of Human Rights under Article 21 of the American Convention on Human Rights?

It is necessary to note the limitations of the present work. The topic of the present paper is delimited regionally and by the subject matter. The focus of the present work is on the rights of indigenous peoples to their ancestral territories in the region of Latin America.

Indigenous peoples' rights to their ancestral lands are protected on the basis of various human rights. These range from the right to property over the right to self-determination, minority rights and environmental rights to the right to life. Thus, the present paper had two options for approaching the topic. One option was to devote equal attention to all of these rights while analysing all of them rather superficially. Another option was to give a certain right more focus than others while being able to dive into its depths.

The Inter-American System of Human Rights (hereinafter IASHR) stands out in the protection of indigenous peoples' land rights due to the complex body of jurisprudence of the IACtHR on indigenous peoples' land rights under the right to property. As the focus of this paper is on Latin America,[25] it dedicates an entire chapter to property rights, while all the other rights are only addressed briefly in the chapter analysing the international legal framework.

The complex question of the right to self-determination of indigenous peoples is thus only discussed succinctly. Similarly, the issue of the status of indigenous peoples under international law. Both of these topics bear great relevance for indigenous peoples' land rights; however, they could not be explored in more depth due to the limitations with respect to the extent of a master's thesis.

[25] All Latin-American States are members of the OAS and thus also fall under the scope of the IASHR. There are two main instruments which form the basis of the IASHR – the American Declaration on the Rights and Duties of Man and the American Convention on Human Rights. The IACtHR concluded in its *Advisory Opinion OC-10/89* that 'For the member states of the Organization, the [American] Declaration [on the Rights and Duties of Man] is the text that defines the human rights referred to in the [OAS] Charter.' IACtHR. *Advisory Opinion OC-10/89*. Advisory Opinion of July 14, 1989 (para 45).

It also should be mentioned that due to the regional delimitation of the topic of this paper, not all decisions of the bodies of the IASHR concerning indigenous peoples' land rights fall within its scope.[26]

The regional delimitation of the topic is also reflected in the instruments of international law which the present work analyses. The paper devotes most attention to those instruments which are most reflected in the case-law of the Inter-American Court of Human Rights related to the region. Some of these instruments are of global international law; some of them were produced within the Inter-American System of Human Rights.

Sources and methods used in the paper

In order to answer the research questions posed, the present work builds upon various types of primary and secondary sources. As to primary sources, the paper analyses the case-law of the Inter-American Court of Human Rights. It also draws upon documents produced by the Inter-American Commission of Human Rights, and the UN human rights bodies.

Moreover, it examines the records of proceedings, minutes of meetings, and reports of bodies of international organisations which capture negotiations of some of the international instruments analysed. These sources provided a great amount of information on the context of the adoption of the international treaties and declarations enshrining the land rights of indigenous peoples.

The present work also builds upon secondary sources, such as academic articles and books which comment on the case-law of the Inter-American Court of Human Rights, as well as on the negotiations leading to the adoption of the instruments of international law examined in this paper. It also relies on a commentary to the American Convention on Human Rights.

Two main methods are used in the present work. Firstly, the work carries out a comparative analysis of the instruments of international law specifically addressing indigenous peoples' land rights and of documents capturing the process of their adoption. The paper provides a description and analysis of the current legal framework of indigenous peoples' land rights and the path towards it. It analyses the development of these issues

[26] Decisions against States which do not belong to Latin America, such as indigenous-rich Canada and Australia, are not analysed in the paper. An exception is the judgement of the Inter-American Court of Human Rights in the case of *Saramaka People v. Suriname.* This judgement is essential for the subsequent development of the Court's case-law. Therefore, the it is included in the present work.

between the adoption of the International Labour Organisation's Convention No. 107, the Indigenous and Tribal Populations Convention[27] (hereinafter ILO Convention 107) and the ADRIP. Thus, its aim is to present the context of the development of indigenous peoples' land rights in international law in the last four decades.

Secondly, the paper analyses the case-law of the IACtHR. The work examines individual cases concerning indigenous peoples' land rights before the Court. Subsequently, it aims to produce an in-depth overview of the current framework of rights and obligations under Article 21 ACHR, which follow from the decisions of the IACtHR in this area. It also points out a few of its problematic aspects.

Structure of the paper

The present work offers an insight into the fundamental findings of the IACtHR while providing an overview of the instruments of international law, which served as a basis for its decisions.

It is structured into three main parts. Chapter 1 addresses the issue of the definition of the term 'indigenous peoples'. It points out some issues with an overall consensus on a universal definition and considers some of the advantages and disadvantages of such a definition.

Chapter 2 presents a number of key international conventions and declarations which deal with indigenous peoples' land rights. This chapter is divided into two main parts.

The first part analyses instruments of global international law. At first, it focuses on those instruments which contain specific provisions on indigenous peoples' rights. ILO Convention 169 and the UNDRIP are analysed in more depth, both with respect to the process of their adoption and their content.

Instruments of global international law which do not specifically address indigenous peoples' rights are then presented. The paper also describes the monitoring mechanisms and the normative activity of some of the monitoring bodies of these instruments since these are also discussed in the case-law of the IACtHR.

[27] *C107 - Indigenous and Tribal Populations Convention*. International Labour Organisation, 26 June 1957, 328 U.N.T.S. p. 247 (hereinafter ILO Convention 107).

The second part of Chapter 2 deals with instruments of the IASHR. It commences with the ADRIP, the only instrument of the IASHR which addresses indigenous peoples' rights specifically. It compares it to the other specific instruments, in particular the UNDRIP, its global counterpart.

Chapter 2 continues with an exposition of relevant provisions of the two main instruments of the IASHR – the ACHR and the American Declaration on the Rights and Duties of Man[28] (hereinafter ADRDM). It seeks to explain why these instruments are important in this area even though they do not specifically address indigenous peoples' land rights.

In the context of some of the instruments discussed in this chapter, the paper analyses other rights which provide protection to indigenous peoples' land rights. Also, it examines relevant case-law of the IACtHR under these rights.

Chapter 3 analyses the core points addressed by the IACtHR in cases regarding indigenous peoples' land rights under Article 21 ACHR enshrining the right to property. It attempts to produce a comprehensive overview of the rights and obligations which are elaborated in the Court's jurisprudence, observing some of its problems in the process.

The Conclusion summarises the findings to which the present research led and attempts to answer the research questions posed. Finally, it outlines questions which remain to be answered.

[28] *American Declaration of the Rights and Duties of Man.* 2 May 1948, OAS Res. XXX.

1. Definition of the term ‘indigenous peoples’

Chapter 1 deals with the definition of the term ‘indigenous peoples’. It is divided into four subchapters. The first subchapter presents an overview of the most significant attempts to produce a definition of this term on the global level.

Subsequently, the second subchapter gives a few examples of how the issue of definition is approached in the IASHR. The third subchapter addresses some of the main obstacles of finding consent on a universal definition of the term.

Finally, the fourth subchapter offers conclusions on the advantages and disadvantages of the absence of a universal definition.

1.1 Definitions at the international level

There is no universal definition of the term ‘indigenous peoples’ under international law, although various attempts have been made throughout the history of the subject. Many of them are rooted in the ‘working definition’ used by José R. Martínez Cobo.[29] This definition was produced in the Study of the Problem of Discrimination against Indigenous Populations (hereinafter Cobo’s study), published in 1983.

In his study, Cobo stresses the necessity of recognising the right of indigenous peoples to define themselves according to their own criteria. He rejects the definition of indigenous peoples through the lens of other, non-indigenous, societies. Cobo further maintains that it is for indigenous peoples to define themselves as a group in terms of the differences that they see between themselves and other groups.[30]

Cobo’s working definition divides the criteria for identification of indigenous peoples into two categories: objective and subjective. Objective criteria concern indigenous peoples’ historical link with the pre-colonial population. Also, their cultural, social, and legal distinctiveness from the current majority population. And lastly, their will to maintain this status-quo for their descendants.[31]

[29] The then Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities.

[30] MARTÍNEZ COBO, José R. *Study of the Problem of Discrimination against Indigenous Populations*. ECOSOC, Sub-Commission on Prevention of Discrimination and Protection of Minorities, 30 September 1983, E/CN.4/Sub.2/1983/21/Add.8, paras 368-375.

[31] *ibid*, para 379.

With regard to the historical link, Cobo presents a non-exhaustive list of possible distinctive attributes, the continuous presence of which may be sufficient to conclude objective indigenousness. These are the occupation of ancestral lands, shared roots with the original populations on these lands, culture, language, and occupation of certain regions.[32]

As to the subjective criteria, Cobo argues that it is for each individual to self-identify as a member of an indigenous people and for members of the group to accept them.[33]

The Committee on the Elimination of Racial Discrimination (hereinafter CERD) views self-identification as a member of a certain group as the primary criterion. It addresses the topic of individuals' identification as a member of a specific racial or ethnic group in its General Recommendation No. 8. The CERD expresses the view that '*such identification shall, if no justification exists to the contrary, be based upon self-identification by the individual concerned*'.[34] Thornberry points out that this results in leaving the *onus probandī* with the one who challenges such a self-identification.[35]

Cobo's subjective and objective criteria are reflected in Article 1 of the 1989 International Labour Organisation's (hereinafter ILO) Convention 169.[36]

This provision, establishing the Convention's scope of application, distinguishes between tribal peoples and indigenous peoples. The key elements which define indigenous peoples according to this provision are:

1) their descent from inhabitants of the territory at the time of colonisation,
2) their having their own social, economic, cultural, and political institutions,
3) self-identification as indigenous.

Tribal peoples:

32 *ibid*, para 380.

33 *ibid*, para 381.

34 CERD. *General Recommendation VIII Concerning the Interpretation and Application of Article 1, Paragraphs 1 and 4 of the Convention, Identification with a Particular Racial or Ethnic Group*. 22 August 1990, A/45/18.

35 THORNBERRY, Patrick. *Indigenous peoples and human rights*. Manchester: Manchester University Press, 2002, p. 207.

36 HENRIKSEN, John B. *Research on Best Practices for the Implementation of the Principles of ILO Convention No. 169: Case Study 7, Key Principles in Implementing ILO Convention No. 169*. International Labour Organisation, Programme to Promote ILO Convention No. 169, 2008, p. 7.

1) have social, cultural and economic conditions which are distinct from the rest of the society in the country,

2) have particular customs, traditions, special laws or regulations,

3) self-identify as tribal. [37]

ILO Convention 169 thus defines indigenous peoples based on their historical link with the relevant territory and, cumulatively, their institutional autonomy. By contrast, it defines tribal peoples by their cultural dissimilarity. However, despite defining indigenous and tribal peoples separately, the Convention attributes both groups the same rights.[38]

The criteria of ILO Convention 169 were preceded by ILO Convention 107 adopted in 1957. This Convention, however, takes an assimilationist and paternalistic approach towards indigenous peoples.[39] This approach is also visible in the provision identifying its scope of application.

It regards indigenous peoples' social and economic conditions as being '*at a less advanced stage than the stage reached by the other sections of the national community*'.[40] Also, it labels their life as '*more in conformity with the social, economic and cultural institutions of that time [the time of conquest or colonisation] than with the institutions of the nation to which they belong*'.[41]

It further employs the term 'semi-tribal' to identify '*groups and persons who, although they are in the process of losing their tribal characteristics, are not yet integrated into the*

[37] ILO Convention 169, Article 1.

[38] ILO Convention 169; HENRIKSEN, John B. *Research on Best Practices for the Implementation of the Principles of ILO Convention No. 169: Case Study 7, Key Principles in Implementing ILO Convention No. 169*. International Labour Organisation, Programme to Promote ILO Convention No. 169, 2008, p. 7.

[39] ILO Convention 169, Preamble (para 5).

'*Considering that the developments which have taken place in international law since 1957 (...) have made it appropriate to adopt new international standards on the subject with a view to removing the assimilationist orientation of the earlier standards*.'

[40] ILO Convention 107, Article 1 (a).

[41] *idem*.

national community'.[42] It views the integration of indigenous peoples as the next stage of the development of their culture and as one of the main objectives of this Convention.[43]

Furthermore, ILO Convention 107 refers not to 'indigenous peoples', but to 'indigenous populations'. This proved to be one of the main points of controversy during the negotiations of its revision and reworking into ILO Convention 169.[44]

Some of the negotiating parties feared that inclusion of the term 'peoples' into ILO Convention 169 would open a path for indigenous groups to seek the right to self-determination, a right ascribed to 'all peoples' within the framework of international law.[45] They suspected that it could affect the territorial integrity of some States.[46] This issue is discussed in more depth in section 2.1.2.2 under indigenous peoples' right to self-determination.

An attempt to provide criteria for identifying indigenous peoples is contained in the World Bank Operational Manual OP 4.10. from 2005. It sets requirements for projects proposed by borrower states to the World Bank (hereinafter WB). Even though it is primarily intended for the WB staff,[47] it is relevant for the rights of indigenous peoples who may be affected by projects financed by the WB.[48]

In its section on identification of indigenous peoples, the directive states that for various reasons, it does not intend to define them. However, it does provide a list of characteristics for working purposes, all of which a group has to at least partly possess to be able to identify as indigenous. The listed characteristics are: social, cultural, institutional and linguistic

[42] ILO Convention 107, Article 1 (b).

[43] *ibid*, Preamble; ŽÁKOVSKÁ, Karolina. Práva domorodých národů jako nástroj ochrany životního prostředí [Rights of Indigenous Peoples as a tool for environmental protection]. ŠTURMA, Pavel a Karolina ŽÁKOVSKÁ, ed. *Od zákazu diskriminace k ochraně kolektivních práv*. 1. Prague: Univerzita Karlova, Právnická fakulta v nakl. Eva Rozkotová, 2014, p. 74.

[44] BARSH, Russel Lawrence. Revision of ILO Convention No. 107. *The American Journal of International Law*. 81. 1987, **81**(3), p. 760.

[45] International Covenant on Civil and Political Rights, 16 December 1966, 999 U.N.T.S., p. 171 (hereinafter ICCPR), Article 1; International Covenant on Economic, Social and Cultural Rights. 16 December 1966, 993 U.N.T.S., p. 3 (hereinafter ICESCR), Article 1.

[46] BARSH, Russel Lawrence. Revision of ILO Convention No. 107. *The American Journal of International Law*. 81. 1987, **81**(3), p. 760.

[47] World Bank. *Operational Manual OP 4.10 – Indigenous Peoples*, July 2005, revised April 2013, disclaimer under the title.

[48] World Bank. *Operational Manual OP 4.10 – Indigenous Peoples*, July 2005, revised April 2013, para 1.

distinctiveness, vulnerability, collective attachment to a (current or former) ancestral territory, and, most importantly, individual and group self-identification as indigenous.[49]

In contrast to the WB's previous manual from 1991, it does not include a requirement of subsistence-oriented production. Also, it does not consider national legislation of borrower states as a basis for identifying indigenous peoples.[50] Moreover, unlike the previous manual, it – although under fairly narrow conditions[51] – applies to indigenous peoples who have been deprived of their ancestral territories.[52]

In 2007, the United Nations General Assembly adopted UNDRIP.[53] During the drafting process, some African and Asian States insisted on the inclusion of a definition in the document. Some of these States, however, were motivated not by the protection of indigenous peoples' rights, but rather by the exclusion of their own indigenous peoples from the scope of the Declaration.[54]

There was a lack of consensus on the issue throughout the negotiations of the UNDRIP. Also, finding a definition which would include all indigenous peoples and only them turned out to be an exceptionally complex task. Eventually, an external, objective definition was not included.[55] After all, it is not the first time a similar declaration does not define its object.[56]

It, moreover, does not differentiate between indigenous and tribal peoples and addresses both these groups as indigenous. Article 33 of the Declaration, however, recognises

[49] World Bank. *The World Bank Operational Manual, Operational Directive OD 4.20*, September 1991, paras 3-4.

[50] World Bank. *The World Bank Operational Manual, Operational Directive OD 4.20*, September 1991, paras 3-5.

[51] MACKAY, Fergus. The Draft World Bank Operational Policy 4.10 on Indigenous Peoples: Progress or More of the Same. *Arizona Journal of International and Comparative Law*. 2005, **22**(1), p. 72-73.

[52] World Bank. *Operational Manual OP 4.10 – Indigenous Peoples*, July 2005, revised April 2013, para 4.

[53] UNDRIP, Article 33.

[54] HENRIKSEN, John B. The UN Declaration on the Rights of Indigenous Peoples: Some Key Issues and Events in the Process. CHARTERS, Claire and Rodolfo STAVENHAGEN, ed. *Making the Declaration Work: The United Nations Declaration on the Rights of Indigenous People*. Copenhagen: IWGIA, 2009, p. 79.

[55] CHÁVEZ, Luis Enrique. The Declaration on the Rights of Indigenous Peoples, Breaking the impasse. CHARTERS, Claire and STAVENHAGEN, Rodolfo, ed. *Making the Declaration Work: The United Nations Declaration on the Rights of Indigenous Peoples*. Copenhagen: IWGIA, 2009, p. 103.

[56] CHÁVEZ, Luis Enrique. The Declaration on the Rights of Indigenous Peoples, Breaking the impasse. CHARTERS, Claire and STAVENHAGEN, Rodolfo, ed. *Making the Declaration Work: The United Nations Declaration on the Rights of Indigenous Peoples*. Copenhagen: IWGIA, 2009, p. 103; Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, 3 February 1993, G.A. Res 47/135, A/RES/47/135.

indigenous peoples' right to self-identification in accordance with their own customs and traditions.

After a long-lasting struggle by indigenous peoples for their right to identify as indigenous based on their own subjective criteria,[57] here, finally, was an instrument of international importance which acknowledged this right.

1.2 Definition within the Inter-American System of Human Rights

Just as the UNDRIP, the ADRIP does not contain a definition of indigenous and tribal peoples. However, in its scope of application enshrined in Article 1, it stipulates that self-identification is a crucial factor in identifying indigenous peoples.

It further emphasises the importance of states' respect for indigenous peoples' use of their own customs and institutions as the basis for self-identification as indigenous.[58] Similarly to the UNDRIP, it does not differentiate between indigenous and tribal peoples and ascribes both groups the same rights.

In the case of *Saramaka v. Suriname,*[59] the IACtHR was faced with the question of whether a certain group can be defined as tribal and thus be entitled to rights ascribed to indigenous and tribal peoples under international law.[60]

Suriname claimed that the Saramaka people are not entitled to be considered a tribal community. It argued that some of the self-identified members of the Saramaka community do not live within the traditional territory and do not follow the community's customs. The State argued that this lack of the traditional way of life of some of Saramaka members deprives the whole group of its cultural distinctiveness.[61]

57 BARSH, Russel Lawrence. Indigenous Peoples: An Emerging Object of International Law. *The American Journal of International Law*. 1986, **80**(2), p. 375.

58 UNDRIP, Article 1 para 2.

59 Even though Suriname is not a Latin-American State, the case of *Saramaka v. Suriname* appears in various sections of this text. The author decided to include it due to the fundamental role which it occupies in the IACtHR's case-law on indigenous peoples' land rights.

60 The IACtHR also affirmed in the case of *Saramaka v.* Suriname, that its jurisprudence concerning indigenous peoples' property rights equally applies to tribal peoples. IACtHR. *Case of Saramaka People v. Suriname*. Judgement of November 28, 2007 (hereinafter *Saramaka*), para 86.

61 *Saramaka*, paras 162, 164.

At first, the Court concluded that the Saramaka people make up a tribal community, referring to their social, cultural and economic distinctiveness, and their special relationship with their ancestral territories.[62]

Further, it had to determine whether to consider as tribal certain individuals who self-identified as members of this group. Responding to the State's objection, the Court ruled that it lay solely with the peoples and their customs, and not with the state or the IACtHR, to determine who is a member of a tribal group.[63] Moreover, it concluded that the State could not use the fact that some individual members of the group do not follow the Saramaka traditions and customs as a pretext to deny the rights to the whole group.[64]

Similarly, in the case of *Xákmok Kásek,* it ruled that it was not for the Court or the State to determine a community's ethnic identity or membership, as the self-identification of a community forms a part of its autonomy and both the Court and the State are obliged to respect it.[65]

1.3 Issues with an international agreement on a universal definition

As can be seen from the foregoing sections, some of the objective criteria used to identify indigenous peoples feature throughout the various attempts to define indigenous peoples. Particularly present are the following: the relationship of indigenous peoples with their ancestral lands, which forms a significant part of their cultural identity;[66] their cultural distinctiveness inherited from their pre-colonial ancestors and their will to preserve it; and a certain degree of institutional autonomy. At the same time, a trend can be observed in the increasingly frequent employment of the subjective criteria – the right to both group and individual self-identification as indigenous.

62 *Saramaka*, paras 78-84.

63 *Saramaka*, para 164.

'Moreover, the question of whether certain self-identified members of the Saramaka people may assert certain communal rights on behalf of the juridical personality of such people is a question that must be resolved by the Saramaka people in accordance with their own traditional customs and norms, not by the State or this Court in this particular case.'

64 *idem.*

65 IACtHR. *Case of the Xákmok Kásek Indigenous Community v. Paraguay*. Judgement of August 24, 2010 (hereinafter *Xákmok Kásek)*, para 37.

66 GÖCKE, Katja. Protection and Realization of Indigenous Peoples' Land Rights at the National and International Level. *Goettingen Journal of International Law*. 2013, **5**(1), 87-154; GILBERT, Jérémie. *Indigenous Peoples' Land Rights under International Law: From Victims to Actors*. Netherlands: Brill | Nijhoff, 2007, xvii.

However, as previously mentioned, there is no universally accepted legal definition of indigenous peoples, and there are various reasons why states have not found consensus on this issue.

The first reason is anthropological and concerns the global diversity of indigenous peoples. The Sámi people in Northern Europe, or the Maasai people in Kenya and Tanzania, and the Maya Q'eqchi' people in Central America and Mexico are all indigenous peoples.[67] Yet it is extremely difficult to specify criteria which are sufficiently comprehensive to capture this diversity, but which, at the same time, are not overly inclusive.[68]

Secondly, consensus over a definition of indigenous peoples has been made difficult by opposition from indigenous peoples themselves arising from the position of certain states.[69] Russia[70] and India,[71] for example, are highly restrictive as to which groups do qualify as indigenous under the national criteria and also which rights these peoples are entitled to.[72] China denies the existence of indigenous peoples on its territory whatsoever and attributes them rights of ethnic minorities.[73] For countries which deny the indigenous status of peoples living on their territory, a firm and overly narrow definition could serve as a tool to exclude indigenous peoples on their territory from the protection provided by international law.[74] It is, therefore, difficult to come to an overall consensus on the international level.

1.4 Conclusions on a definition

On the one hand, it is crucial to define the holder of a specific right enshrined in various international instruments. On the other hand, a firm definition may exclude certain

67 ANAYA, James S. 'International Human Rights and Indigenous Peoples: The Move toward the Multicultural State.' *Arizona Journal of International and Comparative Law.* 2004, **21(**1), p. 13.

68 KINGSBURY, Benedict. 'Indigenous Peoples' in International Law: A Constructivist Approach to the Asian Controversy. *The American Journal of International Law*. 1998, **92**(3), pp. 414-415.

69 ERNI, Christian. *Tribes, States and Colonialism in Asia: The Evolution of the Concept of Indigenous Peoples and its Application in Asia*. IGWIA, 2014, 5.

70 BERGER, David Nathaniel, ed. *The Indigenous World 2019*. Copenhagen: The International Work Group for Indigenous Affairs (IWGIA), 2019, p. 44.

71 *ibid*, p. 347.

72 BARSH, Russel Lawrence. Indigenous Peoples: An Emerging Object of International Law. *The American Journal of International Law*. 1986, **80**(2), p. 375.

73 BERGER, David Nathaniel, ed. *The Indigenous World 2019*. Copenhagen: The International Work Group for Indigenous Affairs (IWGIA), 2019, p. 259.

74 ERNI, Christian. *Tribes, States and Colonialism in Asia: The Evolution of the Concept of Indigenous Peoples and its Application in Asia*. IGWIA, 2014, p. 5.

groups due to its being too narrow. It could also result in States' reluctance to adopt these international instruments, which could otherwise contribute to the improvement of the situation of indigenous peoples on their territory.

Indigenous peoples have been fighting for the right to self-definition for decades.[75] During the negotiations of the ILO 169 Convention, an indigenous representative from Canada appealed to the participants: '*This forum is one which is used for bargaining and negotiating to achieve a desired result. But how can you negotiate and bargain over who we are and what our rights are? (...) How can you bargain away something which does not belong to you?*'[76]

After all, the need for indigenous peoples to define themselves according to their own perception, rather than being subject to an external definition imposed upon them by those with a different cultural viewpoint was already pointed out in Cobo's study.[77] This was almost forty years ago.

The ILO 169 Convention's approach was the first step towards 'decolonising' the area of indigenous peoples' rights under international law. It was the firm instrument in this field of international law which took a pluralistic and multicultural approach.[78] The UNDRIP and ADRIP confirm this change of direction.

2. International instruments relevant for indigenous peoples' land rights

Chapter 2 offers an overview of those instruments of international law which in some way apply to indigenous peoples' land rights. Some of these instruments address the issue in

[75] STAVENHAGEN, Rodolfo. Las organizaciones indígenas: actores emergentes en América Latina. *Revista de la CEPAL*. Santiago de Chile: Naciones Unidas, 1997, **62**, p. 71.

[76] International Labour Conference. *Records of Proceedings, Seventy-Sixth Session, Provisional Record 25*. International Labour Organisation, Geneva, 1989, speech of Ms. Sayers, p. 31/9.

[77] MARTÍNEZ COBO, José R. Study of the Problem of Discrimination against Indigenous Populations. ECOSOC, Sub-Commission on Prevention of Discrimination and Protection of Minorities, 30 September 1983, E/CN.4/Sub.2/1983/21/Add., paras 368-369.

[78] YUPSANIS, Athanasios. The International Labour Organization and Its Contribution to the Protection of the Rights of Indigenous Peoples. *Canadian Yearbook of international Law/Annuaire canadien de droit international*. 2012, **49**, 134.

an explicit, direct way. Some of them cover it in their scope generally, without specifically mentioning indigenous peoples' land rights.

The chapter is divided into two subchapters. The first subchapter deals with instruments of global international law. The second one focuses on the region of Latin America and addresses instruments of the Inter-American System of Human Rights.[79]

The text of this chapter also analyses the adoption and content of those instruments which specifically address indigenous peoples' land rights. The aim is to provide an idea of the context of the development of this area of international law. The chapter points out some of the problematic issues within the negotiations of these instruments. It also compares each new instrument which offers specific protection to indigenous peoples' land rights to the second newest one. The aim of this comparative analysis is to demonstrate how the standards in this field of international law changed over time. Also, it seeks to answer, which problematic points have been resolved so far and which have not.

2.1 Global level

This subchapter presents instruments of international law relevant to indigenous peoples' land rights which apply globally. It is divided into two parts.

The first part analyses three main instruments of global international law which explicitly deal with indigenous peoples' rights to their lands. For ILO Convention 169 and the UNDRIP, it compares the protection of indigenous peoples' land rights enshrined in these instruments to the standards of protection of indigenous peoples' land rights which existed at the time of their adoption.

The second part deals with instruments of global international law which do not specifically address indigenous peoples' land rights. It explains why these instruments are also relevant in this field.

2.1.1 Instruments dealing specifically with indigenous peoples' rights

There are three crucial instruments of global international law which address indigenous peoples' land rights specifically. Those are two Conventions of the International Labour

[79] For an overview of the instruments of international law discussed in this chapter and their support within the region of Latin America, see Annexe II.

Organisation – Conventions 107 and 169, and the UNDRIP, a soft-law instrument of great importance.

2.1.1.1 C107 – Indigenous and Tribal Populations Convention

ILO Convention 107 was adopted in 1957.[80] It was the first and for a long time the only, legally binding international instrument dealing directly with the rights of indigenous peoples.[81] Before the adoption of its successor, ILO Convention 169, ILO Convention 107 had been ratified by 27 countries. Ratification of ILO Convention 169 automatically means denunciation of ILO Convention 107. For those countries which are parties to ILO Convention 107 and have not ratified ILO Convention 169, the former remains in force. It is, however, closed for new ratifications.[82] To date, ILO Convention 107 remains in force for 17 countries.[83]

In comparison, to date, ILO Convention 169 has been ratified by twenty-three countries, fourteen of which are in the region of Latin America. From Latin-American countries, ILO Convention 169 has not been ratified by Cuba, the Dominican Republic, El Salvador, Haiti, Panama, and Uruguay. All of these countries except Uruguay are party to ILO Convention 107.[84]

2.1.1.1.1 Content of ILO Convention 107

The document is divided into eight parts and consists of provisions on general policy (Articles 1-10), land (Articles 11-14), recruitment and conditions of employment (Article 15), vocational training, handicrafts and rural industries (Articles 16-18), social security and health

[80] It was adopted along with a soft-law instrument which had the same assimilationist approach, the International Labour Organisation, *R104 – Indigenous and Tribal Populations Recommendation*. 26 June 1957, R104.

[81] HITCHCOCK, Robert K. International Human Rights, the Environment, and Indigenous Peoples. In: *Colorado Journal of International Environmental Law and Policy*. 5. 1994, 1, p. 6.

[82] ILO Convention 107, Article 36.

[83] See Annexe II; Ratifications of C107 - Indigenous and Tribal Populations Convention, 1957 (No. 107) [online]. *International Labour Organisation.* (accessed on 10 March 2020) Available at: https://www.ilo.org/dyn/normlex/en/f?p=1000:11300:0::NO:11300:P11300_INSTRUMENT_ID:312252.

[84] See Annexe II; Ratifications of C169 - Indigenous and Tribal Peoples Convention, 1989 (No. 169) [online]. International Labour Organisation. (accessed on 10 March 2020) Available at: www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11300:0::NO:11300:P11300_INSTRUMENT_ID:312314:NO;

Ratifications of C107 - Indigenous and Tribal Populations Convention, 1957 (No. 107) [online]. *International Labour Organisation.* (accessed on 10 March 2020) Available at: https://www.ilo.org/dyn/normlex/en/f?p=1000:11300:0::NO:11300:P11300_INSTRUMENT_ID:312252.

(Articles 19 and 20), education and means of communication (Articles 21-27) and general provisions (Articles 28-37) concluding the Convention.

Part I. of the convention contains general policy provisions, which address the protection and integration of indigenous peoples into the national communities of the respective member states.[85] The Convention stipulates, that the aim is to enable indigenous peoples '*to benefit on an equal footing from the rights and opportunities which national laws or regulations grant to the other elements of the population*'[86] and '*raising their standard of living*'.[87] Even though it employs specific measures to prevent discrimination and ensure respect for indigenous customs,[88] it adopts a manifestly assimilationist stance.

These objectives of protection and integration permeate most parts of the convention,[89] namely the provisions on indigenous land rights,[90] education[91] and employment.[92] While in line with international consensus on indigenous peoples' rights at the time of adoption[93], this integrationist approach led it to later become subject to extensive criticism from indigenous peoples, legal scholars and governments.[94]

The Convention dedicates four articles to the issue of indigenous land rights. In its Article 11, it obliges member states to recognise '*the right of ownership, collective or individual, of the members of the populations concerned over the lands which these populations traditionally occupy*'. It does not address the special relationship which indigenous peoples have with their lands and does not touch the topic of natural resources whatsoever.

85 ILO Convention 107, Preamble, Articles 2, 3, 4, 5 and 6.

86 ILO Convention 107, Article 2 (a).

87 ILO Convention 107, Article 2 (b).

88 ILO Convention 107, Articles 3, 7, 8, 9.

89 RODRÍGUEZ-PIÑERO ROYO, Luis. La OIT y los pueblos indígenas en el derecho internacional.: Del colonialismo al multiculturalismo. Revista Trace. 2004, **46**, p. 68.

90 ILO Convention 107, 1957, Article 14 (b).

91 ILO Convention 107, Articles 17 and 24.

92 ILO Convention 107, Article 15.

93 RODRÍGUEZ-PIÑERO ROYO, Luis. La OIT y los pueblos indígenas en el derecho internacional.: Del colonialismo al multiculturalismo. Revista Trace. 2004, **46**, p. 68.

94 International Labour Conference. *Records of Proceedings, Seventy-Sixth Session, Provisional Record 31.* International Labour Organisation, Geneva, 26 June 1989, p. 31/9-10, 31/13, 31/16; GILBERT, Jérémie. *Indigenous Peoples' Land Rights under International Law: From Victims to Actors*. Netherlands: Brill | Nijhoff, 2007, p. 182.

Article 12 addresses the removal of indigenous peoples from their lands. This provision of the Convention was a source of broad discontent among indigenous peoples.[95] It prohibits the removal of indigenous peoples without their free consent.

However, it does allow for the removal of indigenous peoples from their lands, considered it is provided for by law, and fulfils one of the given objectives. Indigenous peoples' can be removed from their lands for the purposes of national security, national economic development or the protection of their own health. In such a case, no consultation or consent is required.[96] It stipulates that the displaced community must be compensated. Still, it does not make any mention of obligation to return the respective land whenever the grounds cease to exist.[97]

It further contains a provision on the transmission of rights and States' obligation to respect relevant indigenous customs in this regard, as long as they do not contradict the national legal framework.[98] Lastly, it prohibits discrimination of indigenous peoples concerning domestic agrarian reforms.[99]

Throughout the development of international law over the three decades following its adoption and with the formation of indigenous peoples' movements from the sixties onwards,[100] the Convention slowly started to lose support. In 1989, it was eventually revised and reworked into ILO 169 Convention.[101]

95 BARSH, Russel Lawrence. Indigenous Peoples. BODANSKY, Daniel, Jutta BRUNNÉE and Ellen HEY, ed. *The Oxford Handbook of International Environmental Law*. OUP, 2008, p. 845.

96 International Labour Office, 75th Session. *Report IV (1): Partial revision of the Indigenous and Tribal Populations Convention 1957 (No. 107)*. Geneva, 1988, p. 62.

97 ILO Convention 107, Article 12 (1).

98 ILO Convention 107, Article 13.

99 ILO Convention 107, 1957, Article 14.

100 STAVENHAGEN, Rodolfo. Las organizaciones indígenas: actores emergentes en América Latina. *Revista de la CEPAL*. Santiago de Chile: Naciones Unidas, 1997, **62**, p. 63; ANAYA, S. James a Robert A. WILLIAMS JR. The Protection of Indigenous Peoples' Rights over Lands and Natural Resources under the Inter-American Human Rights System. *Harvard Human Rights Journal*. 2001, **14**(33), p. 34.

101 ŽÁKOVSKÁ, Karolina. Práva domorodých národů jako nástroj ochrany životního prostředí [Rights of Indigenous Peoples as a tool for environmental protection]. ŠTURMA, Pavel a Karolina ŽÁKOVSKÁ, ed. *Od zákazu diskriminace k ochraně kolektivních práv*. 1. Prague: Univerzita Karlova, Právnická fakulta v nakl. Eva Rozkotová, 2014, p. 74.

2.1.1.2 C169 – Indigenous and Tribal Peoples Convention

The International Labour Organisation's Convention No. 169, Indigenous and Tribal Peoples Convention, was adopted at the ILO in 1989. Its adoption was preceded by negotiations carried out between 1988 and 1989 within the Committee on Convention No. 107. The Committee was composed – as is typical for the ILO – in a tripartite way, of representatives of governments, employers, and workers.[102]

This new Convention distances itself from the assimilationist approach and paternalistic form of its 1957 predecessor. It aims to embrace respect for indigenous peoples' cultural distinctiveness.[103] It can be seen, *e.g.* in the preponderance of collective rights.[104] Among its further objectives is the acknowledgement of the right of indigenous peoples to set their own priorities for their development,[105] and recognition of indigenous peoples' own institutions as subjects of interaction with national societies.[106]

The Convention is currently the most relevant binding instrument of international law explicitly addressing indigenous peoples' rights. Even though only 23 countries have ratified it (mostly Latin-American ones), it is frequently referred to by international human rights bodies,[107] including the Inter-American Court of Human Rights,[108] even in cases related to states which are not member states to the Convention.[109]

[102] International Labour Conference. *Records of Proceedings, Seventy-Sixth Session, Provisional Record 25.* International Labour Organisation, Geneva, 1989, p. 25/1, para 1; *Constitution of the International Labour Organisation*. International Labour Organisation. 1 April 1919, Article 7(1).

[103] ULFSTEIN, Geir. Indigenous Peoples' Right to Land. *Max Planck Yearbook of United Nations Law Online*. 2004, **8**(1), p. 11.

[104] GÖCKE, Katja. *Indigene Landrechte im internationalen Vergleich*. Berlin/Heidelberg: Springer-Verlag, 2016, p. 554.

[105] BARSH, Russel Lawrence. Revision of ILO Convention No. 107. *The American Journal of International Law*. 81. 1987, **81**(3), p. 756.

[106] International Labour Office, 75th Session. *Report IV (1): Partial revision of the Indigenous and Tribal Populations Convention 1957 (No. 107)*. Geneva, 1988, p. 27.

[107] IACmHR. *Las mujeres indígenas y sus derechos humanos en las Américas*. 17 April 2017, OEA/SER.L/V/II., para 64; HR Council. *Report of the Special Rapporteur on the rights of indigenous peoples on her visit to Guatemala,* 10 August 2018, A/HRC/39/17/Add.3, paras 57, 70 and 103.

[108] IACtHR. *Case of the Xucuru Indigenous Peoples and its members v. Brazil.* Judgement of February 5, 2017 (hereinafter *Xucuru*), para 116.

[109] *Saramaka*, para 130.

2.1.1.2.1 Negotiations of ILO Convention 169

The negotiations of this Convention were faced with two main areas of dispute. The first one was the controversy over the use of the word 'peoples' instead of 'populations'.[110] The second one was about land rights.

The inclusion of the term 'peoples' in ILO Convention 169 instead of 'populations' (as is the case in ILO Convention 107), led to significant difficulties throughout the negotiations on the adoption of this instrument.[111] The term 'peoples' included in ILO Convention 169, has two meanings with regard to indigenous peoples. A symbolic one of proclaiming indigenous peoples 'peoples' in the meaning of the word 'nations' as does, *e.g*. the aforementioned Cobo's study.[112]

The second meaning of the word – a political one – brings along implications under international law, within the meaning of the right to self-determination,[113] ascribed to all peoples in the aforementioned Covenants. There was strong opposition to the inclusion of the word 'peoples' in the instrument. It was so due to its political implications in terms of the right to self-determination.[114] Eventually, the term 'peoples' was used instead of 'populations'. It was, however, restricted in its meaning under international law:

'*The use of the term* ***peoples*** *in this Convention shall not be construed as having any implications as regards the rights which may attach to the term under international law.*'[115]

This restriction turned it into a rather symbolical proclamation.

Employment of the term 'self-determination' in ILO Convention 169, which had not been used in ILO Convention 107, met with strong resistance for similar reasons as the term

110 BARSH, Russel Lawrence. Revision of ILO Convention No. 107. *The American Journal of International Law*. 81. 1987, **81**(3), p. 760.

111 BARSH, Russel Lawrence. Revision of ILO Convention No. 107. *The American Journal of International Law*. 81. 1987, **81**(3), p. 760.

112 MARTÍNEZ COBO, José R. *Study of the Problem of Discrimination against Indigenous Populations*. ECOSOC, Sub-Commission on Prevention of Discrimination and Protection of Minorities, 30 September 1983, E/CN.4/Sub.2/1983/21/Add., para 379.

113 BELLIER, Irène. The Declaration of the Rights of Indigenous Peoples and the World Indigenous Movement. In: *Griffith Law Review*. 2014, **14**(2), p. 229.

114 BARSH, Russel Lawrence. Revision of ILO Convention No. 107. *The American Journal of International Law*. 81. 1987, **81**(3), p. 760; Such as for example secession and the establishment of sovereign independent states. See, *Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations*. 24 October 1970, UNGA Res 2625 (XXV), A/RES/2625 (XXV), The principle of equal rights and self-determination of peoples.

115 ILO Convention 169, Article 1 para 3.

'peoples'. Some States viewed the right to self-determination ascribed to the indigenous peoples as a grave threat to their territorial integrity.[116] Opponents of inclusion of the term 'self-determination' argued, that it would prevent many states from ratifying the new Convention.[117]

On the other hand, the inclusion of the right to self-determination was one of the essential requirements of indigenous peoples. Its advocates thus stressed the need for the use of the term out of respect for indigenous peoples.[118] After all, different wording was used to avoid the employment of the term.[119]

The second point of dispute was the part of the Convention related to indigenous peoples' land rights. It was due to the crucial role which lands and territories play for both indigenous peoples and states. For indigenous peoples, because of their deep spiritual connection with their lands and territories. Also, because of their essential meaning for their existence.[120] For States, because of the fundamentality of territory for their sovereignty.[121]

The part on land rights, in fact, involved more than one problematic issue. It was the use of the term 'lands and territories'. Further, the recognition of indigenous land rights and what these would comprise. Also, the question of natural resources. And finally, the issue of removal of indigenous peoples from their lands.[122]

Regarding the use of the term 'lands and territories', its employment was demanded by indigenous peoples. They maintained that only the word 'territories' corresponded with the particular meaning which specific parts of the Earth have for them.[123]

116 International Labour Office, *75th Session. Report IV (1): Partial revision of the Indigenous and Tribal Populations Convention 1957 (No. 107)*. Geneva, 1988, p. 108.

117 BARSH, Russel Lawrence. Revision of ILO Convention No. 107. *The American Journal of International Law*. 81. 1987, **81**(3), p. 760.

118 *idem*.

119 *ibid*, p. 759-760.

120 International Labour Office, *75th Session. Report IV (1): Partial revision of the Indigenous and Tribal Populations Convention 1957 (No. 107)*. Geneva, 1988, p. 44.

121 ULFSTEIN, Geir. Indigenous Peoples' Right to Land. *Max Planck Yearbook of United Nations Law Online*. 2004, **8**(1), p. 16.

122 International Labour Conference. *Records of Proceedings, Seventy-Sixth Session, Provisional Record 25.* International Labour Organisation, Geneva, 1989, para 112.

123 *ibid*, para 113.

Another reason which the indigenous peoples' representatives presented was that they claimed rights not only to lands but also to the whole environment affiliated with the lands. The term 'lands', therefore, was not sufficient. They argued that territory, by contrast, covers everything pertaining to lands – subsoil, airspace, waters, all the resources part of the land, all the occupants, and the fauna and flora.[124]

Some States, however, feared implications which the use of the term 'territories' could have under international law. They viewed it as a potential threat to their sovereignty.[125] They stressed that the inclusion of the unqualified use of the word 'territories' in the Convention could discourage various States from its ratification.[126]

Finally, a compromise was reached. Article 13 paragraph 1 recognises the spiritual relationship which indigenous peoples have with their 'lands or territories' while Article 13 paragraph 2 specifies this term. It explains, that for the purposes of Articles 15 and 16 (addressing the management of natural resources and removal of indigenous peoples from their lands), the term 'lands' '*shall include the concept of territories, which covers the total environments of the areas which the peoples concerned occupy or otherwise use'*.[127]

At the same time, this interpretative provision does not apply to Article 14, which covers the recognition of the rights of ownership and possession of indigenous lands. The rights of ownership and possession thus rest upon lands rather than resources.

In specific, Article 14 obliges States to recognise '*the rights of ownership and possession of the peoples concerned over the lands which they traditionally occupy*'.[128] The government representatives suggested the inclusion of the term 'use' along with the terms of 'ownership' and 'possession'. This proposal, however, met with strong opposition from indigenous peoples. They claimed that it would result in even weaker protection than that provided in ILO Convention 107.[129] Eventually, the word 'use' was omitted.

124 International Labour Office, *75th Session. Report IV (1): Partial revision of the Indigenous and Tribal Populations Convention 1957 (No. 107)*. Geneva, 1988, p. 110.

125 ULFSTEIN, Geir. Indigenous Peoples' Right to Land. *Max Planck Yearbook of United Nations Law Online*. 2004, **8**(1), p. 17.

126 International Labour Conference. *Records of Proceedings, Seventy-Sixth Session, Provisional Record 25.* International Labour Organisation, Geneva, 1989, para 112.

127 ILO Convention 169, Article 13 (2).

128 ILO Convention 169, Article 14.

129 International Labour Conference. *Records of Proceedings, Seventy-Sixth Session, Provisional Record 25.* International Labour Organisation, Geneva, 1989, para 116.

For the identification of the object of these rights, representatives of indigenous peoples further suggested wording '*lands which they traditionally occupied or otherwise used*'. Use of past tense in this provision, however, proved to be unacceptable for the governments as they were concerned about possible retroactive recognition of indigenous claims.[130]

The discussion also revolved around the extent of the power of indigenous peoples to control their lands and the States' possibility to explore and exploit natural resources pertinent to these lands.

On the one hand, indigenous representatives pointed out the indispensability of natural resources for indigenous customs. They asserted the indivisibility of the land and the resources attached to it. Moreover, they stressed the current practice of States which carry out or consent to exploitation of the resources on indigenous lands regardless of how it may affect indigenous peoples' lives or even existence.[131]

On the other hand, governments' representatives pointed out the diverse legal regimes of States regarding the rights to both surface and subsurface natural resources. Within some of the domestic legal frameworks, States retain some or all of these rights. They claimed that this could prove incompatible with a convention which would grant ownership rights or provide extensive protection to indigenous peoples' rights to these resources.[132] Considering the indispensability of natural resources for the survival of indigenous peoples and the central importance of natural resources for States, it is not surprising that this issue presented one of the biggest challenges of the negotiations.

The negotiating parties attempted to find a middle ground between these opposed positions. They included a general provision obliging States to safeguard indigenous peoples' rights to natural resources. A more specific provision follows, stating what these rights comprise, *i.e.* the participation in the use, management and conservation of these resources.[133] It does not attempt to specify what legal regime there should be for indigenous peoples' rights to natural resources due to the aforementioned differing approaches of states towards natural

130 *ibid*, para 117.

131 SWEPSTON, Lee. A New Step in the International Law on Indigenous and Tribal Peoples: ILO Convention No. 169 of 1989. *Oklahoma City University Law Review*. 1990, **15**(3), p. 703-4.

132 International Labour Conference. *Records of Proceedings, Seventy-Sixth Session, Provisional Record 25.* International Labour Organisation, Geneva, 1989, paras 127, 135 and 146.

133 ILO Convention 169, Article 15 (1).

resources. It does, however, address the case where states retain ownership of (some of) these resources and it foresees certain procedural guarantees for indigenous peoples.[134]

Another issue was the question of free and informed consent of indigenous peoples for their removal from their lands. Some negotiating parties required this consent to be an absolute condition for such removal to be permissible. In the end, this was not acceptable for some government representatives, and implementation of measures and procedures ensuring indigenous peoples' participation in the decision-making process was seen as a more viable option.[135]

2.1.1.2.2 The final text of ILO Convention 169

The structure of the final text is almost analogous to that of ILO Convention 107. It consists of ten parts, the first six of which address the same issues as the first six parts of ILO Convention 107. The parts of ILO Convention 169 are I. General Policy (Articles 1-12), II. Land (Articles 13-19), III. Recruitment and Conditions of Employment (Article 20), IV. Vocational Training, Handicrafts and Rural Industries (Articles 21-23), V. Social Security and Health (Articles 24 and 25), VI. Education and Means of Communication (Articles 26-31), VII. Contacts and Cooperation across Borders (Article 32), VIII. Administration (Article 33), IX. General Provisions (Articles 34 and 35) and X. Final Provisions (Articles 36-44).

In its General Policy provisions, it newly enshrines the obligation of States to consult indigenous peoples in case legislative or administrative measures which are to be taken may directly affect them. This consultation needs to be performed in good faith and with the aim of achieving consent. Moreover, it foresees indigenous peoples' participation in decision-making over issues relevant to them.[136]

In contrast with ILO Convention 107, it anchors indigenous peoples' right to set their own priorities for development, including for their lands.[137] It also cedes indigenous peoples

134 SWEPSTON, Lee. A New Step in the International Law on Indigenous and Tribal Peoples: ILO Convention No. 169 of 1989. *Oklahoma City University Law Review*. 1990, **15**(3), pp. 704-5; ILO Convention 169, Article 15.

135 International Labour Office, *75th Session. Report IV (1): Partial revision of the Indigenous and Tribal Populations Convention 1957 (No. 107)*. Geneva, 1988, p. 112; SWEPSTON, Lee. A New Step in the International Law on Indigenous and Tribal Peoples: ILO Convention No. 169 of 1989. *Oklahoma City University Law Review*. 1990, **15**(3), p. 707.

136 ILO Convention 169, Article 6.

137 ILO Convention 169, Article 7.

somewhat more autonomy concerning their customs. Under ILO Convention 107, states were bound to respect indigenous customs as long as they complied with national laws. ILO Convention 169 lifts this threshold to '*fundamental rights defined by the national legal system*' and '*internationally recognised human rights*'.[138] Moreover, it stresses various times the right of indigenous peoples to keep their own institutions, giving them a mandate for autonomy over certain matters, including land use.[139]

This Convention deals with indigenous peoples' land rights in seven of its provisions. Unlike ILO Convention 107, it obliges states to respect the particular relationship of indigenous peoples with their lands, especially its collective aspect.[140] It obliges States to recognise indigenous peoples' right of ownership over their lands. Moreover, it newly speaks of possession – a right often much more relevant for indigenous legal regimes than ownership.[141] Neither had been included in the preceding Convention.

Furthermore, it newly obliges states to adopt measures in order to identify lands over which indigenous peoples enjoy ownership rights, to *effectively* protect these rights, and to enact procedures which will allow for resolution of disputes over land.[142]

As opposed to its predecessor, it contains provisions on natural resources, namely the right of indigenous peoples to participate in their use, management and conservation.[143] States must also consult the relevant indigenous people concerning the potential impact of exploration or exploitation of these resources. It applies to both activities carried out by the State or third persons. Further, it sets out the right of indigenous peoples to benefit from these undertakings and to be compensated for any loss.[144]

The part of ILO Convention 107 on the removal of indigenous peoples from their lands also underwent certain modifications. Just as ILO Convention 107, ILO Convention 169 sets out the requirement for free and informed consent in case of the removal of indigenous

138 ILO Convention 169*,* Article 8.

139 ILO Convention 169, Articles 4 (1), 5 (b), 6 (1)(a), (b), 7 (1); BARSH, Russel Lawrence. Indigenous Peoples. BODANSKY, Daniel, Jutta BRUNNÉE and Ellen HEY, ed. *The Oxford Handbook of International Environmental Law*. OUP, 2008, p. 845.

140 ILO Convention 169, Article 13 (1).

141 SWEPSTON, Lee. A New Step in the International Law on Indigenous and Tribal Peoples: ILO Convention No. 169 of 1989. *Oklahoma City University Law Review*. 1990, **15**(3), p. 700.

142 ILO Convention 169*,* Article 14 (2) and (3).

143 ILO Convention 169*,* Article 15 (1).

144 ILO Convention 169*,* Article 15 (2).

peoples from their lands. Also, similarly as its predecessor, it subsequently waters down this provision by allowing for their removal under the condition that suitable procedures established by law are in place and the people receive either substitute land or monetary compensation.[145]

Just as ILO Convention 107, it states that relocation can only be carried out as an exceptional measure. Newly, it also sets out that once the grounds for indigenous peoples' displacement are no longer present, they have the right to return to their ancestral territory.[146] Moreover, it employs the term 'relocation' rather than 'removal' which had been included in ILO Convention 107. The term implies that such a removal is always linked to certain substitution.[147]

It also obliges states to protect indigenous peoples' lands from the intrusion of third persons.[148] Like the previous Convention, it incorporates provisions on the transfer of land rights between indigenous peoples according to their own customs.

This time, however, it leaves out the restriction that such transfers must comply with the national law. The last provision related to land – a provision on national agrarian programmes – retained the very same wording as was used in ILO Convention 107.

2.1.1.2.3 Conclusions on ILO Convention 169

Upon drafting of ILO Convention 169, the ILO was faced with the extremely challenging task of striking the right balance between what should be done for the protection of a vulnerable group and how much States will be willing to compromise. On the one hand, a convention which does not offer decent protection to the group it aims to protect is utterly futile.

On the other hand, what is the use of a convention which most States will be unwilling to ratify? As opposed to a soft law instrument, it is, moreover, significantly harder to negotiate a binding convention which brings along specific commitments of States.

[145] ILO Convention 169, Article 16 (1), (2), (4).

[146] ILO Convention 169*,* Article 16.

[147] SWEPSTON, Lee. A New Step in the International Law on Indigenous and Tribal Peoples: ILO Convention No. 169 of 1989. *Oklahoma City University Law Review*. 1990, **15**(3), p. 706.

[148] ILO Convention 169*,* Article 18.

It is true that by far not all requirements of indigenous peoples were satisfied by the final text of the instrument.[149] The negotiating parties did not produce a bullet-proof tool for the protection of indigenous peoples' rights, which are crucial for their survival, yet so widely encroached upon.

Before the final vote on the Convention, some indigenous representatives even urged the delegates to vote against its adoption. They disapproved of the Convention mainly due to the restriction on the word 'peoples'[150] and the rejection of absolute conditioning of the removal of indigenous peoples from their lands upon their free and informed consent.[151]

Also, criticism was expressed about the lack of indigenous peoples' voice within the process of drafting of the Convention. After all, it was their rights what was being bargained.[152]

It should be mentioned about indigenous peoples' participation within the process of drafting of the Convention, that it was the first time when the ILO asked the governments to consult indigenous representative agencies in their countries.[153] Also, NGOs representing indigenous peoples influenced the amendments of the draft convention throughout the discussions of the text (mainly through workers' members).[154]

Overall, the negotiations turned out to be a platform, where NGOs had a more substantial possibility for presenting their views than had ever happened before during the drafting of an instrument of international law.[155]

NGOs may have been heard out more than ever before in a setting of this kind. However, indigenous peoples once were subjects of international law and closed treaties with

149 SWEPSTON, Lee. A New Step in the International Law on Indigenous and Tribal Peoples: ILO Convention No. 169 of 1989. *Oklahoma City University Law Review*. 1990, **15**(3), p. 697.

150 ILO Convention 169, Article 1 para 3.

151 International Labour Conference. *Records of Proceedings, Seventy-Sixth Session, Provisional Record 31. International Labour Organisation*, Geneva, 26 June 1989, p. 31/7-8, speeches of Ms. Venne and Mr. Ontiveros Yulquila.

152 International Labour Conference. *Records of Proceedings, Seventy-Sixth Session, Provisional Record 31. International Labour Organisation*, Geneva, 26 June 1989, p. 31/6, speeches of Mr. Crate and Ms. Venne.

153 SWEPSTON, Lee. A New Step in the International Law on Indigenous and Tribal Peoples: ILO Convention No. 169 of 1989. *Oklahoma City University Law Review*. 1990, **15**(3), p. 685.

154 *ibid*, 686.

155 *idem.*

European powers from the position of sovereigns.[156] The question thus remains whether it is enough to give indigenous peoples the same space for participation as to any other minority.

Some of the representatives expressed their strong discontent in their speeches at the ILO.[157] The complex and interesting issue of the status of indigenous peoples under international law does, however, not no fall within the scope of this paper.

Even though the changes with respect to ILO Convention 107 may seem minor, they do constitute remarkable progress in international law's protection of indigenous peoples' land rights.

The assimilationist spirit was abandoned, indigenous peoples' special relationship with their lands was acknowledged, and the need for protection of their collective land rights, including possession, was stressed. It was embedded in the Convention that indigenous peoples' lands include all environment and resources linked to them. The obligation of safeguarding indigenous peoples' rights to natural resources was newly added. Procedural guarantees for situations in which indigenous peoples may be affected were set out. Also, it was clarified that the relocation of indigenous peoples from their lands should only take place under exceptional circumstances. Moreover, the right to return once the reasons for the relocation are no longer present was also newly included.

To date, the Convention has been ratified by 14 out of 20 Latin American countries. It serves as a considerably strong base for the protection of indigenous land rights in the region. The IACtHR has repeatedly referred to it in its jurisprudence,[158] and the Inter-American

156 GILBERT, Jérémie. *Indigenous Peoples' Land Rights under International Law: From Victims to Actors*. Netherlands: Brill | Nijhoff, 2007, p. 42; ALFONOSO MARTÍNEZ, Miguel, UN Special Rapporteur on Treaties, Agreements and Other Constructive Arrangements between States and Indigenous Populations. *Study on treaties, agreements and other constructive arrangements between States and indigenous populations: final report.* ECOSOC, 1999, paras 110-127 and 181-189.

According to Martínez, one of the ways in which colonising nations acquired power over originally indigenous territories was closing treaties with indigenous peoples. Even though the international-law nature of these treaties and the international-law subjectivity of indigenous peoples is now often contested by states, Martínez presents various arguments which support the position (maintained by indigenous peoples until today) that these treaties were treaties of public international law between two subjects of international law in the epoch of colonisation – European sovereigns and indigenous nations. Martínez argues, that in order to secure the 'newly discovered' lands from other European states who could intend to claim rights to them, the colonising power had to close an international treaty with the original sovereign on the 'discovered' territory.

157 International Labour Conference. *Records of Proceedings, Seventy-Sixth Session, Provisional Record 31. International Labour Organisation*, Geneva, 26 June 1989, p. 31/7-8, speeches of Ms. Venne and Mr. Ontiveros Yulquila.

158 IACtHR. *Case of the Yakye Axa Indigenous Community v. Paraguay*. Judgement of June 17, 2005 (hereinafter *Yakye Axa*), paras 127-131; *Case of the Sawhoyamaxa Indigenous Community v. Paraguay.* Judgement of March 29, 2006 (hereinafter *Sawhoyamaxa*), paras 117-119.

Commission of Human Rights (hereinafter IACmHR or Commission) has used it as an interpretation tool for the American Declaration on the Rights and Duties of Man.[159] Both bodies relied on it even in cases related to states which are not its state parties.[160]

The Convention also managed to gain support from many States, including those which had opposed many of the controversial provisions during the negotiations, such as Brazil or Venezuela.[161]

Furthermore, both indigenous peoples and States relied on its provisions in their argumentation during the negotiations of the UNDRIP.[162] Some of its provisions fell short of indigenous peoples' expectations – understandably stemming from the hope that past injustices would finally be remedied. It, nevertheless, seems that at least in the region of Latin America, its moderate progressiveness has shown to be the right strategy for achieving wide acceptance by States.

The ILO, with the help of indigenous peoples, produced a landmark document which opened doors to further negotiations, instruments of international law[163] (albeit of soft-law nature) and judicial decisions,[164] which ascribe indigenous peoples significantly stronger rights than the Convention itself.

Thus, it served as a necessary intermediate step between the integrationist approach of ILO 107 Convention and the self-determination focus of the UNDRIP. Moreover, various

159 In the *Case of Maya Indigenous Communities of the Toledo District (Belize)*. Report No. 40/04 of 12 October 2004, the IACmHR held (in the footnote No. 123):

'*While the Commission acknowledges that Belize is not a state party to ILO Convention (No 169), it considers that the terms of that treaty provide evidence of contemporary international opinion concerning matters relating to indigenous peoples, and therefore that certain provisions are properly considered in interpreting and applying the articles of the American Declaration in the context of indigenous communities.*'

160 *ibid; Saramaka*, paras 130, 137.

161 International Labour Conference. *Records of Proceedings, Seventy-Sixth Session, Provisional Record 31.* International Labour Organisation, Geneva, 26 June 1988, para 37.

162 CHARTERS, Claire. The Road to the Adoption of the Declaration on the Rights of Indigenous Peoples. *New Zealand Yearbook of International Law*. 2007, **4**(7), 122.

163 UNDRIP; ADRIP.

164 *Saramaka*, paras 133-137; Constitutional Court of Colombia. *Judgement No T-601 of 2011*, footnote 61.

scholars have argued that (not solely in the region of Latin America) its provisions on indigenous peoples' land rights have crystallised into customary international law.[165]

2.1.1.3 United Nations Declaration on the Rights of Indigenous Peoples

The UNDRIP is the most progressive soft-law instrument which enshrines indigenous peoples' rights to their lands. The present section describes the way to its adoption and analyses its content in comparison with the ILO Convention 169.

2.1.1.3.1 Adoption of the UNDRIP

It took more than twenty years of work and negotiations of States delegates, experts, representatives of indigenous peoples, and non-governmental organisations from the beginning of the drafting of the UNDRIP in the UN Working Group on Indigenous Populations (hereinafter WGIP) to its adoption by the UN General Assembly in September 2007.[166] The WGIP was established in 1982 by the Economic and Social Council (hereinafter ECOSOC) under the UN Commission on Human Rights' Sub-Commission on Prevention of Discrimination and Protection of Minorities (hereinafter Sub-Commission), which later turned into the Sub-Commission on the Promotion and Protection of Human Rights.[167]

The WGIP is the first international body solely concerned with the topic of indigenous peoples, and it played a significant role in the emergence of the world's indigenous movement.[168] In 1985, it was invited by the Sub-Commission to produce a Draft Declaration on the Rights of Indigenous Peoples (hereinafter Draft Declaration). The Fund for Indigenous

[165] BARSH, Russel Lawrence. Indigenous Peoples. BODANSKY, Daniel, Jutta BRUNNÉE and Ellen HEY, ed. *The Oxford Handbook of International Environmental Law*. OUP, 2008, p. 847; ANAYA, S. James. International Human Rights and Indigenous Peoples: The Move toward the Multicultural State. *Arizona Journal of International and Comparative Law*. 2004, **21**(1), p. 15; GOCKE, Katja. Protection and Realization of Indigenous Peoples' Land Rights at the National and International Level. Goettingen Journal of International Law. 2013, **5**(1), p. 125; ANAYA, James S. a Robert A. WILLIAMS JR. The Protection of Indigenous Peoples' Rights over Lands and Natural Resources under the Inter-American Human Rights System. Harvard Human Rights Journal. 2001, **14**, p. 53 et seq.

[166] EIDE, Asbjørn. The Indigenous Peoples, the Working Group on Indigenous Populations and the Adoption of the UN Declaration on the Rights of Indigenous Peoples. CHARTERS, Claire and Rodolfo STAVENHAGEN, ed. *Making the Declaration Work: The United Nations Declaration on the Rights of Indigenous Peoples*. Copenhagen: IWGIA, 2009, p. 34 *et seq*.

[167] ULFSTEIN, Geir. Indigenous Peoples' Right to Land. *Max Planck Yearbook of United Nations Law Online*. 2004, **8**(1), p. 2.

[168] EIDE, Asbjørn. The Indigenous Peoples, the Working Group on Indigenous Populations and the Adoption of the UN Declaration on the Rights of Indigenous Peoples. CHARTERS, Claire and Rodolfo STAVENHAGEN, ed. *Making the Declaration Work: The United Nations Declaration on the Rights of Indigenous Peoples*. Copenhagen: IWGIA, 2009, p. 34.

Populations was established by the United Nations General Assembly (hereinafter UNGA) in the same year to support indigenous representatives' presence at the negotiations.[169] The Sub-Commission finished the Draft Declaration in summer 1993 and submitted it to the UN Commission on Human Rights (hereinafter UNCHR) (replaced by the Human Rights Council in 2006) for further discussion, modifications, and adoption. [170]

The Working group on the draft declaration on the rights of indigenous peoples was created within the UNCHR in 1995.[171] The plan was to submit the Draft Declaration to the UNGA for its adoption within the International Decade on the World's Indigenous Peoples (1995-2004)[172] which had been proclaimed in December 1993.[173]

In contrast to the expert Sub-Commission, the UNCHR was a political, human rights body, and the discussions of the promoted document showed to be considerably more complicated.[174] It was therefore only in the Second International Decade on the World's Indigenous Peoples (2005-2015)[175] that the UNCHR's successor – the Human Rights Council (hereinafter HR Council) – adopted the Declaration. It did so by a majority of 30 against 2 (Canada and Russia) and 12 abstentions. Australia, New Zealand, and the United States – states in which significant numbers of indigenous peoples live and which later advocated

169 *ibid,* 36.

170 *Department of Economic and Social Affairs, Indigenous Peoples: United Nations Declaration on the Rights of Indigenous Peoples* [online]. United Nations. Available at: https://www.un.org/development/desa/indigenouspeoples/declaration-on-the-rights-of-indigenous-peoples.html.

171 CHARTERS, Claire and Rodolfo STAVENHAGEN. The UN Declaration on the Rights of Indigenous Peoples: How it came to be and what it heralds. CHARTERS, Claire and Rodolfo STAVENHAGEN. *Making the Declaration Work: The United Nations Declaration on the Rights of Indigenous Peoples*. 1. Copenhagen: IWGIA, 2009, p. 12.

172 DAES, Erica-Irene. The Contribution of the Working Group on Indigenous Populations to the Genesis and Evolution of the UN Declaration on the Rights of Indigenous Peoples. CHARTERS, Claire and Rodolfo STAVENHAGEN, ed. *Making the Declaration Work: the United Nations Declaration on the Rights of Indigenous Peoples*. 1. Copenhagen: IWGIA, 2009, p. 73.

173 *International Decade of the World's Indigenous People*, 18 February 1994, UNGA Res 48/163, A/RES/48/163.

174 EIDE, Asbjørn. The Indigenous Peoples, the Working Group on Indigenous Populations and the Adoption of the UN Declaration on the Rights of Indigenous Peoples. CHARTERS, Claire and Rodolfo STAVENHAGEN, ed. *Making the Declaration Work: The United Nations Declaration on the Rights of Indigenous Peoples*. Copenhagen: IWGIA, 2009, p. 38.

175 *Second International Decade of the World's Indigenous People*. 20 December 2004, UNGA Res 59/174, UN Doc. A/RES/59/174.

against the adoption of the Declaration – were not members of the HR Council at the time of the vote.[176]

As the Draft Declaration got to the UNGA in September 2006, even more objections to the text appeared. Moreover, some African countries, including those which had previously supported the declaration in the HR Council, significantly altered their position.[177] The reasons for this sudden change of heart were multiple.

Firstly, it was the political lobbying against the declaration performed by Australia, Canada, New Zealand, and the US. Secondly, the governments feared that stronger indigenous rights could potentially be divisive for the new democracies, recently established as a result of decolonisation in the region.[178] Thirdly, the Draft Declaration proposed broader criteria for identification of indigenous peoples than those set forth in the Cobo's study from 1983.[179]

Even though the identification of indigenous peoples in the Draft Declaration was based on Cobo's criteria, it was subsequently broadened by the WGIP, as the historical primacy on the respective territory was no longer considered the sole determinant for identification.[180] It would mean that many African peoples who would have fallen outside of the scope of the Cobo's definition would suddenly qualify as holders of the rights entrenched in the

176 EIDE, Asbjørn. The Indigenous Peoples, the Working Group on Indigenous Populations and the Adoption of the UN Declaration on the Rights of Indigenous Peoples. CHARTERS, Claire and Rodolfo STAVENHAGEN, ed. *Making the Declaration Work: The United Nations Declaration on the Rights of Indigenous Peoples*. Copenhagen: IWGIA, 2009, p. 39.

177 BARUME, Albert K. Responding to the Concerns of the African States. CHARTERS, Claire and Rodolfo STAVENHAGEN, ed. *Making the Declaration Work: The United Nations Declaration on the Rights of Indigenous Peoples*. Copenhagen: IWGIA, 2009, p. 171.

178 EIDE, Asbjørn. The Indigenous Peoples, the Working Group on Indigenous Populations and the Adoption of the UN Declaration on the Rights of Indigenous Peoples. CHARTERS, Claire and Rodolfo STAVENHAGEN, ed. *Making the Declaration Work: The United Nations Declaration on the Rights of Indigenous Peoples*. Copenhagen: IWGIA, 2009, p. 40.

179 MARTÍNEZ COBO, José R. Study of the Problem of Discrimination against Indigenous Populations. ECOSOC, Sub-Commission on Prevention of Discrimination and Protection of Minorities, 30 September 1983, E/CN.4/Sub.2/1983/21/Add., paras 379-382.

180 EIDE, Asbjørn. The Indigenous Peoples, the Working Group on Indigenous Populations and the Adoption of the UN Declaration on the Rights of Indigenous Peoples. CHARTERS, Claire and Rodolfo STAVENHAGEN, ed. *Making the Declaration Work: The United Nations Declaration on the Rights of Indigenous Peoples*. Copenhagen: IWGIA, 2009, p. 40.

Declaration.[181] Due to this change of position, the vote on the Draft Declaration was deferred to the following session to provide more time for consultations on the instrument.[182]

Eventually, in September 2007, after many compromises made on both sides, the Declaration was finally adopted by a majority of 144 with 4 states voting against it (Australia, Canada, New Zealand, and the United States) and 11 abstaining. All Latin American states voted in favour, except Colombia, which abstained.[183]

2.1.1.3.2 The final text of the UNDRIP

The final text of the declaration rejects assimilation of indigenous peoples – just as ILO Convention 169. Also, similarly to ILO Convention 169 – the majority of the rights it enshrines are of collective nature.[184]

In the Preamble, the UN Declaration acknowledges the severe effects colonisation and land dispossession had on indigenous peoples' lives and recognises that indigenous peoples' rights to their lands, territories and resources are their inherent rights. It further stresses in the Preamble the advantages of indigenous peoples' control over issues affecting them and emphasises the benefits their culture has for the environment.

Moreover, it reaffirms the fundamental role of collective rights for indigenous peoples' survival. It points out that treaties between states and indigenous peoples are of international concern and goes on to reiterate the significance of the right to self-determination, listing the international instruments in which it is anchored. It further prohibits any denial of the exercise of this right in accordance with international law by any provision of the Declaration.[185]

In its operative text, the Declaration prohibits any discrimination towards indigenous peoples. Also, in contrast to ILO Convention 169, it explicitly enshrines their right to self-

[181] *idem.*

[182] *UNGA Resolution 61/178*, 20 December 2006, A/RES/61/178; BARUME, Albert K. Responding to the Concerns of the African States. CHARTERS, Claire and Rodolfo STAVENHAGEN, ed. *Making the Declaration Work: The United Nations Declaration on the Rights of Indigenous Peoples*. Copenhagen: IWGIA, 2009, p. 171.

[183] For an overview of votes in Latin America, See Annexe II; information on Countries which abstained from the vote were: Azerbaijan, Bangladesh, Bhutan, Burundi, Colombia, Georgia, Kenya, Nigeria, Russian Federation, Samoa and Ukraine; *Department of Economic and Social Affairs, Indigenous Peoples: United Nations Declaration on the Rights of Indigenous Peoples*. United Nations. Available at: <www.un.org/development/desa/indigenouspeoples/declaration-on-the-rights-of-indigenous-peoples.html>.

[184] THORNBERRY, Patrick. *Indigenous peoples and human rights*. Manchester: Manchester University Press, 2002, p. 378.

[185] UNDRIP, Preamble.

determination. It further points out its implications for indigenous peoples, namely their right to autonomy concerning their internal affairs.

The provisions on self-determination were, once again, a bone of contention throughout the drafting and negotiations of the Declaration.[186] Neither this time are they free of restrictions.[187] During the negotiations of the Declaration, indigenous peoples asserted that the inclusion of a restrictive provision was discriminatory towards indigenous peoples. They argued that no such clausula is included in the Covenants addressing '*all peoples*' and that they should have the same rights as all the other peoples.[188]

The document further recognises indigenous peoples' both collective and individual right to maintain their distinctive culture and way of life without any external interference, including dispossession of lands, forced evictions or assimilation.[189] It affirms indigenous peoples' right to maintain their own institutions for the management of their own affairs, including their right to development and means of subsistence.[190] It also stresses indigenous peoples' right to participate in the decision-making of the state '*if they so choose'*.[191]

Another matter which caused a lot of controversy among states was the issue of consent of indigenous peoples in case of measures which may affect them.[192] The debate revolved around whether the requirement of States to act in a way to obtain indigenous peoples' consent equals to the right of indigenous peoples to cast a veto.[193] The UNDRIP stipulates that free and informed consent and an agreement on compensation must precede any relocation of indigenous peoples. Just as ILO Convention 169, the Declaration foresees the

186 EIDE, Asbjørn. The Indigenous Peoples, the Working Group on Indigenous Populations and the Adoption of the UN Declaration on the Rights of Indigenous Peoples. CHARTERS, Claire and Rodolfo STAVENHAGEN, ed. *Making the Declaration Work: The United Nations Declaration on the Rights of Indigenous Peoples*. Copenhagen: IWGIA, 2009, p. 40.

187 UNDRIP*,* Article 46(1).

188 CHARTERS, Claire. The Road to the Adoption of the Declaration on the Rights of Indigenous Peoples. *New Zealand Yearbook of International Law*. 2007, **4**(7), 124.

189 *ibid,* Articles 7 and 8.

190 *ibid,* Article 20.

191 *ibid,* Article 5.

192 EIDE, Asbjørn. The Indigenous Peoples, the Working Group on Indigenous Populations and the Adoption of the UN Declaration on the Rights of Indigenous Peoples. CHARTERS, Claire and Rodolfo STAVENHAGEN, ed. *Making the Declaration Work: The United Nations Declaration on the Rights of Indigenous Peoples*. Copenhagen: IWGIA, 2009, p. 40.

193 CHÁVEZ, Luis Enrique. The Declaration on the Rights of Indigenous Peoples, Breaking the impasse. CHARTERS, Claire and Rodolfo STAVENHAGEN, ed. *Making the Declaration Work: The United Nations Declaration on the Rights of Indigenous Peoples*. Copenhagen: IWGIA, 2009, p. 103.

possibility of return whenever plausible.[194] Newly, this Declaration does not provide States with any alternative option where indigenous peoples do not grant consent with such relocation.

The Declaration further sets out various procedural obligations of States concerning actions which may have some impact on indigenous peoples. It prescribes a general duty to '*consult and cooperate in good faith*' '*in order to obtain [indigenous peoples'] free, prior and informed consent*' for measures which may affect them. In such a case, the Declaration expects indigenous peoples to select their own representatives with which the State is obliged to carry out these consultations.[195]

The Preamble further encourages States' consultation and cooperation with indigenous peoples when selecting measures to ensure compliance with international human rights law in cases which concern them.[196]

Prior consultations and cooperation with the aim of obtaining free and informed consent are also specifically foreseen by the Declaration in the event of permitting or undertaking any projects which may affect indigenous territories. This obligation is tied, namely to exploration and exploitation of natural resources, and the State is further expected to act in a way to lessen any potential harm.[197]

Unlike ILO Convention 169, the Declaration does not explicitly allow states to establish any alternative procedures in case consent is not obtained. It, however, formulates the consent-related obligation more as an obligation of conduct rather than one of the result.[198] Still, the wording is one step more favourable to the protection of indigenous peoples' rights than ILO Convention 169. Moreover, the IACtHR has further elaborated on this provision when addressing the issue of free, prior and informed consent in its case-law.[199]

194 UNDRIP, Article 10.

195 UNDRIP, Article 19.

196 UNDRIP, Preamble.

197 UNDRIP, Article 32.

198 CHÁVEZ, Luis Enrique. The Declaration on the Rights of Indigenous Peoples, Breaking the impasse. CHARTERS, Claire and Rodolfo STAVENHAGEN, ed. *Making the Declaration Work: The United Nations Declaration on the Rights of Indigenous Peoples*. Copenhagen: IWGIA, 2009, pp. 103-104.

199 *Saramaka*, paras 131-137. This issue is dealt with in more detail in Section 3.2.8.1.

States are further not allowed to dispose of or store dangerous materials on indigenous peoples' territories without their prior and informed consent.[200] Just as in the case of the relocation of indigenous peoples, States do not have any alternative measures in case indigenous peoples' consent is not obtained. This provision bears considerable relevance for indigenous peoples as it gives them a tool to influence the use of pesticides and other toxic chemicals on their lands.[201]

As concerns indigenous peoples' land rights, the final text of the UNDRIP addresses them primarily in the group of provisions of Articles 25-30 and 32. However, given the crucial role which lands play for indigenous culture and the unorderly structure of the instrument, land rights, in fact, permeate in various forms the entire Declaration. Provisions on lands, territories and resources were one of the main subjects of argument in the negotiations of the UNDRIP. Just as throughout the negotiations of ILO Convention 169.

There was a dispute over the reference to the relationship of indigenous peoples with their lands as '*material*' for which indigenous peoples were advocating. In the end, they surrendered this requirement most likely in exchange for a broadly formulated provision stipulating to which lands indigenous peoples have rights.[202]

Article 26 para 1 of the Declaration embeds indigenous peoples' '*right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired*'. The past tense wording of the provision gives indigenous peoples a stronger claim than that of Article 14 of ILO Convention 169. Article 14 of ILO Convention 169 speaks – in the present tense – of rights '*over the lands which they traditionally occupy'*.[203]

However, this article only speaks of a right in general; it does not specify the quality of the right. The quality is specified in the second paragraph of the same article. The provision stipulates that indigenous peoples have the right to '*own, use, develop and control the lands, territories and resources (...)*' which they currently possess. This paragraph is, nevertheless,

[200] UNDRIP, Article 29 (2).

[201] CARMEN, Andrea. International Indian Treaty Council Report from the Battle Field - the Struggle for the Declaration. CHARTERS, Claire and Rodolfo STAVENHAGEN, ed. *Making the Declaration work: The United Nations Declaration on the Rights of Indigenous Peoples*. Copenhagen: IWGIA, 2009, p. 94.

[202] CHARTERS, Claire. The Road to the Adoption of the Declaration on the Rights of Indigenous Peoples. *New Zealand Yearbook of International Law*. 2007, **4**(7), 126.

[203] BARSH, Russel Lawrence. Indigenous Peoples. BODANSKY, Daniel, Jutta BRUNNÉE and Ellen HEY, ed. *The Oxford Handbook of International Environmental Law*. OUP, 2008, p. 847.

written in the present tense, narrowing the right of indigenous peoples to own, use, develop and control only the lands and natural resources which they possess at the moment.[204]

Compared to ILO Convention 169, it, nevertheless, does explicitly mention the right of indigenous peoples to own natural resources.[205] Moreover, it envisages States' recognition of indigenous peoples' laws, traditions, customs and land tenure systems. It requires states to establish a process which will facilitate the recognition and adjudication of indigenous peoples' rights to lands, territories and resources both present and past.[206]

In addition, the UNDRIP newly anchors indigenous peoples' right to restitution, or alternatively compensation for lands, territories and resources, which they have in some way been deprived of without their free, prior and informed consent.[207] Some States also insisted on the inclusion of a clause ensuring respect for human rights and fundamental freedoms in the application of the indigenous peoples' rights enshrined in the Declaration.[208] This provision was not to the liking of the indigenous representatives. Charters argues that the likely objective of the inclusion of this restrictive provision was to protect the rights of the current landowners.[209]

As to other rights which are in various ways related to land rights, the document also addresses indigenous peoples' rights to manifest their past, present, and future culture through religious and archaeological objects and sites.[210]

Also, it sets out the obligation of states to return property which had been illicitly seized.[211] It mentions labour rights protection[212] and incorporates provisions on indigenous peoples' rights concerning their traditional medicines. Additionally, it incorporates

[204] CHARTERS, Claire. The Road to the Adoption of the Declaration on the Rights of Indigenous Peoples. *New Zealand Yearbook of International Law*. 2007, **4**(7), 127.

[205] UNDRIP, Article 26 (2).

[206] UNDRIP, Article 27.

[207] UNDRIP, Article 28.

[208] UNDRIP, Article 46 (2).

[209] CHARTERS, Claire. The Road to the Adoption of the Declaration on the Rights of Indigenous Peoples. *New Zealand Yearbook of International Law*. 2007, **4**(7), 127.

[210] UNDRIP, Articles 11 and 12.

[211] UNDRIP, Articles 11 and 12.

[212] UNDRIP, Article 17.

indigenous peoples' right to the highest attainable standard of health,[213] borrowing the formulation of Article 12 ICESCR.

Moreover, it addresses the protection of women, children, the elderly, and persons with disabilities,[214] as well as of indigenous languages, education, and media.[215]

2.1.1.3.3 Conclusions on the UNDRIP

The works on the Declaration started three years ahead of those on ILO Convention 169. Eventually, the Declaration turned out to be a significantly more progressive document than the Convention.

By far not all requirements of indigenous peoples were fulfilled, many of the provisions in the original draft were watered down, and the structure of the instrument is somewhat chaotic. Yet, it still was a significant leap forward when compared to ILO Convention 169.

The right to self-determination – although in a circumscribed form – was explicitly confirmed. Land rights were recognised as indigenous peoples' inherent rights. Indigenous peoples' right to lands which they had occupied in the past was affirmed. Their right to restitution of ancestral territories lost without their free, prior and informed consent was enshrined for the first time. Indigenous peoples' right to own natural resources was newly anchored in a legal instrument of an international character. Finally, states' obligation to consult and cooperate with indigenous peoples in good faith in order to obtain a free, prior and informed consent was set out.

For the relocation of indigenous peoples from their traditional lands and the placement of dangerous materials on their territories, the need for a free, prior and informed consent is moreover formulated as unconditional.[216]

There are various factors which may have played a role in this progressiveness. Firstly, as follows from the two foregoing sections, the UNDRIP was eventually adopted eighteen years later than ILO Convention 169. This allowed for more developments to take place both in international law (such as delivering of a landmark judgement on indigenous peoples' land

213 UNDRIP, Article 24.

214 UNDRIP, Articles 17 and 22.

215 UNDRIP, Articles 13, 14, and 16.

216 HR Council, *Report of the UN Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, James Anaya.* 15 July 2009, A/HRC/12/34, para 47.

rights by the IACtHR[217]) and states' constitutional law. One of these developments was the adoption of ILO Convention 169, which laid the groundwork for the UNDRIP.

Secondly, the indigenous movement's gaining strength[218] also played a critical role in creating a climate more amenable to indigenous peoples' claims.

Thirdly, the fact that the Declaration is a soft-law instrument with no supervisory mechanism possibly led to States' greater willingness to recognise a broader spectrum of indigenous peoples' rights. This way, it still lays fully with them to decide which rights they will implement into their national laws as opposed to a binding instrument such as is ILO Convention 169.

Upon the UNDRIP's adoption, some States' representatives asserted that the Declaration could not be seen as evidence of customary international law. Namely, it was the representatives of Australia, Canada and Colombia. Moreover, they fiercely emphasised its non-binding nature.[219]

The Declaration itself claims to embed the minimum standards for indigenous peoples' existence.[220] Even though it is a mere declaration, a soft-law, non-binding instrument, some authors argue that its parts do reflect customary international law in the field of indigenous peoples' rights.[221]

Besides, it serves as a powerful tool for interpretation of other legal instruments in the context of indigenous peoples' rights,[222] which is evidenced by the decisions of international

217 IACtHR. *Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua*. Judgement of August 31, 2001 (hereinafter *Awas Tingni)*.

218 ANAYA, S. James a Robert A. WILLIAMS JR. The Protection of Indigenous Peoples' Rights over Lands and Natural Resources under the Inter-American Human Rights System. *Harvard Human Rights Journal*. 2001, **14**(33), p. 34.

219 UNGA. *Minutes of the 107th plenary session of the General Assembly of 13 September 2007*, A/61/PV.107, p. 12, 13, 17.

220 UNDRIP, Article 43.

221 RODRÍGUEZ-PIÑERO ROYO, Luis. "Cuando Proceda": Vigilancia y aplicación de los derechos de los pueblos indígenas según la declaración. CHARTERS, Claire and Rodolfo STAVENHAGEN. *El desafío de la Declaración: Historia y futuro de la declaración de la ONU sobre pueblos indígenas*. C: Transaction Publisher; Central Books, 2009, p. 359; CHARTERS, Claire. The Road to the Adoption of the Declaration on the Rights of Indigenous Peoples. *New Zealand Yearbook of International Law*. 2007, **4**(7), 121.

222 *idem.*

judicial and other human-rights bodies (including the IACtHR) produced over the first thirteen years of its existence.[223]

Finally, it served as an example for the works on the American Declaration on the Rights of Indigenous Peoples, which was adopted in 2016, thus leaving a strong imprint on the legal framework of indigenous peoples' rights in the region of Latin America.

2.1.2 Relevant global instruments of international law not specifically addressing indigenous peoples' rights

This second part of the first subchapter describes instruments international law which apply globally and bear some relevance for indigenous peoples land rights, despite not addressing the topic explicitly. It is the Universal Declaration on Human Rights, the International Covenant on the Civil and Political Rights (hereinafter ICCPR), International Covenant on the Economic, Social and Cultural Rights (hereinafter ICESCR), and International Convention on the Elimination of All Forms of Racial Discrimination (hereinafter ICERD).

Very important are further the general comments and recommendations produced as a means of interpretation of the aforementioned three Conventions. Due to the activity of the Human Rights Committee (hereinafter HRC), Committee on the Economic, Social and Cultural Rights (hereinafter CESCR) and the CERD – especially their jurisprudence on individual complaints, as well as the general observations on country reports – these international law instruments have also become increasingly relevant for the protection of indigenous peoples' land rights.

Another instrument which can be mentioned in this context is the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities (hereinafter DRM).

Moreover, the Convention on the Rights of the Child (hereinafter CRC) and the Convention on Biological Diversity (hereinafter CBD) also apply to indigenous peoples' land rights. It is mainly due to the cultural and environmental aspects of indigenous peoples' relationship with their territories.

[223] See, for example, *Saramaka*, paras 131, 137; HR Council. *Report of the Special Rapporteur on the rights of indigenous peoples on her visit to Guatemala,* 10 August 2018, A/HRC/39/17/Add.3, para 70.

2.1.2.1 Universal Declaration of Human Rights

This fundamental human rights instrument which serves as a base for global protection of human rights, was adopted by the UN General Assembly in 1948.[224] Rights which are anchored in the Declaration were later embedded in international conventions, namely the ICCPR and the ICESCR.

It contains many provisions relevant to the protection of indigenous peoples' land rights. Mentioned should be those of Article 1 (equality in dignity and rights), Article 2 (access to rights without distinction), Article 3 (the right to life), Article 4 (protection of the law without any discrimination), Article 12 (right to privacy), Article 17 (the right to property), Article 23 (the right to work), Article 25 (the right to adequate health, food, housing and medical care), and Article 27 (the right to participate in the cultural life). These rights are further analysed in the context of the instruments of international law addressed in this chapter and in the case of the right to property in Chapter 3.

2.1.2.2 International Covenant on the Civil and Political Rights

One of the instruments of the global human rights system which offer protection to indigenous peoples' land rights is the ICCPR. The ICCPR was adopted in 1966 and entered into force upon its ratification by 35 states in 1976. To date, there are 173 state parties to the Covenant, including all Latin American countries except Cuba. Cuba signed the Covenant in 2008 but has not ratified it.[225]

The Covenant counts on three monitoring mechanisms, which are within the competence of the HRC. The first mechanism consists of States' submission of reports. These reports contain information on compliance with the Covenant and measures which the states undertook to ensure this compliance. This mechanism is anchored in Article 40 of the ICCPR.[226]

224 *Universal Declaration of Human Rights*, 10 December 1948, UNGA Resolution 217 A (III), A/RES/3/217 A.

225 *United Nations Treaty Collections: 4. International Covenant on Civil and Political Rights* [online]. Geneva: United Nations, 2020 (accessed on 5 April 2020). Available at: https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en.

226 ICCPR, p. 171, Article 40.

From 1992, the HRC issues concluding observations upon consideration of these reports.[227] In these observations, it addresses the content of these reports and produces recommendations for the State parties to improve their compliance. This mechanism is especially relevant for indigenous peoples' land rights, as it enables the HRC to provide observations on States' compliance with Article 1 of the ICCPR, which enshrines the right to self-determination. It contrasts with the HRC's competence to review individual complaints described below from which Article 1 is excluded.[228]

The second monitoring mechanism is construed upon the provision of Article 41 of the ICCPR. It allows State parties to accept the competence of the HRC to review communications submitted by other State parties alleging their non-compliance with the ICCPR. The HRC only accepts these communications from state parties which had accepted its competence in this regard.[229] So far, 50 state parties made a declaration recognising this competence of the HRC. From Latin American countries, this declaration has been issued by Argentina, Chile, Ecuador and Peru.[230]

The third monitoring mechanism consists of individual complaints. The UNGA adopted the Optional Protocol to the ICCPR which establishes this mechanism in the same year as the ICCPR itself.[231] Based on this protocol, individuals, who claim that their rights under the ICCPR have been violated, can submit communications to the HRC.

As has been mentioned, Article 1 of the ICCPR is, however, excluded from the individual complaints' mechanism. It is so because it does not enshrine individual rights.[232] Furthermore, individual complaints can only be filed against States which are parties to the Optional Protocol. To date, it has been ratified by 116 States. From Latin American States,

227 THORNBERRY, Patrick. *Indigenous peoples and human rights*. Manchester: Manchester University Press, 2002, p. 119.

228 GÖCKE, Katja. *Indigene Landrechte im internationalen Vergleich*. Berlin/Heidelberg: Springer-Verlag, 2016, p. 577; HRC. *Case of Ángela Poma Poma v. Peru, Communication No. 1457/2006*, 24 April 2009. CCPR/C/95/D/1457/2006, para 6.3.

229 ICCPR, Article 41.

230 *United Nations Treaty Collections: 4. International Covenant on Civil and Political Rights*. Geneva: United Nations, 2020 (accessed on 10 April 2020). Available at: <https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en>.

231 *Optional protocol to the International Covenant on Civil and Political Rights*, 19 December 1966, 999 U.N.T.S. p. 171, Articles 1-3.

232 HRC. *Case of Ángela Poma Poma v. Peru, Communication No. 1457/2006*, 24 April 2009, CCPR/C/95/D/1457/2006, para 6.3.

only Cuba and Haiti are not state parties to the Protocol.[233] The HRC has dealt with indigenous peoples' land rights also within the framework of individual complaints.[234]

The HRC has moreover produced non-binding documents which serve as a guideline for the interpretation and application of the provisions of the Covenant – the General Comments (hereinafter GCs). The GCs comments build upon the Committee's experience with a significant number of state party reports.[235] GC No. 23 on minority rights is the most relevant one for indigenous peoples' land rights.

The ICCPR does not explicitly mention indigenous peoples in any of its provisions. Nevertheless, indigenous peoples' land rights do fall under the scope of some of its provisions. Article 1, which anchors the right to self-determination and Article 27 on the rights of minorities, are most frequently applied in this context.

Article 6 on the right to life may also play a role. Indigenous peoples' rights are not explicitly addressed in the GC No. 36 on the right to life.[236] Issues under Article 6 may, however, arise, for example, in connection with environmental harm caused to indigenous territories.[237]

One of the two articles of the Covenant, which are most relevant for indigenous peoples' land rights is Article 27. It addresses the rights of ethnic, religious or linguistic minorities. Its provisions incorporate the negative right of the members of these groups not to be denied the right to enjoy their distinctive culture, religion and language with the other members of their group.[238] The ICCPR does not contain any definition of minorities.

Indigenous peoples' land rights are protected on the basis of minority rights,[239] and thus also under Article 27.[240] This also follows from the HRC's GC No. 23 mentioned above. In

[233] *United Nations Treaty Collections: 5. Optional Protocol to the International Covenant on Civil and Political Rights*. Geneva: United Nations (accessed on 10 April 2020). Available at: <https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-5&chapter=4&lang=en>.

[234] HRC. *Case of Ángela Poma Poma v. Peru, Communication No. 1457/2006*, 24 April 2009, CCPR/C/95/D/1457/2006, para 7.2.

[235] THORNBERRY, Patrick. *Indigenous peoples and human rights*. Manchester: Manchester University Press, 2002, p. 119.

[236] HRC. *General Comment No. 36: Article 6 (right to life).* 3 September 2019. CCPR/GC/36.

[237] THORNBERRY, Patrick. *Indigenous peoples and human rights*. Manchester: Manchester University Press, 2002, p. 136.

[238] ICCPR, Article 27.

[239] THORNBERRY, Patrick. *Indigenous peoples and human rights*. Manchester: Manchester University Press, 2002, p. 34.

this GC, the Committee emphasizes the indispensable role of territories and resources for the indigenous peoples' way of life and culture.[241]

Even though minorities' rights do cover indigenous peoples' rights, there are some notable differences. Under international law, indigenous peoples' rights reach further than minorities' rights. This is why States sometimes do not recognise certain groups as indigenous peoples, but rather view them as minorities.[242] Also, indigenous peoples sometimes oppose the view that they belong to minorities, referring to the fact that they had been sovereign peoples in the past.[243]

Instruments of international law addressing the rights of minorities, in essence, aim to guarantee these groups' participation in the decision-making of the majority. Their objective is to ensure that the majority societies protect the interests of the minorities in their decision-making.[244]

By contrast, instruments of international law focusing solely on indigenous peoples' rights are formulated in a way to provide indigenous peoples with a high degree of autonomy and control over their own matters, including the development.[245] Henriksen argues, that, *e.g.* in the UNDRIP, the right of indigenous peoples to participate in the decision-making of the State is constituted as a secondary right to that of maintaining their own autonomous institutions.[246]

Moreover, unlike for minorities, the protection of land rights plays a major role for indigenous peoples.[247]

240 Among instruments, such as the DRM, CRC, as well as the ICESCR and ICERD.

241 HRC. *General Comment No. 23: Article 27 (Rights of Minorities)*, 8 April 1994, CCPR/C/21/Rev.1/Add.5, paras 3.2 and 7.

242 HENRIKSEN, John B. *Research on Best Practices for the Implementation of the Principles of ILO Convention No. 169: Case Study 7, Key Principles in Implementing ILO Convention No. 169*. International Labour Organisation, Programme to Promote ILO Convention No. 169, 2008, p. 11.

243 GÖCKE, Katja. *Indigene Landrechte im internationalen Vergleich*. Berlin/Heidelberg: Springer-Verlag, 2016, p. 575.

244 HENRIKSEN, John B. *Research on Best Practices for the Implementation of the Principles of ILO Convention No. 169: Case Study 7, Key Principles in Implementing ILO Convention No. 169*. International Labour Organisation, Programme to Promote ILO Convention No. 169, 2008, pp. 9-10.

245 *idem.*

246 HENRIKSEN, John B. *Research on Best Practices for the Implementation of the Principles of ILO Convention No. 169: Case Study 7, Key Principles in Implementing ILO Convention No. 169*. International Labour Organisation, Programme to Promote ILO Convention No. 169, 2008, p. 10.

247 *idem.*

Another characteristic of indigenous peoples' rights is that they are predominantly of a collective character – they are peoples' rights. Minority rights are individuals' rights.[248] The HRC affirms the individual character of the rights enshrined in Article 27 in its GC on the rights of minorities. Nevertheless, it also notes that States may be obliged to adopt certain measures in order to ensure the possibility of individuals to enjoy these rights in a community.[249]

The second right enshrined in the ICCPR, which is crucial for indigenous peoples' land rights is the right to self-determination. This right is grounded in Article 1 common to the ICCPR and ICESCR. Besides, it forms one of the core principles enshrined in the UN Charter.[250] The first paragraph of this article anchors this right as '*all peoples''* right to '*freely determine their political status and freely pursue their economic, social and cultural development'*.[251] Paragraph 2 subsequently elaborates on the economic content of this right – the free disposition of their natural wealth and resources. It further stipulates that no people may be deprived of its means of subsistence.[252]

In its GC No. 12 addressing this article, the HRC reiterates, that this right is interrelated with other provisions of the Covenant.[253] The HRC does not mention indigenous peoples in the GC. It is, however, necessary to point out, that the document was produced in 1984. At that point, the debate on indigenous peoples' right to self-determination was at its outset. The HRC does ascribe the right to self-determination to indigenous peoples in its more recent documents referring to this right.[254]

For various reasons, this right stands out among other rights embedded in the Covenants. It is entrenched separately in Part I of the Covenants, whereas all the other rights are to be found in Part III. This relates to another one of its distinctive features - it is a

248 *idem*.

249 HRC. *General Comment No. 23: Article 27 (Rights of Minorities)*, 8 April 1994, CCPR/C/21/Rev.1/Add.5, para 6.2.

250 *Charter of the United Nations*, 24 October 1945, 1 U.N.T.S. XVI, Articles 1(2) and 55.

251 ICCPR, Article 1(1).

252 ICCPR, Article 1(2)

253 HRC. *General Comment No. 12: Article 1 (Right to self-determination).* 13 March 1984, paras 2 and 5.

254 HRC. *Concluding observations on Mexico*. 1999, UN Doc. CCPR/C/79/Add. 109, para 1; HRC. *Concluding observations on Chile.* 2007, UN Doc. CCPR/C/CHL/CO/5, para 19.

collective right, while all the other rights enshrined in the Covenant are individual ones.[255] Therefore, as mentioned above, the HRC does not have the competence to review individual complaints on its violations.

There are also quite a few problematic issues to this right.[256] The concept of self-determination originated in the time of decolonisation. It has thus been a subject of long-standing debate, whether this right only applies in the context of decolonisation, or whether it is universal and subject to further development. Thornberry argues that the right is universal and continuing. He draws this conclusion from the HRC's requirement of states to also report on the internal processes illustrating compliance with this right.[257]

Another problematic issue – not unrelated to the previous one – concerns the subject of this right – all peoples. Who are *all peoples*? Any peoples? Or only colonised peoples?[258] Even though there were attempts to produce a definition of the term 'peoples' upon the drafting of the Covenants, they were unsuccessful due to the lack of consent.[259] This issue is related to another question – is the right to self-determination enshrined in the instruments addressing indigenous peoples' rights identical with the one enshrined in Article 1 of the Covenants?

There is one notable difference between the right to self-determination enshrined in the Covenants and that anchored in instruments specifically addressing indigenous peoples' rights. Those instruments of international law which provide specific protection to indigenous peoples' rights, and contain the right to self-determination, also contain a provision restricting this right. Namely, it is the UNDRIP and ADRIP. These restrictive provisions always prevent any interpretation of this right, which could affect the territorial integrity of States, and potentially lead to secession.[260]

[255] HRC. *General Comment No. 23: Article 27 (Rights of Minorities)*, 8 April 1994, CCPR/C/21/Rev.1/Add.5, para 3.1.

[256] THORNBERRY, Patrick. *Indigenous peoples and human rights*. Manchester: Manchester University Press, 2002, 125.

[257] *ibid.,* 126.

[258] *ibid.*, pp. 125-126

[259] UNGA, *Draft International Covenants on Human Rights, Report of the Third Committee*, 8 December 1995, A/3077, para 67.

[260] UNDRIP, Article 46(1); ADRIP, Article IV.

The right to self-determination has two aspects – an external and an internal one.[261] The external right to self-determination entails the right of peoples to determine their political status, be equal with all other peoples and to not be subjugated by another nation.[262] As has been mentioned, the external aspect of the right to self-determination has been a source of great resistance on the side of many States when negotiating international instruments.[263] It was this external aspect of the right to self-determination, which constituted the grounds for the formation of independent States in the era of decolonisation.

On the other hand, the internal aspect of self-determination means the right of peoples to be in control of decision-making about matters which concern them; it comprises the decision-making power over social, economic and cultural issues, including land and natural resources.[264] It seems that it is this internal aspect of the right to self-determination, which is enshrined in the UNDRIP and ADRIP.

The internal aspect of the right to self-determination has been gaining increasing support as the basis for indigenous peoples' rights to lands, territories and resources, especially in the region of Latin America.

In its judgement in the case of *Saramaka People v. Suriname*, the IACtHR interpreted the provision of Article 21 of the ACHR on the right to property[265] in light of the right to self-determination under Article 1 common to the Covenants. The Court held that the Saramaka people had the right to '*freely determine and enjoy their own social, cultural and economic development, which includes the right to enjoy their particular spiritual relationship with the territory they have traditionally used and occupied*'.[266]

This inclusion of indigenous peoples' rights to lands and natural resources under the scope of the right to self-determination is also present in some of the constitutions of the Latin

[261] ULFSTEIN, Geir. Indigenous Peoples' Right to Land. *Max Planck Yearbook of United Nations Law Online*. 2004, **8**(1), p. 5.

[262] CERD. General Recommendation 21: Right to self-determination. 23. August 1996. CERD/48/Misc. 7/Rev. 3, para. 4; GILBERT, Jérémie. Indigenous Peoples' Land Rights under International Law: From Victims to Actors. Netherlands: Brill | Nijhoff, 2007, p. 205.

[263] CHARTERS, Claire. The Road to the Adoption of the Declaration on the Rights of Indigenous Peoples. *New Zealand Yearbook of International Law*. 2007, **4**(7), p. 128.

[264] ULFSTEIN, Geir. Indigenous Peoples' Right to Land. *Max Planck Yearbook of United Nations Law Online*. 2004, **8**(1), p. 5.

[265] ACHR, Article 1.

[266] *Saramaka,* para 96.

American States, namely Mexico and Bolivia.[267] The interpretation of the right to self-determination as the basis for the rights of indigenous peoples over their lands and natural resources is further reflected in the case-law of national courts in the region.[268]

This trend has also been observed by the UN Special Rapporteur on the Rights of Indigenous Peoples, Victoria Tauli-Corpuz. Tauli-Corpuz has pointed out that in addition to national case-law, there is a growing jurisprudence from the UN treaty bodies linking the right to lands and resources with the right to self-determination.[269]

One such example is the HRC's interpretation of the aforementioned Article 27 ICCPR on minority rights in light of Article 1 in its concluding observations on Mexico.[270] It urged that Mexico guarantee indigenous peoples both their individual and collective rights. These rights included indigenous peoples' usufruct of their lands and resources under ICCPR Article 1(2), and mainly, their right to self-determination.[271]

Similarly, the HRC called on Chile, also referring to Article 1 jointly with Article 27 to observe its obligation to demarcate indigenous peoples' lands.[272] It should be noted that the HRC interprets the right to self-determination jointly with Article 27 despite the fact that minorities are not generally subjects of the right to self-determination. The right to self-

[267] *Political Constitution of the United Mexican States*. 1917, Art 2(A) secs V. and VI.*; Political Constitution of the Plurinational State of Bolivia*. 2009, Articles 2 and 30.II.4.

[268] Constitutional Court of Colombia. *Judgement No T-601 of 2011*, 4. Las juntas de acción comunal en el contexto de los territorios indígenas; FIGUERA VARGAS, Sorily a Andrea ARIZA LASCARO. Derecho a la autodeterminación de los pueblos indígenas en el ordenamiento jurídico colombiano. *Revista de Estudios Sociales*. 2015, **53**, p. 75.

[269] ECOSOC, Permanent Forum on Indigenous Issues. *'International expert group meeting on the theme "Sustainable Development in the Territories of Indigenous Peoples"'*, 21 February 2018, E/C.19/2018/7, para 47.

[270] HRC. Concluding observations on Mexico. 1999, UN Doc. CCPR/C/79/Add. 109, para 19; HENRIKSEN, John B. *Research on Best Practices for the Implementation of the Principles of ILO Convention No. 169: Case Study 7, Key Principles in Implementing ILO Convention No. 169*. International Labour Organisation, Programme to Promote ILO Convention No. 169, 2008, p. 12; ULFSTEIN, Geir. Indigenous Peoples' Right to Land. *Max Planck Yearbook of United Nations Law Online*. 2004, **8**(1), p. 6 on the HRC. *Concluding observations on Canada*, 7 April 1999, CCPR/C/79/Add.105.

[271] HRC. *Concluding observations on Mexico*. 1999, UN Doc. CCPR/C/79/Add. 109, para 19; HENRIKSEN, John B. *Research on Best Practices for the Implementation of the Principles of ILO Convention No. 169: Case Study 7, Key Principles in Implementing ILO Convention No. 169*. International Labour Organisation, Programme to Promote ILO Convention No. 169, 2008, p. 12.

[272] HRC. *Concluding observations on Chile*. 2007, UN Doc. CCPR/C/CHL/CO/5, para 19.

determination is a peoples' right; minority rights are individuals' rights.[273] The rights both under Article 1 and 27 thus only pertain to peoples who, at the same time, are a minority.

The link between the right to self-determination and indigenous peoples' rights to their territories and resources has also been observed by the UN Special Rapporteur on the Rights of Indigenous Peoples further in her report on her visit to Guatemala. The UN Special Rapporteur mentioned in the report that the right to consultation arises out of indigenous peoples' substantive rights, namely the right to self-determination and the rights over lands, territories and natural resources which are associated with it.[274] Therefore, there seems to be growing evidence that the right of indigenous peoples to self-determination also entails their rights to lands and natural resources.[275]

Upon closer scrutiny of the right to self-determination, however, certain issues can be identified. Namely, that the provision of Article 1 common to the Covenants, anchors the public sovereignty over a territory *(imperium)*.[276] However, indigenous peoples' rights to lands and natural resources, as they have been discussed above, refer to the right to private property (*dominium*).[277]

Nevertheless, the concept of indigenous peoples' communal rights over lands and natural resources does not directly correspond to the right to private property either. It is so due to the collective character of this relationship.[278]

It thus seems that the concept of indigenous peoples' communal rights to their lands, territories and resources can be placed somewhere in between *imperium* and *dominium*. It is so due to its public, collective aspects linked with the right of indigenous peoples to autonomy, including the management of their own subsistence and development on the one hand. And also due to its private aspects, linked with ownership rights, on the other. It,

[273] HRC. *General Comment No. 23: Article 27 (Rights of Minorities)*, 8 April 1994, CCPR/C/21/Rev.1/Add.5, para 3.1.

[274] HR Council. Report of the Special Rapporteur on the rights of indigenous peoples on her visit to Guatemala, 10 August 2018, A/HRC/39/17/Add.3, para 70.

[275] GILBERT, *Jérémie. Indigenous Peoples' Land Rights under International Law: From Victims to Actors.* Netherlands: Brill | Nijhoff, 2007; PARONYAN, Hayk a Pedro Mauricio GALARZA QUEZADA. El derecho de los pueblos indígenas a la libre determinación en el derecho internacional. *INNOVA Research Journal*. 2017, **2**(12), p. 47.

[276] VAN DER LINDEN, Mieke. *The Acquisition of Africa (1870-1914): The Nature of International Law*. 1. Brill | Nijhoff, 2016. ISBN 9789004321199, p. 49.

[277] *Awas Tingni,* para 144.

[278] See Section 3.1 on indigenous peoples' property rights.

however, does not easily match either of these two categories. It remains for the further developments within this area of international law to bring more clarity on which of these two categories this concept will better fit into. Or whether a third category will emerge.

2.1.2.3 International Covenant on the Economic, Social and Cultural Rights

The ICESCR also has its place in the protection of indigenous peoples' rights. Like the ICCPR, it was adopted in 1966 and entered into force in 1976. To date, there are 170 State parties to the Covenant. All Latin American countries are also State parties to this Covenant with one exception – Cuba, which has signed it but not ratified.[279]

From 1985, the monitoring of the Covenant is carried out by the CESCR, which was established by an ECOSOC resolution.[280] It replaced a working group previously set up within the ECOSOC.[281]

The ICESCR relies on various monitoring mechanisms. Just like the HRC, the CESCR revises State reports and produces concluding observations. The CESCR has produced many concluding observations addressing the topic of indigenous peoples' land rights.[282] Apart from State reports, it receives reports from specialised UN agencies regarding States' implementation of the rights enshrined in the Covenant.[283]

Since quite recently, it can also revise communications from individuals and State-parties alleging – upon a State declaration accepting this competence – Covenant violations. This competence was introduced by the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights. It was adopted in 2008 and came into force in 2013.

279 *United Nations Treaty Collections: 3. International Covenant on Economic, Social and Cultural Rights*. Geneva: United Nations. (accessed on 10 April 2020). Available at: https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-3&chapter=4&lang=en.

280 GÖCKE, Katja. *Indigene Landrechte im internationalen Vergleich*. Berlin/Heidelberg: Springer-Verlag, 2016, p. 581.

281 ECOSOC. *Resolution 1985/17.* 25 May 1985.

282 UNDP, OHCHR. *Compilación de observaciones finales del Comité de Derechos Económicos, Sociales y Culturales sobre países de América Latina y el Caribe (1989-2004),* ISBN: 956-299-504-6, p. 50 para 21 (Bolivia), p. 57 paras 35-36 (Brazil), p. 66 para 33 (Chile), p. 127 para 28 (Ecuador), p. 194 para 12 (Panama), p. 217 para 9 (Paraguay).

GÖCKE, Katja. *Indigene Landrechte im internationalen Vergleich*. Berlin/Heidelberg: Springer-Verlag, 2016, p. 582.

283 ICESCR, Article 18; THORNBERRY, Patrick. *Indigenous peoples and human rights*. Manchester: Manchester University Press, 2002, p. 184.

This Protocol also gives States the possibility to declare that they recognise the CESCR's competence to undertake an inquiry in the event of an indication of grave human rights violations by the State party.[284] To date, 24 states have become parties to the Optional Protocol, out of which eight are in the region of Latin America. Three more Latin-American countries have signed the Protocol but not yet ratified. Five State parties have made a declaration accepting the jurisdiction of the CESCR to revise inter-state communications and to undertake the inquiry procedure. Of Latin-American countries, only El Salvador has done so.[285]

There are various provisions which are relevant to the protection of indigenous peoples' land rights. It is the right to self-determination (Article 1) which both Covenants share. Additionally, the CESCR has addressed indigenous peoples' land rights namely in connection with the right to adequate housing, food and water (Article 11 paragraph 1), the right to the highest attainable standard of health (Article 12), and the right to take part in cultural life (Article 15 paragraph 1[a]).

Just as the HRC, the CESCR has produced a number of GCs which address indigenous peoples' land rights. The GC No. 12 deals with the right to adequate food anchored in Article 11 ICESCR. The Committee explains that the right to food also encompasses its economic and physical accessibility. It specifically points out that the lack of access of indigenous peoples to their ancestral lands leads to their particular vulnerability.[286]

The Committee's GC No. 15 provides guidance on the right to water under Articles 11 and 12. The CESCR interprets this article in conjunction with Article 1 para 2 of the Covenant, which states that a people may not be deprived of its own means of subsistence. In view of the foregoing, the CESCR calls upon States to ensure indigenous peoples' adequate access to water for subsistence farming in order to secure their livelihood.

States should also adopt special measures to prevent the pollution of the resources on indigenous peoples' ancestral territories and also their encroachment. Additionally, the

[284] *Optional Protocol to the International Covenant on Economic, Social and Cultural Rights*, 5 March 2009, A/RES/63/117, Articles 10 and 11.

[285] *United Nations Treaty Collections: 3. a Optional Protocol to the International Covenant on Economic, Social and Cultural Rights*. Geneva: United Nations (accessed on 10 April 2020). Available at: https://treaties.un.org/pages/viewdetails.aspx?src=ind&mtdsg_no=iv-3-a&chapter=4&lang=en.

[286] CESCR. *General Comment No. 12: The right to adequate food (Article 11)*. 12 May 1999. E/C.12/1999/5, para. 13.

Committee asks States to facilitate indigenous peoples' own control of their access to water.[287]

The Committee has also produced a GC on the right to the highest attainable standard of health grounded in Article 12. In its GC No. 14, the CESCR draws attention to the role which territories play for indigenous peoples' health. The Committee notes the necessity for protection of medicinal plants, animals and minerals which indigenous peoples need to fully enjoy their right to health.

Moreover, it emphasises the collective aspect of indigenous peoples' health. It especially mentions development activities which result in an involuntary removal of indigenous peoples from their traditional territories. The CESCR observes that this displacement leads to '*denying them their sources of nutrition and breaking their symbiotic relationship with their lands' and thus 'has a deleterious effect on their health'*.[288]

The IACtHR refers to this GC in the case of *Yakye Axa v. Paraguay.* The Court pointed out that the lack of access of the Yakye Axa community to their traditional lands and resources deprived them also of the possibility '*to obtain clean water and to practice traditional medicine to prevent and cure illnesses*'.[289]

The Committee's GC No. 7 on the right to adequate housing enshrined in Article 11(1) points out the particular vulnerability of indigenous peoples (among other groups) with regard to forced evictions.[290]

The CESCR also addresses indigenous peoples' land rights in its GC No. 21 dealing with the right to take part in cultural life. This right is enshrined in Article 15, paragraph 1(a) ICESCR. In the GC, the Committee emphasises the communal nature of indigenous peoples' culture, which also encompasses their traditional lands, territories and resources.

The Committee points out the essential role which ancestral lands, territories and resources play in indigenous peoples' way of life and cultural identity. Also, the CESCR appeals to states to recognize their rights to '*own, develop, control and use their communal*

287 CESCR. *General Comment No. 15: The right to water (Articles 11 and 12).* 20 January 2003. E/C.12/2002/11, paras 7 and 16 (d).

288 CESCR. *General Comment No. 14: The right to the highest attainable standard of health.* 11 August 2000. E/C.12/2000/4, para 27.

289 *Yakye Axa*, para 168.

290 CESCR. *General Comment No. 7: The right to adequate housing (Art. 11.1): forced evictions.* 20 May 1997, E/1998/22, para 10.

lands, territories and resources' and to return those lands and territories which have been taken away without their free, prior and informed consent.[291]

2.1.2.4 International Convention on the Elimination of All Forms of Racial Discrimination

Another instrument significant for the land rights of indigenous peoples on the global level, albeit not specifically mentioning them, is the ICERD adopted in 1965. Currently, there are 182 member states to the Convention, including all 22 Latin American states.[292] The rights enshrined in the ICERD can be both individual and collective.[293] A provision which crucial for indigenous peoples' land rights is that of Article 5. This article enshrines the prohibition of discrimination with respect to the *'right to own property alone as well as in association with others*'.[294] Compliance with the ICERD is monitored by the CERD.

The CERD has three monitoring mechanisms within its competence which are similar to those of the HRC. These are the revision of member State reports, communications from individuals or groups of individuals and inter-state complaints.[295] Communications from groups and individuals may only be revised after a State has made a declaration accepting this competence of the CERD. So far, 58 such declarations have been made. Half of the Latin American states have to date made such a declaration.[296] The right to submit communications to the CERD denouncing a violation of the Convention applies to both groups and individuals.[297]

291 CESCR. *General Comment No. 21: Right of everyone to take part in cultural life (Art. 15 para 1[a]).* 21 December 2009, E/C.12/GC/21, para 36.

292 *United Nations Treaty Collections: 2. International Convention on the Elimination of All Forms of Racial Discrimination*. Geneva: United Nations. (accessed on 13 April 2020). Available at: https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-2&chapter=4&lang=en.

293 GÖCKE, Katja. *Indigene Landrechte im internationalen Vergleich*. Berlin/Heidelberg: Springer-Verlag, 2016, p. 580.

294 *International Convention on the Elimination of All Forms of Racial Discrimination*. 21 December 1965, 660 U.N.T.S. p. 195 (hereinafter ICERD), Article 5 (d)(v).

295 THORNBERRY, Patrick. *Indigenous peoples and human rights*. Manchester: Manchester University Press, 2002, p. 200.

296 *United Nations Treaty Collections: 2. International Convention on the Elimination of All Forms of Racial Discrimination*. Geneva: United Nations. (accessed on 13 April 2020). Available at: <https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-2&chapter=4&lang=en>.

297 ICERD, Article 14.

The CERD has addressed indigenous peoples' land rights in many of its concluding observations on state reports.[298] For example, in its concluding observations from 2007, it requested Costa Rica to ensure delimitation of indigenous lands in accordance with its national legislation.[299] In its concluding observations on Chile from 2014, it urged Chile to implement mechanisms allowing for consultations with indigenous peoples in the event of decisions which may directly affect their rights to lands and resources.[300]

Since 1993, the CERD has also had two types of extraordinary measures at hand. These measures include early warning measures and urgent procedures. Early warning measures aim to prevent an existing structural issue from escalating into a more serious one. The objective of urgent procedures is giving immediate attention to human rights violations in order to prevent more violations from taking place.[301] These measures have on various occasions been used for protection of indigenous peoples' rights related to their territories.

For example, the CERD employed an urgent procedure with respect to Costa Rica in August 2013. The Committee made use of the procedure to address physical violence against indigenous peoples in Costa Rica and the illegal occupation of their territories. The Committee called on Costa Rica to adopt legislation providing protection to indigenous peoples' rights to lands, territories and natural resources and to investigate the violent acts and punish their perpetrators.[302]

Under the same procedure, it urged Peru to provide information on the effects which a specific gas-exploration and exploitation project might have on the rights of indigenous peoples living in voluntary isolation.[303]

298 CERD. *Observaciones finales, Argentina*, 10 December 2004, CERD/C/65/CO/1, para 16; CERD *Observaciones finales, Argentina*, 27 April 2001, CERD/C/304/Add.112, para 11; CERD, *Observaciones finales, Colombia.* 1984, A/39/18, para 131.

299 UNGA, *Report of the Committee on the Elimination of Racial Discrimination*, 2007, A/62/18, p. 61, para 304.

300 UNGA. *Report of the Committee on the Elimination of Racial Discrimination.* 2014, A/69/18, p. 37, para 12 (b).

301 UNGA, *Report of the Committee on the Elimination of Racial Discrimination*. 15 September 1993, A/48/18, Annex 3, para 7; THORNBERRY, Patrick. *Indigenous peoples and human rights*. Manchester: Manchester University Press, 2002, p. 200.

302 UNGA. *Report of the Committee on the Elimination of Racial Discrimination.* 2014, A/69/18, p. 6, para 17.

303 *ibid*, p. 7, para 22.

It also urged Guyana in 2014 to implement the right of indigenous peoples to provide free, prior and informed consent before granting any mining concessions for mining projects which may affect lands to which these peoples possess rights.[304]

The CERD further produces General Recommendations (GR) which have a similar function to the GCs produced by the HRC and the CESCR. In 1997, the CERD adopted the GR No. XXIII. on indigenous peoples. In this GR, the CERD reaffirms that indigenous peoples fall under the scope of the ICERD. It emphasises that the discrimination of indigenous peoples led to their dispossession of their territories to colonists, business enterprises and the States. Further, it urges States to respect indigenous peoples' culture and their way of life and to prevent their discrimination.[305]

2.1.2.5 Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities

Another instrument which also provides protection to indigenous peoples' rights is the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities.[306] It was adopted by the UNGA in 1993. Just as Article 27 ICCPR, it applies to indigenous peoples' land rights due to the cultural and religious aspects of indigenous peoples' relationship with their lands.

The Declaration claims to have taken inspiration in Article 27 of the ICCPR. In its Articles 2 and 3, it provides a list of individual rights of members belonging to national, ethnic, cultural, religious, and linguistic minorities, which can be exercised both individually and in community. Further, it sets out various obligations of states which are required to ensure these rights.[307]

2.1.2.6 Convention on the Rights of the Child

The CRC was adopted in 1989. It addresses indigenous children's rights related to lands mainly – but not only – in its Article 30. This article anchors the right of indigenous children to enjoy their culture, practice their religion and speak their language, together with other

304 UNGA. *Report of the Committee on the Elimination of Racial Discrimination*. 2014, A/69/18, p. 8, para 24.

305 CERD. *General Recommendation No. 23: Indigenous Peoples.* 18 August 1997, paras 3, 4 (a) and (c).

306 THORNBERRY, Patrick. *Indigenous peoples and human rights*. Manchester: Manchester University Press, 2002, p. 176; *Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities*, 3 February 1993, UNGA Res 47/135, A/RES/47/135.

307 *idem*.

members of their community.[308] According to GC No. 11 produced by the Committee on the Rights of the Child, this right is also closely linked with the use of indigenous territories and resources. This is the case due to the importance of traditional lands for indigenous cultures and religions.[309]

2.1.2.7 Convention on Biological Diversity

In the Preamble, the CBD, which was adopted in 1992, points out the dependence of indigenous peoples on biological resources. Further, in its operative provisions, the CBD calls for States' respect, preservation and maintenance of indigenous knowledge, practices and technologies for sustainable use of biological diversity. Moreover, it requires States to share the benefits produced as a result of the employment of this knowledge.[310]

2.2 The Inter-American System of Human Rights

This subchapter of Chapter 2 addresses the instruments of the IASHR.

The first part of this subchapter focuses on the only instrument explicitly addressing indigenous peoples' land rights within the IASHR – the American Declaration on the Rights of Indigenous Peoples.

The second part of this subchapter presents instruments which do not deal with indigenous peoples' land rights specifically. Those are the ACHR and the ADRDM. Due to the monitoring role of the IACtHR, the ACHR is absolutely crucial in this field. In addition, especially for States of the region which are not parties to the ACHR, the ADRDM plays an essential role as well.

2.2.1 An instrument of the Inter-American System of Human Rights dealing specifically with indigenous peoples' land rights – the American Declaration on the Rights of Indigenous Peoples

This section provides an insight into the context of the adoption of ADRIP. At the point of the ADRIP's endorsement by the OAS GA, the UNDRIP comprised the highest standards

308 *Convention on the Rights of the Child.* 20 November 1989, 1577 U.N.T.S., p. 3, Article 30.

309 Committee on the Rights of the Child. *General Comment No. 11, Indigenous Children and their Rights under the Convention,* 12 February 2009, CRC/C/GC/11, paras 16 and 35.

310 *Convention on Biological Diversity*. 5 June 1992, 1760 U.N.T.S., p. 79, Preamble and Article 8 (j)

in the field. This section thus compares these two instruments and points out ADRIP's strong points and shortcomings.

2.2.1.1 Adoption of the American Declaration on the Rights of Indigenous Peoples

Within the IASHR, the topic of indigenous peoples' rights is specifically dealt with in the ADRIP. The drafting process of the Declaration started in the same decade of the last century as that of ILO Convention 169 and the UNDRIP. More specifically, in November 1989, the OAS General Assembly (hereinafter OAS GA) requested the IACmHR to start drafting the Declaration. The initial plan was to adopt the final text in 1992.[311]

The UNDRIP served as a significant point of reference from the beginning of the drafting process.[312] The IACmHR produced the Draft American Declaration on the Rights of Indigenous Peoples (hereinafter DADRIP) in 1997.[313] It was four years after the publishing of the first draft of the UNDRIP by the UN WGIP. The DADRIP was produced by experts with very limited participation of indigenous peoples. This trend also continued after the draft's submission to the OAS General Assembly.[314] Within the OAS GA, the DADRIP was considered by the Working Group established upon the incentive from the OAS GA.[315]

A change was brought about only due to the pressure from indigenous organisations of the region.[316] Eventually, in 2001, the OAS GA recommended a more substantial inclusion of indigenous representatives in the works on the DADRIP and an establishment of a voluntary fund facilitating their participation in the meetings.[317]

311 OAS GA. *Resolution 1022 (XIX-O/89).* 18 November 1989, para 13.

312 RODRÍGUEZ-PIÑERO ROYO, Luis. The Inter-American System and the UN Declaration on the Rights of Indigenous Peoples: Mutual Reinforcement. ALLEN, Stephen and Alexandra XANTHAKI, ed. *Reflections on the UN Declaration on the Rights of Indigenous Peoples*. Hart Publishing, 2011, p. 475.

313 IACmHR. Proposed American Declaration on the Rights of Indigenous Peoples. 26 February 1997, CP/doc.2878/97 corr. 1 [online]. OAS (accessed on 23 April 2020) <http://www.cidh.oas.org/Indigenas/Indigenas.en.01/Preamble.htm>.

314 RODRÍGUEZ-PIÑERO ROYO, Luis. The Inter-American System and the UN Declaration on the Rights of Indigenous Peoples: Mutual Reinforcement. ALLEN, Stephen and Alexandra XANTHAKI, ed. *Reflections on the UN Declaration on the Rights of Indigenous Peoples*. Hart Publishing, 2011, p. 476.

315 OAS GA. *Resolution 1610 (XXIX-O/99).* 7 June 1999, para 1.

316 RODRÍGUEZ-PIÑERO ROYO, Luis. The Inter-American System and the UN Declaration on the Rights of Indigenous Peoples: Mutual Reinforcement. ALLEN, Stephen and Alexandra XANTHAKI, ed. *Reflections on the UN Declaration on the Rights of Indigenous Peoples*. Hart Publishing, 2011, p. 476.

317 OAS GA. *Resolution 1780 (XXXI-O/01).* 5 June 2001, paras 3 and 4.

Finding an agreement on the text of the Declaration turned out to be very complicated, and various changes in the method of negotiations were required. The provisions of the text were divided into four categories depending on how easily consensus could be reached on them.[318] In 2008, the delegations of Canada and the United States (also opposing countries of the UNDRIP at that point) withdrew from the negotiations. It was due to their disagreement with the direction of the negotiations of the DADRIP. They reserved their position on the final text.[319]

Throughout the negotiations, some of the most contentious issues appeared to be the right to self-determination; restitution of property taken away without indigenous peoples' free, prior and informed consent; the right of free, prior and informed consent concerning actions potentially affecting the environment on indigenous lands and territories, provisions on the rights to lands, territories and resources, and the right to development and peace and security in case of armed conflict.[320] After all, this soft-law instrument specific for the region of the Americas was adopted by the General Assembly of the OAS in 2016.[321]

It was adopted with four reservations included in the footnotes of the Declaration. One of them was made by the United States, which emphasised the legally non-binding status of the instrument. The second one was made by Canada, which pointed out that as it had not participated in the negotiations on the text, it could not take a position on the Declaration.

The other two reservations were voiced by the representatives of Colombia. It objected to its provisions on free, prior and informed consent and military activities on indigenous territories. The Delegation of Colombia further submitted three notes of interpretation of six articles of the Declaration.[322]

318 OAS, Working Group to Prepare the Draft American Declaration on the Rights of Indigenous Peoples. *CLASSIFICATION OF PROVISIONS THAT COULD FACILITATE CONSENSUS.* 15 February 2013, OEA/Ser.K/XVI, GT/DADIN/doc.329/08 rev 6, iii.

319 OAS, Working Group to Prepare the Draft American Declaration on the Rights of Indigenous Peoples. *Eleventh Meeting of Negotiations in the Quest for Points of Consensus*. 30 December 2009, OEA/Ser.K/XVI, GT/DADIN/doc.334/08 rev. 3, pp. 25-26.

320 OAS, Working Group to Prepare the Draft American Declaration on the Rights of Indigenous Peoples. Classification of provisions that could facilitate consensus. 15 February 2013. OEA/Ser.K/XVI, GT/DADIN/doc.329/08 rev 6, p. 17 *et se*q.

321 *CIDH celebra aprobación de la Declaración Americana sobre los Derechos de los Pueblos Indígenas. Press Release* [online]. Washington, D.C.: OAS IACmHR, 2016 (accessed on 10 April 2020). Available at: http://www.oas.org/es/cidh/prensa/comunicados/2016/082.asp.

322 ADRIP, Footnotes 1-5, Annex I.

2.2.1.2 Content of the ADRIP

Unlike the UNDRIP, the ADRIP is structured into sections – the Preamble and six thematic sections. The Preamble of the ADRIP contains various provisions which exactly replicate those of the UNDRIP. Nevertheless, there are also various notable differences.

The ADRIP addresses indigenous peoples as 'peoples', but it does not explicitly affirm their status as peoples. The UNDRIP does so in the Preamble. Furthermore, in contrast to the UNDRIP, the ADRIP does not mention the right to self-determination in the Preamble and thus does not make it a guiding principle of the entire instrument.[323]

Whereas the UNDRIP stipulates that '*indigenous peoples are equal to all other peoples while recognising the right of all peoples to be different (...) and to be respected as such'*, the ADRIP states that '*indigenous peoples are original, diverse societies with their own identities that constitute an integral part of the Americas*'. The UNDRIP moreover emphasises in the Preamble that indigenous peoples are entitled to collective rights. The ADRIP does not do so.

The first section contains provisions on the scope of application of the Declaration and on self-determination. Like the UNDRIP, it puts self-identification and indigenous practices as the principal criterion for identification of the indigenous peoples.[324] As opposed to the UNDRIP, it does not make any mention of the right to obtain citizenship of the states in which they live.[325]

The provisions on self-determination are identical with those of the UNDRIP, even placed in the same article – Article 3. However, the ADRIP puts the restrictive provision addressing the territorial integrity of States directly after the right to self-determination. The UNDRIP instead goes on to elaborate on indigenous peoples' right to autonomy and self-government.[326]

The UN Declaration includes the exact same restrictive provision, only incorporates it in its penultimate article. Furthermore, whereas the UNDRIP contains provisions on the right

[323] YÁÑEZ FUENZALIDA, Nancy. *Analysis: OAS's American Declaration on the Rights of Indigenous Peoples* [online]. Copenhagen: IWGIA, 2016 (accessed on 20 April 2020). Available at: https://www.iwgia.org/en/news-alerts/archive?view=article&id=2417:analysis-oass-american-declaration-on-the-rights-o&catid=150.

[324] ADRIP, Articles I. (2.) and VIII.

[325] UNDRIP, Article 33.

[326] YÁÑEZ FUENZALIDA, Nancy. *Analysis: OAS's American Declaration on the Rights of Indigenous Peoples* [online]. Copenhagen: IWGIA, 2016 (accessed on 20 April 2020). Available at: https://www.iwgia.org/en/news-alerts/archive?view=article&id=2417:analysis-oass-american-declaration-on-the-rights-o&catid=150.

of indigenous peoples to live as distinct peoples,[327] the ADRIP stresses that indigenous peoples are an integral part of their societies.[328]

Section two of the ADRIP recognises that indigenous peoples possess collective rights. It uses the exact same wording as does the UNDRIP in the Preamble. Unlike the UNDRIP's Preamble, it goes on to specify that this applies to their institutions, cultures, spiritual beliefs, languages, and also indigenous peoples' lands, territories and resources.[329]

The second section also incorporates provisions forbidding assimilation, racial discrimination and stresses the prohibition of any form of genocide[330] – provisions also included in the UNDRIP.

The ADRIP differs from the UNDRIP by incorporating provisions on issues especially relevant for the IASHR.[331] It addresses gender equality and stresses the necessity of prevention of violence, especially against indigenous women.[332] Also, it requires states to recognise indigenous peoples' right to legal personality.[333] This right is also included in the ACHR[334] and is addressed in the IACtHR's case-law in the context of indigenous peoples' communal property rights to lands.[335]

Just as the UNDRIP, the ADRIP addresses indigenous cultural heritage, spirituality and traditional knowledge, and their protection, maintenance and development.[336] These rights are included in section three along with rights related to autonomous and culturally and linguistically appropriate education and indigenous media of communication.[337]

327 UNDRIP, Article 7.

328 CLAVERO, Bartolomé. La Declaración Americana sobre Derechos de los Pueblos Indígenas: el reto de la interpretación de una norma contradictoria. *Pensamiento Constitucional*. 2016, **26**, p. 17; ADRIP, Article II.

329 ADRIP, Article VI.

330 ADRIP, Articles X, XI and XII.

331 REGINO MONTES, Adelfo. SERVICIOS DEL PUEBLO MIXE. *Organización de los Estados Americanos aprobó la Declaración Americana sobre los Derechos de los Pueblos Indígenas* [online]. Cultural Survival, 2016 (accessed on 10 May 2020). Available at: https://www.culturalsurvival.org/news/organizacion-de-los-estados-americanos-aprobo-la-declaracion-americana-sobre-los-derechos-de.

332 ADRIP, Article VII.

333 ADRIP, Article IX.

334 ACHR, Article 3.

335 IACtHR. *Case of Saramaka People v. Suriname*. Judgement of November 28, 2007, paras 159-175.

336 ADRIP, Articles XIII, XIV, XVI.

337 ADRIP, Articles XIC and XV.

The third section further includes provisions on the recognition, respect and protection of various indigenous forms of family,[338] a right not included in the UNDRIP.

The ADRIP follows the UNDRIP by including specific provisions on indigenous peoples' right to '*the highest attainable standard of physical, mental, and spiritual health'*.[339] It formulates this right as both individual and collective, as opposed to the UN Declaration, which construes it as an individual right. As to the right to a healthy environment also included in this section, the ADRIP employs wording very similar to the UNDRIP.

Nevertheless, unlike the UNDRIP, the ADRIP does not condition the placement of hazardous materials on indigenous peoples' territories upon their free, prior and informed consent. Instead, it sets out indigenous peoples' '*right to be protected against the introduction (...) of any harmful substance*' for indigenous communities, lands, territories and resources.[340]

Section four anchors indigenous peoples' right to assembly, association, and expression in keeping with their culture. Moreover, it addresses their right to autonomy and self-government concerning their own matters as a part of their right to self-determination. The provisions are fairly similar to those of the UNDRIP.

However, there is one noteworthy difference between the two declarations regarding indigenous peoples' participation. The UNDRIP anchors both the right of indigenous peoples to their own institutions and decision-making over their own, internal matters, as well as their right to participate in the decision-making of the state '*if they so choose'*.[341] The ADRIP does not include any such opt-out formulation.[342]

Where these declarations also differ, are the provisions on the indigenous jurisdiction. While the UNDRIP incorporates provisions on the recognition of indigenous land tenure systems,[343] it does not contain a general requirement that indigenous legal systems are recognised. The ADRIP includes a landmark provision on indigenous jurisdiction. It

338 ADRIP, Article XVII.

339 ADRIP, Article XVIII.

340 ADRIP, XIX; YÁÑEZ FUENZALIDA, Nancy. *Analysis: OAS's American Declaration on the Rights of Indigenous Peoples* [online]. Copenhagen: IWGIA, 2016 (accessed on 20 April 2020). Available at: https://www.iwgia.org/en/news-alerts/archive?view=article&id=2417:analysis-oass-american-declaration-on-the-rights-o&catid=150.

341 UNDRIP, Articles 4 and 5.

342 CLAVERO, Bartolomé. La Declaración Americana sobre Derechos de los Pueblos Indígenas: el reto de la interpretación de una norma contradictoria. *Pensamiento Constitucional*. 2016 (26), p. 16.

343 UNDRIP, Article 40.

incorporates indigenous peoples' right to maintain their '*juridical systems and customs*' as long as they comply with international human rights standards. It also anchors the corresponding states' obligation to recognise and respect these systems.[344]

As to provisions on indigenous peoples' participation in decision-making over matters which may affect them, both declarations set out states' obligation to consult and cooperate in good faith with indigenous peoples represented by their own institutions '*in order to obtain their free, prior and informed consent*'.[345]

Section four also deals with indigenous peoples' '*treaties, agreements and other constructive arrangements concluded with States or their successors*'.[346] A part of the provision is exactly the same as the corresponding provision of the UNDRIP. The ADRIP's version, however, sets out the recognition, observance and enforcement of these treaties '*in accordance with their true spirit and intent in good faith*' and requires States to take into account indigenous peoples' understanding of these treaties.[347] In addition, the article envisages the resolution of disputes arising under these treaties by '*competent bodies, including regional and international bodies*'.[348] Such a provision adds a potential international dimension to such disputes.[349]

Interestingly, one of the draft versions of the UNDRIP while it was still in the WGIP, included provisions on adherence to treaties with indigenous peoples '*according to their original intent'*. It also included a provision on the dispute resolution by '*competent international bodies*'.[350] They were, however, taken out during subsequent negotiations in the political bodies. On the other hand, the DADRIP adopted by the IACmHR in 1997 only included the wording '*competent bodies*'.[351]

344 ADRIP, Article XXIII.

345 ADRIP, Article XXIII (2); UNDRIP, Article 19.

346 ADRIP, Article XXIV (1)

347 ADRIP, Article XXIV (1)

348 ADRIP, Article XXIV (2).

349 THORNBERRY, Patrick. *Indigenous peoples and human rights*. Manchester: Manchester University Press, 2002, p. 403.

350 UNCHR. *Draft declaration on the rights of indigenous peoples*. 8 June 1993, U.N. Doc. E/CN-4/Sub.2/1993/26, Operative paragraph 34; THORNBERRY, Patrick. *Indigenous peoples and human rights*. Manchester: Manchester University Press, 2002, p. 403.

351 IACmHR. *Proposed American Declaration on the Rights of Indigenous Peoples*. 26 February 1997, CP/doc.2878/97 corr. 1 [online]. OAS (accessed on 23 April 2020) <http://www.cidh.oas.org/Indigenas/Indigenas.en.01/Preamble.htm>.

Section five of the ADRIP addresses social, economic and property rights, part of which are also the rights to lands, territories and resources. These are contained in Article XXV. Its wording is very similar to Article 25 of the UNDRIP. It, however, sees the indigenous peoples' distinctive relationship with their lands, territories and resources not only as spiritual but also as cultural and material.

The ADRIP echoes the UNDRIP by recognising indigenous peoples' – unspecified – '*right to lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired*'. In the following paragraph which specifies this right, it, however, also – just as the UNDRIP – employs the present tense. It, thus, incorporates indigenous peoples' right to '*own, use, develop and control the lands, territories and resources*' which they *currently* possess.[352] Unlike the UNDRIP, it does not, however, require States to establish mechanisms of recognition of lands, territories and resources traditionally owned, occupied or used *in the past*.[353]

The ADRIP also envisages recognition of '*the various and particular modalities and forms of property, possession and ownership of their [indigenous peoples'] lands, territories and resources*'. It sets itself apart from the UNDRIP by setting out the requirement that this be in line with each State's legal system and international law.[354]

The requirement of conformity with states' national legislation has been an object of wide criticism, as it is regressive with respect to both the UNDRIP and the case-law of the IACtHR.[355] According to the Court's case-law States are obliged to recognise indigenous peoples' customary forms of land ownership.[356]

352 ADRIP, Article XXV (1), (2).

353 UNDRIP, Article 27.

354 ADRIP. 15 June 2016, Article XXV (5).

355 YÁÑEZ FUENZALIDA, Nancy. *Analysis: OAS's American Declaration on the Rights of Indigenous Peoples* [online]. Copenhagen: IWGIA, 2016 (accessed on 20 April 2020). Available at: https://www.iwgia.org/en/news-alerts/archive?view=article&id=2417:analysis-oass-american-declaration-on-the-rights-o&catid=150; BLANCO, Cristina. Declaración Americana sobre los Derechos de los Pueblos Indígenas: Breve balance de un esperado documento [online]. Instituto de democracia y derechos humanos, 2016 (accessed on 24 April 2020). Available at: https://idehpucp.pucp.edu.pe/opinion/declaracion-americana-sobre-los-derechos-de-los-pueblos-indigenas-breve-balance-de-un-esperado-documento/.

356 *Awas Tingni*, paras 151 and 164.

Where the ADRIP also deviates from both the IACtHR's case-law and the UNDRIP, is the right of indigenous peoples to restitution or compensation for lands, territories and resources which they had possessed in the past and of which they have been deprived.[357]

Even though it does contain a provision on the restitution of property, it is not included in the article addressing land rights, but in an article dealing with cultural identity. This provision, moreover, speaks only of restitution of '*cultural, intellectual, religious and spiritual property taken without their free, prior and informed consent (...)'*.[358] In comparison, the UNDRIP also contains such a provision on the restitution of cultural property.[359] In addition to that, it, however, also incorporates a provision which speaks specifically of redress by means of restitution, and when not possible, compensation '*for lands, territories and resources*'.[360]

Moreover, the ADRIP does not contain any provision on the prohibition of the relocation of indigenous peoples from their lands or territories and on conditions for situations in which such a relocation does take place. Neither does it enshrine the right to return once the grounds for the relocation cease to exist. Such a provision was included in the draft version of the American Declaration, but it was removed one year before the adoption of the Declaration.[361] This provision is contained both in ILO Convention 169[362] and the UNDRIP.[363]

The American Declaration, on the other hand, noticeably reflects the case-law of the IACtHR by incorporating the obligations of demarcation and titling of indigenous peoples' lands.[364]

357 See, UNDRIP, Article 28; IACtHR. *Case of the Moiwana Community*. IACtHR, Judgement of June 15, 2005 (hereinafter *Moiwana)*, paras 133-134; IACtHR. *Sawhoyamaxa*, para 128.

358 ADRIP, Article XIII.

359 UNDRIP, Article 11.

360 UNDRIP, Article 28.

361 OAS, Working Group to Prepare the Draft American Declaration on the Rights of Indigenous Peoples. *Nineteenth Meeting of Negotiations in the Quest for Points of Consensus*. 24 May 2016. OEA/Ser.K/XVI, GT/DADIN/doc.334/08 rev. 12, p. 12, Article XXV.

362 ILO Convention 169, Article 16.

363 UNDRIP, Article 10.

364 *Awas Tingni*, para 164. For more information, see Section 3.2.4.

Section five of the ADRIP further contains provisions on the respect and protection of indigenous peoples in voluntary isolation, including their right to remain so. This provision is unique to the American Declaration and reflects the situation in the region.[365]

The fifth section also deals with the right to development. This ADRIP enshrines indigenous peoples' right to maintain and determine their own priorities with respect to their development.[366] This formulation gives indigenous peoples a little more leeway than that of the UNDRIP. The UN Declaration formulates this right as '*the right to maintain and develop their political, economic and social systems or institutions*'.[367]

The ADRIP also (like the UNDRIP) requires the states to '*consult and cooperate in good faith with indigenous peoples concerned (...) in order to obtain their free and informed consent*' prior to carrying out or approving any projects related to natural resources.[368] Also, like the UN Declaration, it incorporates provisions on restitution or alternatively compensation, in case indigenous peoples are deprived of their means of subsistence and development.[369]

Unlike the UNDRIP, the ADRIP further contains provisions on the protection of indigenous peoples and their human rights, including their lands, territories and resources in the event of armed conflict.[370]

It also prohibits military activities on indigenous territories, with the exception of relevant public interest and indigenous peoples' free consent or request. This part of the provision is very similar to the wording of the UNDRIP. Unlike the UNDRIP, however, it does not incorporate provisions on effective consultations which shall be carried out in the event that military activities are to be carried out.[371]

365 ADIRP, Article XXVI; REGINO MONTES, Adelfo. SERVICIOS DEL PUEBLO MIXE. *Organización de los Estados Americanos aprobó la Declaración Americana sobre los Derechos de los Pueblos Indígenas* [online]. Cultural Survival, 2016 (accessed on 10 May 2020). Available at: https://www.culturalsurvival.org/news/organizacion-de-los-estados-americanos-aprobo-la-declaracion-americana-sobre-los-derechos-de.

366 ADRIP, Article XXIX. (1.)

367 UNDRIP, Article 20(1).

368 ADRIP, Article XXIX. (4.).

369 ADRIP, Article XXIX. (5.).

370 ADRIP, XXX.

371 ADRIP, Article XXX. (5.); UNDRIP, Article 30.

Section six contains general provisions. This section of the ADRIP comprises a provision on the respect for the human rights and fundamental freedoms while exercising the rights affirmed in it. It is the same provision which was also included in the UNDRIP possibly as a means to protect the rights of the owners of lands claimed by indigenous peoples.[372]

Finally, an identical version of an article preventing any interpretation which would diminish indigenous peoples' both current and future rights is included both in the ADRIP and the UNDRIP.[373] It seems that due to the retrograde features of the ADRIP in comparison with the UNDRIP, such a provision may be of increased value in the former.

2.2.1.3 Conclusions on the ADRIP

It seemed that the ADRIP had many prerequisites to become the flagship instrument of international law on indigenous peoples' rights. The IASHR human rights bodies have already laid the foundations for the protection of indigenous peoples' rights. Indigenous peoples' rights are also anchored in national constitutions of many Latin-American states.[374] The US and Canada withdrew from the negotiations of the ADRIP. This means that the two of the loudest opposing voices throughout the negotiations of the UNDRIP did not participate in the ADRIP negotiations. Moreover, the UNDRIP had already been adopted and served as a strong point of departure.

Yet, the instrument incorporates various provisions which are regressive towards the already established standards. It emphasises that indigenous peoples form an integral part of national societies.[375] It requires that indigenous forms of ownership be in keeping with national laws to be eligible for recognition by States.[376] It does not mention indigenous peoples' right to restitution of their traditionally used lands, territories and resources, nor any

372 ADRIP, Article XXXVI; See Section 2.1.1.3.2 on the content of the UNDRIP; CHARTERS, Claire. The Road to the Adoption of the Declaration on the Rights of Indigenous Peoples. *New Zealand Yearbook of International Law*. 2007, **4**(7), 126.

373 ADRIP, Article XL.

374 AGUILAR, Gonzalo, Sandra LAFOSSE, Hugo ROJAS and Rebecca STEWARD. The Constitutional Recognition of Indigenous Peoples in Latin America. *Pace International Law Review Online Companion*. 2010, **2**(2).

375 CLAVERO, Bartolomé. La Declaración Americana sobre Derechos de los Pueblos Indígenas: el reto de la interpretación de una norma contradictoria. *Pensamiento Constitucional*. 2016, **26**, 17; ADRIP, Article II.

376 YÁÑEZ FUENZALIDA, Nancy. *Analysis: OAS's American Declaration on the Rights of Indigenous Peoples* [online]. Copenhagen: IWGIA, 2016 (accessed on 20 April 2020). Available at: https://www.iwgia.org/en/news-alerts/archive?view=article&id=2417:analysis-oass-american-declaration-on-the-rights-o&catid=150; ADRIP, Article XXV. (5).

restriction on their relocation from their lands and their right to return. Moreover, it does not establish any means for indigenous peoples to prevent the placement of harmful substances on their territories.

It thus seems that indigenous peoples' lower chance of participation in the process of drafting as compared to the UNDRIP[377] may have also affected the level of standards anchored in the instrument.

On the other hand, the ADRIP contains provisions which are not included in any other instrument of international law on indigenous peoples' rights.[378] Some of them based on the case-law of the IACtHR and some of them specifically reflecting the context of the region. It encompasses the obligation of demarcation and titling of indigenous peoples' lands. It incorporates states' obligation to recognise indigenous peoples' right to legal personality – a right crucial for indigenous peoples' land rights.[379]

The ADRIP further anchors indigenous peoples' right to health as both individual and collective one. It contains provisions on indigenous peoples in voluntary isolation. It also entrenches the protection of indigenous peoples in the situation of armed conflict. Additionally, its provision on treaties between states and indigenous peoples constitutes a significant leap forward with respect to the UNDRIP.

After all, even with all its shortcomings, now, there is a special instrument of international law symbolising the commitment of the Inter-American region to the improvement of the position the indigenous peoples.[380] It has, moreover, already found its way into the case-law of the IACtHR.[381]

377 BLANCO, Cristina. *Declaración Americana sobre los Derechos de los Pueblos Indígenas: Breve balance de un esperado documento* [online]. Instituto de democracia y derechos humanos, 2016 (accessed on 24 April 2020). Available at: https://idehpucp.pucp.edu.pe/opinion/declaracion-americana-sobre-los-derechos-de-los-pueblos-indigenas-breve-balance-de-un-esperado-documento/; THORNBERRY, Patrick. *Indigenous peoples and human rights*. Manchester: Manchester University Press, 2002, p. 370.

378 ADIRP, Article XXVI; REGINO MONTES, Adelfo. SERVICIOS DEL PUEBLO MIXE. *Organización de los Estados Americanos aprobó la Declaración Americana sobre los Derechos de los Pueblos Indígenas* [online]. Cultural Survival, 2016 (accessed on 10 May 2020). Available at: https://www.culturalsurvival.org/news/organizacion-de-los-estados-americanos-aprobo-la-declaracion-americana-sobre-los-derechos-de.

379 Even though since the adoption of the declaration in 2016 the IACtHR has only addressed two cases regarding indigenous peoples' land rights, this provision has already been cited in its case-law. *Lhaka Honhat Association,* para 154.

380 Although the differing position of the US and Canada needs to be noted.

381 *Lhaka Honhat Association*, paras 30, 154, 231, 248, 255.

2.2.2 Relevant instruments of the Inter-American System of Human Rights not specifically addressing indigenous peoples' land rights

This section deals with the two instruments of the IASHR which provide protection to indigenous peoples' land rights but do not mention them – the ADRDM and the ACHR. The text presents an overview of relevant provisions of these instruments.

Also, it provides the context of some of the cases before the IACmHR and IACtHR concerning indigenous peoples' land rights in which these bodies found a violation of the aforementioned provisions.

2.2.2.1 American Declaration on the Rights and Duties of Man together with the Charter of the Organisation of American States

Another instrument of the IASHR, which provides protection to indigenous peoples' rights is the ADRDM adopted in 1948. The Declaration was initially a non-binding soft law instrument. Nevertheless, according to the case-law of both the IACtHR and the IACmHR, the Declaration defines the human rights referred to in the OAS Charter and is thus now a source of legal obligations for all OAS member states.[382]

The IACtHR has also addressed the competence of the IACmHR to monitor States' observance of the obligations set out in the ADRDM. Based on the Court's interpretation of the OAS Charter[383] in conjunction with the IACmHR Statute,[384] the IACmHR is authorised to examine petitions which claim violations of the ADRDM by those States which are not a party to the ACHR.[385] The ADRDM, therefore, plays an especially important role for the member states of the OAS which are not a party to the ACHR.[386]

382 IACtHR. *Interpretation of the Declaration of the Rights and Duties of Man Within the Framework of Article 64 of the American Convention on Human Rights*. Advisory Opinion of July 14, 1989, paras 42-45; *Case of Maya Indigenous Communities of the Toledo District (Belize)*. Report No. 40/04 of 12 October 2004, para 85.

383 OAS, *Charter of the Organisation of American States*, 30 April 1948, Article 150.

384 OAS, *Statute of the Inter-American Commission on Human Rights*, 1 October 1979, Resolution No. 447, Article 1.

385 *Case of Maya Indigenous Communities of the Toledo District (Belize)*. Report No. 40/04 of 12 October 2004, para 85.

386 Some of the decisions of the IACmHR, which concern indigenous peoples' rights to lands, territories and resources, were against states which do not belong to the region of Latin America. They, therefore, do not fall under the scope of this text. (See IACmHR. *Case of Maya Indigenous Communities of the Toledo District [Belize]*. Report No. 40/04 of 12 October 2004; IACmHR. *Case of Mary and Carrie Dann [United States]*. Report No. 75/02 of 27 December 2002).

It follows from the decisions of both the IACtHR as well as the IACmHR that the most relevant provisions of the ADRDM for indigenous peoples' land rights are those of Article I. (the right to life, liberty and personal security),[387] Article II. (the right to equality before law), Article VIII. (the right to residence and movement),[388] Article XI. (the right to the preservation of health and to well-being),[389] and Article XXIII. (the right to property).[390]

A landmark case before the IACmHR concerning indigenous peoples' land rights was the *Yanomami v. Brazil.*[391] This case concerned the Yanomami indigenous community living in the Brazilian Amazon region.[392]

The State constructed a highway which crossing through the Yanomamis' ancestral territory. Further, it allowed for invasions of third parties into this territory. Among these people were construction workers, mining prospectors and farmworkers intending to settle in the area. This invasion led to epidemics of various diseases within the community, such as influenza and tuberculosis, resulting in numerous deaths.[393]

Moreover, the discovery of metals on the territory brought about violent conflicts between the miners and the Yanomamis, interfering with the lives, health, security and cultural identity of the community.[394]

The Commission found violations of various rights of the ADRDM. Namely, it declared a violation of the right to life, liberty and personal security under Article I., the right to residence and movement under Article VIII., and the right to the preservation of health and to well-being under Article XI.[395]

387 IACmHR. *Case of Yanomami, No. 7615 (Brazil).* Resolution No. 12/85. 5 March 1985 (hereinafter *Yanomami)*.

388 *ibid.*

389 *ibid*.

390 IACmHR. *Case of Maya Indigenous Communities of the Toledo District (Belize)*. Report No. 40/04 of 12 October 2004.

391 KAŠTYL, Miroslav. Současné postavení domorodého obyvatelstva v americkém systému ochrany lidských práv [Current status of indigenous peoples in the context of Inter-American protection of human rights]. In: ŠTURMA, Pavel, ed. *Mezinárodní ochrana lidských práv: regionální a tematická diferenciace*. Praha: Univerzita Karlova, Právnická fakulta, 2011, p. 61.

392 *Yanomami,* para 2.a.

393 *Yanomami,* para 10.a.-b.

394 *Yanomami,* para 10.d.

395 *Yanomami,* The IACmHR, resolves: 1.

2.2.2.2 American Convention on Human Rights

An instrument of international law crucial for indigenous peoples' land rights is the American Convention on Human Rights. Even though the Convention does not explicitly mention indigenous peoples, its application on indigenous property rights follows from the jurisprudence of the IACtHR. Due to its binding nature and the IACtHR's role as a monitoring body, it is one of the essential instruments providing protection to these rights.

The IACtHR rules on cases concerning the interpretation or application of the ACHR which are submitted to it by any State party to the ACHR or by the Inter-American Commission on Human Rights. It is authorised to decide over cases against States which have either permanently recognised its jurisdiction or which have declared their recognition of its jurisdiction in a special agreement.[396] For States party to ACHR which have not accepted the Court's jurisdiction, the monitoring role is carried out by the IACmHR.[397]

Out of 20 Latin-American States, only Cuba is not a state party to the ACHR. All 19 state parties except the Dominican Republic have accepted the jurisdiction of the IACtHR.[398]

It follows from the Court's case-law that for the interpretation of the provisions of the ACHR, the Court also takes in to account other instruments of international law, which can shed light on the issue in question. The IACtHR came to this conclusion based on Article 29(b) of the ACHR. According to this provision, the level of protection offered by the ACHR may not be more restrictive than that provided by the national law or any other international instrument which applies to the relevant State.[399]

Out of the provisions of the ACHR, Article 21 of the Convention (the right to property) has played a fundamental role in the protection of indigenous peoples' land rights in the region of Latin America.[400]

396 ACHR, Articles 61, 62.

397 This follows from Article 1 of the IACmHR Statute (OAS, *Statute of the Inter-American Commission on Human Rights*, 1 October 1979, Resolution No. 447); ACHR, Articles 41(f) and 44.

398 DEPARTMENT OF INTERNATIONAL LAW, OAS. *AMERICAN CONVENTION ON HUMAN RIGHTS "PACT OF SAN JOSE, COSTA RICA" (B-32): Signatories and Ratifications* [online]. San Jose, Costa Rica: OAS, 2014 (accessed on 12 May 2020). Available at: https://www.oas.org/dil/treaties_B-32_American_Convention_on_Human_Rights_sign.htm#Argentina.

399 *Yakye Axa*, paras 127-130.

400 This right is the subject of Chapter 3.

Other provisions which have been invoked in the context of indigenous peoples' land rights are that of the right to juridical personality under Article 3,[401] the right to life under Article 4, and the right to judicial protection under Article 25.[402] Most recently, the Court also applied Article 26 on progressive development.

The right to juridical personality is enshrined in Article 3 of the ACHR. It represents every person's right to recognition as a person before the law and provides the basis for one's right to have rights.[403] The IACtHR has held that in order to guarantee indigenous peoples their right to own ancestral lands in a communal manner, the juridical personality of the indigenous or tribal community must be recognised.[404]

The IACtHR addressed the right to life in the *Sawhoyamaxa Indigenous Community* v. *Paraguay*. In this case, the State failed to enforce the right of the Sawhoyamaxa indigenous peoples to their lands. Paraguayan laws do recognize indigenous peoples' right to communal property rights. The ownership of the claimed lands had, however, been conveyed to a third party. The Sawhoyamaxa community started claiming their rights to these lands which form a part of their ancestral territory in 1993.[405] The State did not return these lands, nor did it provide the community with alternative ones.[406]

As a result, the community was denied access to these ancestral lands and lived on the side of a public road in atrocious conditions. Due to the lack of access to their traditional way of subsistence and the lack of medical care and water, many of the members of the Sawhoyamaxa community died of preventable diseases and malnutrition. The Court thus found that the State could have prevented this situation by returning the traditional lands to the community within a reasonable time or by providing them with alternative ones. By failing to adopt adequate measures, the State violated the right to life of various members of the community anchored in Article 4 of the ACHR.[407]

401 *Saramaka,* para 172.

402 *Awas Tingni*, paras 115, 127 and 137-139.

403 STEINER, Christian and Marie-Christine FUCHS, ed. *Convención Americana sobre Derechos Humanos: Comentario*. 2nd edn. Bogotá: Konrad-Adenauer-Stiftung e. V., 2019, p. 110.

404 *Saramaka,* paras 172.

405 *Sawhoyamaxa*, paras 135-144.

406 For more information on the obligations of the State with respect to indigenous peoples' lands ancestral lands which have been conveyed to third parties, see section 3.2.7.

407 *Sawhoyamaxa,* paras 156-178.

The right to judicial protection grounded in Article 25 of the Convention has also been applied in the context of protection of indigenous peoples' land rights. It comprises the right of everyone to an effective judicial remedy. The IACtHR has interpreted this right specifically in the context of indigenous peoples' property rights. It ruled that it embodies the obligation of States to establish a legal procedure which enables the delimitation, demarcation and titling of indigenous peoples' lands.[408]

In its most recent judgement related to indigenous peoples' land rights, *Lhaka Honhat Association v. Argentina,* the IACtHR addressed claimes under Article 26 on progressive development. In this case, various issues arose under a few different rights, all under the scope of Article 26. Namely, it was the right to a healthy environment, adequate food, water, and to take part in cultural life. It was the first time that the IACtHR addressed these rights in a contentious case as stand-alone rights under Article 26.[409]

Article 26 ACHR is the only provision of Chapter III. ACHR. This Chapter is entitled '*economic, social and cultural rights*'. The article enshrines the obligation of the State parties to the ACHR to undertake measures in order to progressively achieve the economic, social, educational, scientific and cultural standards grounded in the OAS Charter.

The case concerned various indigenous communities which, from 1991, had been together claiming their rights to their ancestral lands. Argentina took some partial steps to ensure the rights of these communities to their lands. However, until the judgement of the IACtHR in February 2020, it failed to properly implement them.[410]

For 28 years, Argentina did neither issue a title deed to these communities, nor did it demarcate their lands. It also did not relocate third parties from them. In the meantime, third parties carried out illegal wood-logging, installed fences and reared cattle on these territories.[411]

The stockbreeding and forestry affected the environment of the territories and the communities' access to water. It also interfered with their traditional means of subsistence.

408 *Awas Tingni*, paras 115, 127 and 137-139.

409 IACtHR. *Caso Comunidades indígenas miembros de la asociación Lhaka Honhat (Nuestra tierra) vs. Argentina, Resumen oficial emitido por la Corte Interamericana*, Sentencia de 6 de Febrero de 2020, part III.b.

410 *Lhaka Honhat Association*, para 287.

411 *Lhaka Honhat Association*, para 287.

According to the Court, this interference with the indigenous communities' traditional resources led to harm to their cultural identity.[412]

The IACtHR addressed the claims under all these rights together due to their interrelatedness. It found support for its ruling under these rights in many instruments of international law, including the documents produced by the UN treaty-monitoring bodies mentioned in Chapter 2.1.2.

The Court found the basis for the application of the right to a healthy environment under Article 26 ACHR in its *Advisory Opinion OC-23/17*. In this advisory opinion, The IACtHR held that '*a healthy environment is a fundamental right for the existence of humankind'*.[413] It also concluded that the right to a healthy environment falls under Article 26 ACHR.[414]

For the right to adequate food, the IACtHR found support in the GC No. 12 of the CESCR on the right to adequate food. With respect to the right to water, the Court referred to the CESCR's GC on the right to water. Regarding the right to take part in cultural life, the Court based its observations, among others, on the CESCR's GC No. 21 on the right to take part in cultural life. Also, it referred to the GC No. 23 of the HRC, on the rights of minorities.[415]

Finally, the IACtHR concluded that the State failed to ensure the right of the indigenous communities to control the activities on their ancestral territory. As a result, the rights of these communities to a healthy environment, adequate food, water, and to take part in cultural life under Article 26 of the ACHR were violated.[416]

These findings of the Court are rather progressive. However, there seems to be plausible grounding for them. The provision of Article 26 of the ACHR foresees progressive development. Argentina is a party to the ICCPR,[417] ICESCR,[418] and the ILO Convention

412 *Lhaka Honhat Association*, para 284.

413 IACtHR. *Advisory Opinion OC-23/17,* November 14, 2017 (hereinafter *OC-23/17*), para 59.

414 *OC 23/17*, para 56.

415 *Lhaka Honhat Association,* paras 202-289.

416 *Lhaka Honhat Association,* para 289.

417 This instrument anchors the rights of minorities. (See section 2.1.2.2 on the ICCPR)

418 This instrument anchors the right to water, adequate food and the right to take part in cultural life. (See section 2.1.2.3 on the ICESCR).

169.[419] The rights which were violated in this case are anchored in these instruments. Moreover, it follows from the previous well-established case-law of the IACtHR that the Court is authorised to take other international law instruments, which apply to the State party to the case, into account when interpreting the ACHR.[420]

Now, the IACtHR's jurisprudence also reflects the interconnectedness between indigenous peoples' rights to their territories, and their right to adequate food, water, healthy environment and culture.

3. Property rights as a basis for the protection of indigenous peoples' land rights in the case-law of the Inter-American Court of Human Rights

The focal point of Chapter 3 are property rights. The first part of this chapter provides the background for where indigenous peoples' right to own their lands is grounded.

Subsequently, the second part presents the jurisprudence of the IACtHR on indigenous peoples' land rights under Article 21 of the ACHR enshrining the right to property.[421]

3.1 Indigenous peoples' property rights

Indigenous peoples' collective form of land ownership is distinct from the classical concept of the individual right to private property *(dominium)*.[422]

Gilbert points out that indigenous peoples' claim for recognition of their collective property rights poses a challenge for human rights law.[423] Recently, indigenous peoples'

[419] This instrument anchors indigenous peoples' environmental rights. See, ŽÁKOVSKÁ, Karolina. Práva domorodých národů jako nástroj ochrany životního prostředí [Rights of Indigenous Peoples as a tool for environmental protection]. ŠTURMA, Pavel a Karolina ŽÁKOVSKÁ, ed. *Od zákazu diskriminace k ochraně kolektivních práv*. 1. Prague: Univerzita Karlova, Právnická fakulta v nakl. Eva Rozkotová, 2014, p. 81.

[420] For more information on the evolutive interpretation employed in the case-law of the IACtHR, see Section 3.2.2.

[421] For an overview of findings of the IACtHR on this issue, see Annexe I.

[422] GILBERT, *Jérémie. Indigenous Peoples' Land Rights under International Law: From Victims to Actors.* Netherlands: Brill | Nijhoff, 2007, p. 88; '*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 centered on an individual but rather on the group and its community*.' *Awas Tingni*, para 149.

communal property rights have been increasingly gaining recognition within international human rights law.

The obligation of states to recognise indigenous peoples' right to own their lands is enshrined in ILO Conventions 107 and 169, and the UN and the American Declarations.[424] Only the oldest instrument, ILO Convention 107, speaks of individual ownership rights.[425] All of the newer instruments fully recognise the communal aspect of indigenous land tenure and omit any mention of individual property rights. ILO Convention 169, the UNDRIP and the ADRIP further acknowledge the significance of the special collective relationship of indigenous peoples to their lands.[426]

All four of these instruments in some way also anchor the rights of indigenous peoples with respect to measures which may affect them, including development projects carried out on their territories or their relocation from their traditional lands. The latter three instruments do so in a significantly more progressive manner.[427]

These three instruments also mention the rights of indigenous peoples to natural resources. The two Declarations, moreover, specify that indigenous peoples have the right to own them.[428]

The right of indigenous peoples to own their lands is also grounded in Article 21 of the ACHR. The Article reads:

'1. Everyone has the right to the use and enjoyment of his property. The law may subordinate such use and enjoyment to the interest of society.

2. No one shall be deprived of his property except upon payment of just compensation, for reasons of public utility or social interest, and in the cases and according to the forms established by law.

423 GILBERT, *Jérémie. Indigenous Peoples' Land Rights under International Law: From Victims to Actors.* Netherlands: Brill | Nijhoff, 2007, p. 88.

424 ILO Convention 107, Article 11; ILO Convention 169, Article 14; UNDRIP, Articles 26 and 27; ADRIP, Article XXV.

425 ILO Convention 107, Article 11.

426 ILO Convention 169, Article 13; UNDRIP, Articles 1, 25, and 26; ADRIP, Articles VI. and XXV.

427 ILO Convention 107, Article 12; ILO Convention 169, Articles 15, 16; UNDRIP, Articles 10, 19, 29, 30, 32.

428 ILO Convention 169, Article 15; UNDRIP, Articles 25-28; ADRIP, Article XXV.

3. Usury and any other form of exploitation of man by man shall be prohibited by law.'[429]

Paragraph 1 of Article 21 anchors the content of the right to property and sets out conditions for its restriction. These conditions are further elaborated on in paragraph 2.

Interestingly, all the versions of this instrument except the English one incorporate the right under Article 21 as the right to *private* property. Nevertheless, the IACtHR has developed a complex body of jurisprudence according to which indigenous peoples' *communal* property rights to their lands also fall under the scope of this article.

3.2 Case-law of the Inter-American Court of Human Rights on indigenous peoples' land rights under Article 21

Due to the jurisprudence of the IACtHR, the right to property has become the central pillar of the protection of indigenous peoples' land rights in Latin America. The IACtHR has step by step developed a complex set of rights of indigenous peoples and the corresponding obligations of States under Article 21 of the ACHR. The following sections analyse the content of this case-law.

3.2.1 Indigenous peoples' collective spiritual relationship to their lands

For indigenous peoples, their lands, territories and resources do not merely constitute a source of subsistence, but also form an essential part of their culture and religion. Indigenous peoples have a profound spiritual connection with their ancestral lands and live in harmony with their environment.[430] Indigenous peoples' collective relationship with their ancestral lands plays an essential role in their physical and mental health and the perpetuation of their culture.[431]

The IACtHR has recognised the fundamentality of this spiritual relationship for indigenous peoples' current and future existence and emphasised the importance of protection of their collective property rights over their lands under the scope of Article 21 of the ACHR in its jurisprudence.

[429] ACHR, Article 21.

[430] DANNENMAIER, Eric. Beyond Indigenous Property Rights: Exploring the Emergence of a Distinctive Connection Doctrine. *Washington University Law Review*. 2008, **86**(1), 86-7.

[431] IACmHR. *Case of Maya Indigenous Communities of the Toledo District,* Report No. 40/04 of 12 October 2004, para 155.

According to the Court, '*the close ties of indigenous people with the land must be recognised 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'*.[432]

In the case of *Saramaka v. Suriname*, the IACtHR affirmed the dependency of the very survival of indigenous and tribal peoples on the safeguarding of this relationship.[433]

3.2.2 Protection of indigenous peoples' communal land rights under Article 21 ACHR

Indigenous peoples' concept of collective land tenure does not map onto the concept of private property exactly. Right to property is anchored in Article 21 of the ACHR, but its wording does not mention any collective element of this right. The IACtHR has, however, interpreted this provision as inclusive of indigenous peoples' communal ownership.

This follows from the IACtHR's landmark judgement in the case of the *Mayagna (Sumo) Awas Tingni v. Nicaragua*. The Court, using evolutionary interpretation, interpreted Article 21 in light of the provision anchored in Article 29(b) ACHR.

According to this provision, no right enshrined in the ACHR can be interpreted in a way which is more restrictive of such right, than provisions of another convention to which the respective State is a party or than the State's national laws. As a basis, it referred to the recognition of indigenous collective property rights in the Nicaraguan Constitution.[434]

The IACtHR reiterated this argumentation in various subsequent cases. As a source of recognition of indigenous peoples' communal ownership under property rights, the Court relied both on provisions of states' national law (if they recognised indigenous peoples' collective property rights), as well as on international treaties (in particular Article 11 of the

[432] *Awas Tingni*, para 149.

[433] *Saramaka*, paras 90 and 122.

[434] *Awas Tingni*, para 148.

ILO 107 Convention[435] and Article 13 of the ILO 169 Convention[436]) if respective states were state parties to these treaties.

The IACtHR reiterated this position in its judgement in the case of *Yakye Axa v. Paraguay*.[437] The Court took into consideration the provisions of ILO Convention 169. In particular, it relied on provisions enshrining the collective relationship of indigenous peoples with their lands and the importance of these lands for their cultural survival.

Eventually, the Court confirmed that Article 21 also protects these collective ties of indigenous peoples with their lands.[438] The IACtHR further dealt with indigenous peoples' collective property rights under Article 21 of the ACHR in the case of indigenous communities *Kuna of Madungandí and Emberá of Bayano.*

In this case, the Court further held that Article 21 needs to be interpreted in light of ILO Convention 169, the UNDRIP, other instruments and decisions of international bodies, as well as national laws, which altogether form the *corpus iuris* which defines the obligations of state parties under the ACHR.[439]

In the case of *Moiwana v. Suriname,* the Court applied Article 21 ACHR as a basis for the recognition of tribal peoples' property rights without a reference to neither the ILO Conventions nor Surinamese national laws. Suriname was not (and still is not) a party to neither of the two ILO Conventions related to indigenous people's land rights. Also, Surinamese national legislation did not (and still does not) recognise collective property rights.[440]

The Court included the tribal peoples' communal land rights under the scope of Article 21 solely based on the provisions of this article and its previous interpretation in its jurisprudence.[441] This judgement consolidated the inclusion of indigenous peoples' communal

[435] IACtHR**.** *Case of the Kuna Indigenous People of Madungandí and the Emberá Indigenous People of Bayano and their members v. Panama*. Judgement of October 14, 2014 (*Kuna of Madungandí and Emberá of Bayano)*, para 116.

[436] *Yakye Axa*, paras 130-137.

[437] *Yakye Axa*, para 137.

[438] *Yakye Axa*, para 127 *et seq.*

[439] *Kuna of Madungandí and Emberá of Bayano*, para 113; IACtHR. *Case of the Community Garífuna Triunfo de la Cruz and its members v. Honduras*. Judgement of October 8, 2015 (*Garífuna Triunfo de la Cruz)*, para 103.

[440] *Moiwana*, para 86(5).

[441] *Moiwana*, paras 125-134.

property rights under Article 21 ACHR independently of a State's ratification of the two ILO Conventions and its national laws.

However, it should be noted that the Court developed this interpretation of Article 21 based on the national law of one State – Nicaragua. Subsequently, it applied it when deciding on the obligations of another state – Suriname. As has been mentioned, unlike Nicaragua, Suriname had not implemented legislation underpinning indigenous peoples' communal property rights. The argumentation of the Court in this case is therefore problematic.

A question arises whether, had the *Moiwana* case come before the IACtHR first, the Court would have reached the same conclusion. In its subsequent judgement against Suriname, the Court based the obligation of Suriname to recognise indigenous peoples' communal property rights on Article 21 ACHR, interpreted in light of Article 1 common to the Covenants (right to self-determination) and Article 27 of the ICCPR (rights of minorities), to which Suriname is a State party.[442]

3.2.3 Recognition of traditional possession as a title

As regards the recognition of indigenous peoples' property rights in the event that they lack a real title to the relevant land, the Court further held in the aforementioned *Awas Tingni* case, that indigenous peoples' customs and traditional use need to be taken into account when assessing the existence of property rights.

According to the Court, traditional possession of land suffices as a title for the recognition and subsequent registration of these rights.[443] In the case of *Xucuru v. Brazil,* the IACtHR further specified that the traditional possession of lands by indigenous peoples has the exact same effects as a title deed issued by the State.[444]

[442] IACtHR. *Case of the Kaliña and Lokono Peoples v. Suriname*, Judgement of November 25, 2015 (*Kaliña and Lokono)*, paras 122-125.

[443] *Awas Tingni*, para 151.

[444] *Xucuru,* para 117.

Based on this finding of the IACtHR, it can be argued that indigenous peoples' communal property rights exist regardless of the State's act of titling them; such act of titling is declaratory.[445]

3.2.4 The right to demarcation, delimitation, titling, effective control and permanent use

The recognition of indigenous peoples' long-term traditional possession of lands as equal to a real title is only the first in a set of obligations of States concerning indigenous communal property rights.

In the case of the *Mayagna (Sumo) Awas Tingni v. Nicaragua*, the Court held that to ensure indigenous peoples' full enjoyment of their property rights over their lands, states are obliged to adopt a procedure which will allow these rights to materialise.[446]

The *Awas Tingni* case concerned an indigenous community of over six hundred members traditionally inhabiting lands in the northern part of the Pacific coast of Nicaragua. The indigenous community did not have a title deed to the lands which they inhabited, but from 1991 they were seeking to have their rights to these lands recognised and to have the lands demarcated.

At that point, the Constitution of Nicaragua recognised indigenous communal land ownership.[447] Still, there was no law establishing an effective process of recognition of indigenous collective land rights, and the delimitation,[448] demarcation[449] and titling[450] of these lands.[451]

445 RUIZ CHIRIBOGA, Oswaldo and Gina DONOSO. Jurisprudencia de la Corte IDH sobre los Pueblos Indígenas y Tribales. Fondo y Reparaciones. STEINER, Christian and FUCHS, Marie-Christine, ed. *Convención Americana sobre Derechos Humanos: Comentario*. 2nd edn. Bogotá: Konrad-Adenauer-Stiftung e. V., 2019, p. 1155.

446 *Awas Tingni*, para 152.

447 *Constitución Política de la República de Nicaragua*. Adopted 19 November 1986, Articles 89 and 180; *Awas Tingni*, paras 115-147.

448 Delimitation of lands is the verbal or graphical description of the boundaries of the specific territory.

449 Demarcation of lands is the formal process of identifying the actual locations and boundaries of indigenous lands or territories and physically marking those boundaries on the ground. DAES, Erica-Irene. *Indigenous people and their relationship to land.* ECOSOC, Sub-Commission on Prevention of Discrimination and Protection of Minorities, 1999, UN Doc. E/CN.4/Sub.2/1999/18, para 47.

450 Land titling procedures provide legal descriptions of the nature of the land and resource rights held, in accordance with laws and land tenure systems. OECD. *OECD Rural Policy Reviews, Linking Indigenous Communities with Regional Development.* 17 July 2019, Chapter 3.

451 *Awas Tingni,* paras 115-147.

In 1996, the State awarded a concession to a private company for wood logging in the area claimed by the Awas Tingni community. The State considered the lands as state-owned and thus did not carry out any consultations with the indigenous community before granting the concession.

The IACtHR held that by not having established a mechanism enabling delimitation, demarcation and titling of indigenous peoples' lands, Nicaragua hindered the possibility of this community to enjoy their communal property.

The Court, therefore, ordered the State to establish a procedure facilitating the delimitation, demarcation and issuing of a title deed to the lands of indigenous communities. Moreover, this procedure needs to comply with indigenous peoples' customary law and traditions.[452] Without such a delimitation, demarcation and titling, indigenous people are exposed to a situation of uncertainty over the extent of their rights.[453]

According to the Court, a mere abstract legal recognition of property rights without an actual delimitation, demarcation and titling lacks any practical purpose.[454] Moreover, until the delimitation, demarcation and titling procedure is completed, states have to guarantee the indigenous community 'effective ownership' of the lands. Also, States must abstain from undertaking any activity which could have an adverse effect on the claimed territory. States further have to ensure that no third party engages in any such activity.[455]

However, the mere practical possibility to use and occupy land without legal recognition of property rights does not suffice either. The *Saramaka v. Suriname* case addressed this issue.

The IACtHR ruled that the State must guarantee indigenous peoples both permanent ownership and effective control over their lands without any external interference.[456] Suriname does not recognise indigenous communal property rights. It argued that the Saramaka people have the possibility of using and occupying their ancestral lands through a 'community forests' permit.

[452] *Awas Tingni*, para 164; *Garífuna Triunfo de la Cruz*, para 104.

[453] *Garífuna Triunfo de la Cruz*, para 106.

[454] *Awas Tingni*, para 164; *Garífuna Triunfo de la Cruz*, para 104.

[455] *Awas Tingni*, para 164; *Kaliña and Lokono*, para 132.

[456] *Saramaka*, para 115.

The IACtHR, however, objected that these permits, which are in fact forestry concessions, depend on the discretion of the authority granting them. Also, they are revocable. Therefore, they do not guarantee the permanent use and enjoyment of the property rights to their lands and do not provide the people with the necessary legal certainty.[457]

Another obligation which, according to the IACtHR, accompanies the guarantee of indigenous peoples' property rights is regularisation (*saneamiento* in Spanish). It consists of the remedy of any legal defects of the title, including the discharge of obligations attached to the lands. Third parties occupying the territory must be displaced (according to procedures established by the law), and any other interference with the peaceful enjoyment of the property rights must be removed.[458]

This obligation was first mentioned in 2015 in the case of *Garífuna de Punta Piedra v. Honduras*.[459] In this case, the Court found support for its findings on the concept of regularisation of indigenous peoples' land rights in the communication of the UN Special Rapporteur on the Rights of Indigenous Peoples addressed to Nicaragua and in the national laws of some of the states in the region, in particular Colombia.[460]

It is, however, necessary to point out that in his communication, the UN Special Rapporteur James Anaya found support for Nicaragua's obligation of regularisation in Nicaraguan national law.[461] Subsequently, the Court found that Honduran legislation did not incorporate the obligation of the State to carry out regularisation of indigenous communal property rights. According to the IACtHR Honduras was obliged to carry out the regularisation of the *Garífuna de Punta Piedra* land rights based on a contract between Honduras and the indigenous community.[462]

457 *Saramaka,* para 113-115.

458 *Xucuru*, para 124.

459 IACtHR. *Case of Garífuna de Punta Piedra y sus Miembros v. Honduras.* Judgement of October 8, 2015 (*Garífuna de Punta Piedra)*, para 181.

460 *Garífuna de Punta Piedra,* paras 176 and 178.

461 UN Special Rapporteur on the Rights of Indigenous Peoples. *Communication to Nicaragua of 10 May 2013*, NIC 1/2013.

462 *Garífuna de Punta Piedra,* paras 113, 114 and 180.

Finally, the Court concluded that land regularisation was one of many measures a state could adopt to comply with its obligation to guarantee indigenous and tribal peoples' effective enjoyment and use of their property rights.[463]

When the Court next had to address this positive obligation of a state to ensure and protect the peaceful enjoyment of indigenous communal property rights, it substantiated it in a more elegant way.

In the case of *Xucuru v. Brazil* from 2018, the IACtHR reasoned that regularisation was based on the principle of legal certainty. It held that regularisation was one of the States' specific obligations linked with indigenous peoples' communal property rights alongside delimitation, demarcation and titling.[464]

These obligations of States towards indigenous communities stemming from the long-term possession of their ancestral lands, moreover, also apply in cases where the community was provided with substitute lands. This follows from the case of *Kuna Indigenous People of Madungandí and the Emberá Indigenous People of Bayano and their members v. Panama*.

The Kuna de Madungandí and Emberá de Bayano peoples were moved to alternative lands because their ancestral lands were to be flooded due to construction of a dam in the early 1970s. The State, however, failed to comply with its obligation to title, delimit and demarcate these new lands within a reasonable time.[465]

Although these obligations of delimitation, demarcation and titling of indigenous ancestral lands are conditional on possession over an extended period of time, the IACtHR ruled that the State's obligations attached to the substitute lands have to be the same as those which are linked to the ancestral lands. Were it not so, the community would be deprived of its rights, even though it was not in its power to possess these new lands for an extended period of time.[466]

463 *Garífuna de Punta Piedra,* para 181.

464 *Xucuru,* paras 120, 126 and 132.

465 The Court does not mention the obligation of regularization. This obligation was established in the IACtHR's case-law after the delivery of this judgement.

466 *Kuna of Madungandí and Emberá of Bayano,* para 120-122.

3.2.5 The right to own natural resources

The IACtHR has also addressed the relationship between lands and resources, because of the inextricable connection between them in indigenous peoples' way of life. It concluded that Article 21 covers indigenous peoples' property rights not only to their lands but also to those natural resources which are located on these lands and which indigenous peoples traditionally use.

According to the IACtHR's judgement in the *Yakye Axa v. Paraguay* case, some of the natural resources on indigenous peoples' territories are crucial for the maintenance of their distinctive culture, traditions, health and medicine, and their overall survival as peoples.[467]

In another case, the Court held that indigenous peoples have the right to own the natural resources which they have traditionally used for the same reasons that they have the right to own their traditionally occupied lands. According to the IACtHR, separating indigenous peoples' rights to their territories from the rights over their natural resources would render the protection of their land rights meaningless.[468]

3.2.6 The right to restitution of ancestral lands

In the event that an indigenous or tribal community is deprived of the possibility to occupy its ancestral lands to which it has a traditional relationship, even though it may lack a real title to these lands, its property rights persist. This follows from the IACtHR's judgement in the *Moiwana* case.

The Moiwana tribal community was forced to leave its ancestral lands after a massacre carried out by members of the Surinamese armed forces against the community in 1986. During the massacre, 40 members of the tribal community were killed, and the whole village was demolished. Suriname failed to investigate the events and punish the perpetrators.[469] This state of impunity made the surviving members of the community fear reoccurrence of the events, and therefore they did not intend to return to these lands.[470]

The Court held that, even though the tribal community did not own a real title to its traditional lands and had not been able to occupy these lands for almost twenty years, it

467 *Yakye Axa*, paras 135-137.

468 *Saramaka*, para 122.

469 *Moiwana*, para 3.

470 *Moiwana*, para 128.

remained the legitimate owner of these lands. The IACtHR reiterated that traditional land possession entitles indigenous and tribal peoples to require the recognition of their property rights and held that the deprivation of the possibility to occupy these lands does not lead to a loss of their claim.[471]

An exception to this rule is a case when property rights to ancestral lands have been lawfully transferred to third parties in good faith without the indigenous peoples' consent. In such a case, according to the Court, the State is obliged to either return the lands to the indigenous community which had traditionally occupied it or substitute it with lands of the same extent and quality.[472]

3.2.7 Conflict of indigenous peoples' rights to communal property and private property rights

The deficiencies in states' guarantee of indigenous peoples' land rights, including the lack of recognition of communal property rights and delays in delimitation, demarcation and titling of indigenous lands, bring along additional complications. It is sometimes the case that, during the time when indigenous peoples' property rights were not ensured, these rights were also conferred on other persons, often in good faith.

When there is a conflict between the property rights claim of an indigenous community and third parties in good faith, it is up to the State to assess the consequences of one right prevailing over the other in each individual case.

The IACtHR addressed such a situation in 2005 in the *Yakye Axa* case. The Yakye Axa is an indigenous community living in Paraguay whose culture and subsistence is based on hunting, fishing, gathering, and farming. At the point of the judgement, it consisted of approximately 90 families. Their ancestral lands were sold through the London stock exchange to British entrepreneurs at the end of the 19th century and subsequently managed by the Anglican church. The members of the indigenous community were employed on these lands but received low wages and lived in poor conditions.

In 1993, the community started the procedure of claiming back their ancestral lands. The State acknowledged that these lands (which at that point were owned by various private companies) represented part of their ancestral territory. Nevertheless, it did not enable the

471 *Moiwana*, paras 133-134.

472 *Sawhoyamaxa*, para 128; *Xákmok Kásek*, para 109; *Kaliña and Lokono*, para 131.

community to, in fact, own and use them. The State claimed that the lands were '*under rational use*'.[473]

After ten years of proceedings, expropriation of the lands from their current owners was ruled out. The community was offered substitute lands, which it rejected because no consultation had preceded the offer.[474]

When addressing the *Yakye Axa* case, the Court first recalled the general rules for resolving a situation of two contradicting rights envisaged in Article 21 ACHR and further elaborated in the IACtHR's case-law; each restriction must be *established by law*, it must be *necessary* and *proportional*, and it must follow a *legitimate aim* in a democratic society.[475]

Subsequently, it pointed out that when weighing the private rights against indigenous peoples' rights in each particular situation, the State needs to take into consideration the role which ancestral lands play for the collective survival of indigenous communities as a people and the preservation of their culture.[476] The failure to protect indigenous peoples' communal property rights could result in a violation of other human rights of these communities and their members, including their right to life and the preservation of their culture.

The preservation of indigenous cultures can, according to the Court, represent a *legitimate aim* in a pluralist democratic society. Moreover, the restriction of private property rights may be *necessary* for the attainment of this aim. Additionally, payment of fair compensation to the affected individuals may make such a restriction *proportional*.

The IACtHR also clarified that this does not imply that indigenous peoples' rights always prevail. According to the Court, '*for concrete and justified reasons,*' it is sometimes not possible to return traditional lands to indigenous peoples. Where this is the case, the compensation, be it in money, in kind, or in the form of alternative lands, must be based on all that these ancestral lands represent for indigenous peoples.[477]

As to the form of the compensation, the Court based its findings on Article 16(4) of ILO Convention 169 (ratified by Paraguay in October 1993), which addresses the right of

473 *Yakye Axa*, para 50 *et seq*.

474 *Yakye Axa,* paras 50.59-50.61.

475 *Yakye Axa,* paras 144-145.

476 *Yakye Axa,* para 146.

477 *Yakye Axa*, paras 146-149, 154.

indigenous peoples to return to their ancestral lands. The IACtHR found that it does not depend solely on the State to determine the form of compensation. The State must consult the respective indigenous peoples according to their own procedures and reach a consensus on the selection of alternative lands or monetary compensation or both.[478]

The Court subsequently reiterated this position in the case of *Sawahoyamaxa v. Paraguay*[479] and the *Xákmok Kásek v. Paraguay*.[480] In the *Yakye Axa* case, Paraguay did not make it possible for indigenous peoples to return their ancestral lands, nor did it reach a consensus on compensation. Therefore, the Court declared a violation of Article 21 ACHR.

3.2.8 Guarantees in case of an interference with indigenous peoples' rights to traditionally used natural resources

The property rights of private persons in good faith are only one instance of interference with indigenous peoples' land rights. Indigenous peoples are often affected by projects of exploration and exploitation of natural resources on their territories, such as the construction of water dams, wood logging or gold mining.

This was also the case in *Saramaka v. Suriname*, where Suriname granted concessions for gold mining and timber logging within the territory claimed by the Saramaka tribal people without consulting them.

As has previously been pointed out, indigenous peoples have the right to own those natural resources which they have traditionally used as a part of their culture and which are necessary for their survival. Nevertheless, exploration and exploitation of even those natural resources which indigenous peoples do not traditionally use may indirectly affect those resources which they do.

In *Saramaka v. Suriname,* the Court dealt with the question of the interconnectedness of natural resources traditionally used by indigenous peoples and those not traditionally used. It pointed out that it is very probable that the extraction of natural resources which are not traditionally used by indigenous peoples will also affect those resources which are necessary for indigenous peoples' survival. It used the example of clean natural water, where cleanliness relates to the number of fish living in it. The Saramakas catch fish as a means of subsistence.

478 *Yakye Axa*, para 151.

479 *Sawhoyamaxa*, para 135.

480 *Xákmok Kásek*, paras 109, 170.

Thus, when the cleanliness of water is affected by extraction activities, it will also impact the Saramakas' means of subsistence.

According to the IACtHR, it cannot be concluded that the State must not grant any concessions for the exploration and exploitation of natural resources in indigenous peoples' territories, as the right enshrined in Article 21 is not absolute. Therefore, the IACtHR at first resorted to the conditions already mentioned in the *Yakye Axa* case concerning the restriction of property rights (legality, necessity, proportionality, and a legitimate aim).

It also found that such a restriction of indigenous peoples' communal property rights *may not endanger the survival* of the indigenous or tribal group or its members.[481] The Court elaborated a list of safeguards which states need to follow in order to ensure the survival of an indigenous community and the preservation of its customs and traditions in the event that its property rights are restricted in the context of exploration of natural resources.

According to the Court, prior to the granting of any concessions within the territory of indigenous peoples, the State is obliged to ensure:

1) *effective participation* of indigenous peoples according to their customs and traditions in the creation of any development plans,
2) *environmental and social impact assessment* carried out by independent and technically capable entities and under the State's supervision, and
3) *a reasonable benefit* to these peoples from the relevant project.[482]

3.2.8.1 Right to effective participation: free, prior and informed consent through consultation, or consultation alone

The right to the effective participation of indigenous peoples regarding measures which may affect them – such as the exploration and extraction of natural resources on their territories – is one of the most contentious issues within the topic of indigenous peoples' land rights. It is linked to many questions. What role do indigenous peoples play in decision-making over development plans which may affect their territories? When do they need to be consulted? Can the State let a private entity consult on its behalf?

[481] *Saramaka*, para 128.

[482] *Saramaka*, para 129; The Court found support for its findings in the UNDRIP, pointing out that Suriname had recently voted in favour of its adoption, and in the report of the Human Rights Committee on the case of an indigenous community against New Zealand which was delivered on the basis of Article 27 of the ICCPR. *Saramaka,* paras 130-131.

The IACtHR has addressed the conditions and goals of consultation in various cases. In the case of *Saramaka v.* Suriname, the Court concluded that a state which plans to grant concessions for a development project on indigenous peoples' territories *always* has the positive obligation of consultation of indigenous peoples. It has to do so in *good faith* and with the *aim of reaching an agreement*.[483] After all, the consultations should serve as a real tool for participation and should establish a dialogue between the parties.[484]

In the case of *Garífuna Triunfo de la Cruz v. Honduras*, the Court determined that the indigenous peoples concerned need to be included *in the early stages* of the planning of the project, so that they have a real chance of influencing it.[485]

In *Sarayaku v. Ecuador,* the Court specified that it is the State that is ultimately responsible for carrying out the consultations. The IACtHR relied in its findings on the Report of the UN Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, James Anaya.[486]

Moreover, the State may not entrust the consultations to a third party – the Court specifically excluded their delegation to a company which has an interest in the resources in the territory.[487] Anaya points out in one of his later works that, on the one hand, it is the State that is ultimately responsible for complying with all the requirements for the consultations. On the other hand, subject to further conditions, '*direct negotiations between the business enterprise and indigenous peoples may enhance efficiency and also be desirable'*. Anaya moreover calls attention to the need for mitigation of power imbalances between the peoples concerned, the state agencies and private companies.[488]

In *Saramaka,* the Court also concluded that the State must provide the community with *all the necessary information* regarding environmental and health impacts to ensure that their decision is informed and voluntary. The consultations must be carried out *according to the*

[483] *Saramaka,* para 133.

[484] IACtHR. *Case of the Kichwa Indigenous People of Sarayaku v. Ecuador.* Judgement of June 27, 2012 (*Sarayaku),* para 186.

[485] *Garífuna Triunfo de la Cruz*, para 160.

[486] HRC, *Report of the UN Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, James Anaya.* 15 July 2009, A/HRC/12/34, paras 54-55.

[487] *Sarayaku*, para 187.

[488] ANAYA, James and Sergio PUIG. Mitigating state sovereignty: The duty to consult with indigenous peoples. *University of Toronto Law Journal*. **67**(4), p. 458.

traditional decision-making methods of the peoples concerned.[489] In *Sarayaku v. Ecuador,* it affirmed that the burden of proof for showing that consultations complied with all the requirements falls on the State.[490]

In the *Saramaka* case, the Court made a substantial – and controversial – leap forward in its case-law on this issue. It concluded that where an extensive project may have a profound impact on the property rights of the community and affect a large part of its territory, the State is not only obliged to *consult* the community but also receive their free, prior and informed *consent*.[491]

The Court based its decision on two documents – the Report of the UN Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, Rodolfo Stavenhagen,[492] and the CERD Concluding observations on Ecuador.[493]

In its concluding observations, the CERD observed '*that merely consulting these communities prior to exploiting the resources falls short of meeting the requirements set out in the Committee's general recommendation XXIII on the rights of indigenous peoples*', and it recommended that '*the prior informed consent of these communities be sought (...).*'[494] The General Recommendation mentioned requires that '*no decisions directly relating to their [indigenous peoples'] rights and interests are taken without their informed consent'*.[495] Thornberry argues that this wording of the Committee gives indigenous peoples the right to a veto in the case of decisions which directly affect them.[496]

On the other hand, the newest binding instrument addressing this issue is ILO Convention 169. The Convention does not include the obligation to obtain consent.[497] The questions of consultation and consent posed a considerable hurdle throughout its

[489] *Saramaka,* para 133.

[490] *Sarayaku*, para 179.

[491] *Saramaka,* para 134.

[492] HR Council. *Report of the UN Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, Rodolfo Stavenhagen*. 21 January 2003, UN Doc. E/CN.4/2003/90, para 66.

[493] CERD. *Concluding Observations on Ecuador.* 2 June 2003, CERD/C/62/CO/2, para 16.

[494] *ibid*, para 16.

[495] CERD. *General Recommendation No. 23: Indigenous Peoples.* 18 August 1997, A/52/18, Annex V, para. 4(d).

[496] THORNBERRY, Patrick. *Indigenous peoples and human rights*. Manchester: Manchester University Press, 2002, p. 125.

[497] Although it should be pointed out that Suriname is not a party to this Convention.

negotiations.[498] Eventually, due to many states' resistance, the obligation of consent was not included in the instrument as a *conditio sine qua non*.[499]

While mentioning the *Saramaka* decision, Anaya observes in his Report that '*the principles of consultation and consent are aimed at avoiding the imposition of the will of one party over the other*'.[500] According to Anaya, the States' obligation of consultation responds to historical patterns when states would impose decisions on indigenous peoples without any regard as to how these decisions would affect them, at times threatening their very survival. On the other hand, it also should not lead to indigenous peoples' unilaterally preventing a state from carrying out actions with a legitimate aim in the public interest.[501]

In the subsequent *Sarayaku* case, the Court concluded that Ecuador had violated the right to property of the Sarayaku people because it had failed to consult them before a private company carried out exploration activities, placed 1500 kg of explosives (prone to activation and detonation),[502] and damaged their cultural sites on their territory.[503]

Not even the most progressive soft-law instrument in this field, the UNDRIP, enshrines the right to a veto of measures which may affect indigenous peoples. It does enshrine this right with respect to the relocation of indigenous peoples and placing of hazardous materials on their territories. But that was not the case in the *Saramaka*. For the granting of concessions, the UNDRIP envisages consultations with the aim of obtaining a free, prior and informed consent. The UNDRIP formulates this obligation as one of process, rather than of result.

It thus seems, considering the current state of international law in this area, that the *Saramaka* decision may have gone a step too far in its progressiveness.

The IACtHR did not reaffirm its findings from the *Saramaka* on free, prior and informed consent in the *Sarayaku* case.[504] Nor has it done so in any further cases concerning

498 See section 2.1.2.2.1.

499 See section 2.1.2.2.2

500 HRC, *Report of the UN Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, James Anaya.* 15 July 2009, A/HRC/12/34, para 49.

501 *idem*.

502 *Sarayaku,* para 247.

503 *Sarayaku,* para 211.

504 *Sarayaku,* paras 201-203, 232; *Asociación Lhaka Honhat,* para 184.

the issue of free, prior and informed consultation or consent. In all its subsequent cases, the Court solely addressed the obligation of consultation.[505] Whether that was due to the individual particularities of the cases or because the Court changed its position on the scope of this obligation remains to be clarified.

3.2.8.2 Right to an environmental and social impact assessment

The State is obliged to ensure an environmental and social impact assessment (ESIA), in order to guarantee that any development project carried out on indigenous peoples' territories does not threaten their survival as a people. The term 'survival' does not entail their mere physical survival, but also the protection and preservation of their traditional relationship with their territory, their distinct culture, customs, traditions, as well as their social and economic system.[506]

The ESIA needs to be carried out *prior to* granting any concessions for such projects by technically competent entities, under the State's supervision. They must also follow relevant international standards and best practices. The ESIA should not only consider the impact of an individual project in question but should also assess the cumulative impact of all existing and proposed projects. Also, it must respect the peoples' traditions and culture.[507]

Part of the reason why such an assessment needs to be conducted is to provide the indigenous peoples concerned with all the necessary information about the potential impact which the project in question may have.[508] It, therefore, forms a precondition for the community's effective participation in the consultations.[509]

3.2.8.3 Right to benefit-sharing

Benefit-sharing is one of the safeguards to preserve indigenous peoples' rights. Indigenous peoples have the right to a share of the benefits made as a result of the projects which led to the restriction of their rights.

505 RUIZ CHIRIBOGA, Oswaldo and Gina DONOSO. Jurisprudencia de la Corte IDH sobre los Pueblos Indígenas y Tribales. Fondo y Reparaciones. STEINER, Christian and FUCHS, Marie-Christine, ed. *Convención Americana sobre Derechos Humanos: Comentario*. 2nd edn. Bogotá: Konrad-Adenauer-Stiftung e. V., 2019, p. 1175; *Asociación Lhaka Honhat,* para 184.

506 IACtHR. *Case of the Saramaka People v. Suriname. Interpretation of the Judgment*. Judgment of August 12, 2008 (*Saramaka Interpretation),* para 37.

507 *Saramaka Interpretation,* para 41; *Sarayaku,* paras 204-207.

508 *Saramaka Interpretation*, para 40.

509 *Sarayaku,* para 206**;** *Garífuna Triunfo de la Cruz,* paras 179-181;

The IACtHR considers this to be a form of the right to compensation established in Article 21, paragraph 2 ACHR. In the *Saramaka* case, the Court found support for this interpretation in ILO Convention 169,[510] as well as in the UNDRIP.[511] It concluded, that the fact that the members of the Saramaka people had not received any benefit from the timber logging in their territory formed part of the violation of Article 21.[512]

Conclusion

What are the instruments of international law anchoring indigenous peoples' land rights in the region of Latin America?

Indigenous peoples' land rights find support in various instruments of international law both within the global human rights system and within the IASHR. On the global level, two international conventions address this topic specifically – ILO Convention 107 and ILO Convention 169 which aimed to replace it (but remains valid for those state parties which did not ratify ILO Convention 169). As of 2007, there is also an essential instrument of soft law – the UNDRIP.

There are also various other instruments which apply globally and provide protection to indigenous peoples' land rights despite no specifically mentioning them. Mostly, it is on the basis of economic, social, cultural and environmental rights. Among these instruments are the ICCPR, ICESCR, ICERD, DRM, CRC and CBD.

Because all Latin American States are member states of the OAS, the instruments of the IASHR bear great relevance to the land rights of indigenous peoples in the region. In 2016, the OAS adopted its own declaration anchoring the rights of indigenous peoples within the region of the Americas – the ADRIP. This soft-law instrument also contains various provisions which specifically deal with indigenous peoples' land rights.

Moreover, there are two instruments which do not contain any mention of indigenous peoples but cannot be omitted. Firstly, the ADRDM bears special importance for States which

510 ILO Convention 169, Article 15(2); Suriname is not a party to this Convention.

511 UNDRIP, Article 32.

512 *Saramaka,* paras 138-140 and 153-154.

are not a party to the ACHR. Secondly, an essential instrument in this field and region is the ACHR. Its crucial value lies in its binding character and the monitoring role of the IACtHR.

Between the first and most recent, how have the instruments specifically addressing indigenous peoples' land rights developed?

The oldest binding instrument is ILO Convention 107. This Convention was revised and reworked into ILO Convention 169 because of its assimilationist and paternalistic approach.[513] ILO Convention 169 made a significant leap forward with respect to its predecessor. Throughout its negotiations, however, many compromises had to be made.

It included representatives of indigenous peoples in the works on the new Convention[514] and rejected the integrationist views of its forerunner. It abandons the term 'populations' and uses 'peoples' instead. However, it removes the international legal dimension of this word.[515] Also, it anchors the right of indigenous peoples to set their own priorities with respect to their own matters – the internal part of the right to self-determination. However, it does not explicitly mention this right.

The Convention newly enshrines the general obligation of States to consult indigenous peoples in good faith when measures are being adopted, which may directly affect them. The objective of these consultations must be consent.

It further anchors the States' obligation to respect indigenous peoples' collective relationship with their lands. Also, it requires that States recognise indigenous peoples' collective property rights and possession of lands.[516] As opposed to ILO Convention 107, it leaves out the option of the recognition of individual property rights. This way, the States cannot choose to only recognise individual property rights.

The Convention also made some progress with respect to the removal of indigenous peoples from their lands. It still allows for the relocation of indigenous peoples from their lands without their free, prior and informed consent. Nevertheless, only in so far as the

513 GILBERT, Jérémie. *Indigenous Peoples' Land Rights under International Law: From Victims to Actors*. Netherlands: Brill | Nijhoff, 2007, p. 182.

514 SWEPSTON, Lee. A New Step in the International Law on Indigenous and Tribal Peoples: ILO Convention No. 169 of 1989. *Oklahoma City University Law Review*. 1990, 15(3), p. 685.

515 ILO Convention 169, Article 1 (3).

516 ILO Convention 169, Articles 13-14.

grounds for such relocation still exist. Once they do not, indigenous peoples have the right to return.[517]

ILO Convention 169 significantly advanced the protection of indigenous peoples' land rights by anchoring their rights to natural resources. Its predecessor does not contain a single provision on this issue. However, it does not explicitly enshrine the right to own these resources.[518]

As concerns exploitation and exploration of these resources, States must consult indigenous peoples prior to putting any such projects in place. However, the Convention does not mention the obligation of aiming for consent. It newly contains the right of indigenous peoples to a share of the benefits from such projects.[519]

From a current point of view, especially after the adoption of the UNDRIP, the Convention may seem only mildly progressive. However, it should be noted that its point of reference was an assimilationist instrument which viewed indigenous cultures as being '*at a less advanced stage than the stage reached by the other sections of the national community*'.[520] Thus, adoption of an instrument which embraces cultural diversity and comprises mainly collective rights constitutes a major step forward.

As a binding instrument, it moreover serves as a strong tool for both national[521] and international[522] judicial protection of indigenous peoples' land rights in Latin America where it enjoys a high number of ratifications. Also, it provided a firm point of reference for the adoption of significantly more progressive soft-law instruments, such as the aforementioned UNDRIP, adoption of which followed.

The UNDRIP anchors the right of indigenous peoples to self-determination already in the Preamble, making it one of its guiding principles. It also reiterates it in its operative text. Nevertheless, it contains a provision which restricts the external aspect of the right to self-determination, preventing it from having any effect on the territorial integrity of States.

517 ILO Convention 169, Article 16.

518 ILO Convention 169, Article 15.

519 ILO Convention 169, Article 15.

520 ILO Convention 107, para 1. (a).

521 Constitutional Court of Colombia. Judgement No T-601, 2011, 3. Fundamentos jurídicos de la acción.

522 *Yakye Axa*, para 127.

As was pointed out by indigenous peoples during the negotiations of the instrument, this provision seems discriminatory.[523] It attempts to exclude indigenous peoples from being subjects of the right to self-determination in its full range, including its external aspect, pertaining to 'all peoples'.[524]

As the right to self-determination is not the primary focus of this paper, it does not provide answers to the questions which arise as to the effects of this restrictive provisions on indigenous peoples' right to self-determination. However, it would certainly be a fruitful topic for follow-up research. Especially due to the link between the right to self-determination and indigenous peoples' rights to lands and natural resources mentioned in section 2.1.1.2.

The UNDRIP incorporates the standards which had been established by ILO Convention 169. In addition, it introduces a number of provisions which are significantly more favourable to indigenous peoples' land rights than any previous instrument of international law.

The UNDRIP newly anchors the right of indigenous peoples to own natural resources which they traditionally use.[525] Furthermore, the Declaration acknowledges indigenous peoples' traditional forms of tenure of their lands, territories and resources and requires States to recognise them.[526]

Moreover, when hazardous materials are to be placed in indigenous peoples' territories, the UNDRIP requires States not only to consult them but also to obtain their free, prior and informed consent. The same requirement is attached to the relocation of indigenous peoples from their territories.[527]

In other cases, such as planning of development projects, the UNDRIP requires States to carry out consultations with indigenous peoples with the aim of obtaining their free, prior and informed consent.[528]

523 CHARTERS, Claire. The Road to the Adoption of the Declaration on the Rights of Indigenous Peoples. *New Zealand Yearbook of International Law*. 2007, **4**(7), 124.

524 ICCPR, Article 1 (1).

525 UNDRIP, Article 26 (2).

526 UNDRIP, Article 25.

527 HRC, *Report of the UN Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, James Anaya.* 15 July 2009, A/HRC/12/34, para 47.

528 UNDRIP, Articles 19 and 32.

The UNDRIP facilitated the progress of the protection of indigenous peoples' land rights on the international level. Both through its negotiations which contributed to the mobilisation indigenous peoples all around the globe[529] and through its progressive content which quickly found its way into the decisions of international human rights bodies.[530]

In 2016, a soft-law declaration was adopted in the region of the Americas – the ADRIP. The ADRIP incorporates the right to self-determination in the same restricted form as the UNDRIP. Also, this right is not mentioned in its Preamble. As opposed to the UNDRIP, it thus does not make this right its core principle.[531] Moreover, the restricting provision is not placed at the end of the Declaration, as is the case in the UNDRIP. It directly follows after the provision anchoring the right itself.

The American Declaration moreover contains an integrationist provision emphasising that indigenous peoples are a part of the national societies. In contrast, the UNDRIP enshrines indigenous peoples' right to live as distinct peoples.[532]

As has been mentioned above, the UNDRIP requires States to obtain indigenous peoples' consent in the event of their relocation from their ancestral land or placing of dangerous materials on these lands. The ADRIP, on the other hand, does not require such consent[533] and does not incorporate provisions on indigenous peoples' relocation at all. Also, it does not follow the UNDRIP in incorporating indigenous peoples' right to restitution of lands owned in the past and taken away without their free, prior and informed consent.

Furthermore, the ADRIP envisages that indigenous peoples' forms of land ownership comply with national laws in order for States to be obliged to recognise these their property

529 EIDE, Asbjørn. The Indigenous Peoples, the Working Group on Indigenous Populations and the Adoption of the UN Declaration on the Rights of Indigenous Peoples. CHARTERS, Claire and Rodolfo STAVENHAGEN, ed. *Making the Declaration Work: The United Nations Declaration on the Rights of Indigenous Peoples*. Copenhagen: IWGIA, 2009, p. 34.

530 See, for example, paras 131, 137; HR Council. *Report of the Special Rapporteur on the rights of indigenous peoples on her visit to Guatemala.* 10 August 2018, para 70.

531 YÁÑEZ FUENZALIDA, Nancy. *Analysis: OAS's American Declaration on the Rights of Indigenous Peoples*. Copenhagen: IWGIA, 2016 [cit. 2020-04-20]. Available at: https://www.iwgia.org/en/news-alerts/archive?view=article&id=2417:analysis-oass-american-declaration-on-the-rights-o&catid=150.

532 CLAVERO, Bartolomé. La Declaración Americana sobre Derechos de los Pueblos Indígenas: el reto de la interpretación de una norma contradictoria. *Pensamiento Constitucional*. 2016, **26**, p. 17; ADRIP, Article II.

533 ADRIP, XIX; YÁÑEZ FUENZALIDA, Nancy. *Analysis: OAS's American Declaration on the Rights of Indigenous Peoples* [online]. Copenhagen: IWGIA, 2016 (accessed on 20 April 2020). Available at: https://www.iwgia.org/en/news-alerts/archive?view=article&id=2417:analysis-oass-american-declaration-on-the-rights-o&catid=150.

rights. This provision is a step backwards compared to both the UNDRIP and IACtHR's case law.[534]

In this way, the American Declaration fell short of its potential emanating from the standards which had been already established both globally and in the region of Latin America.

On the other hand, it contains a few provisions which do constitute an advancement of the current standards in the region.[535] It enshrines indigenous peoples' right to health as both collective and individual, rather than just individual, which is the case in the UNDRIP.[536] This provision may bear relevance, for example, in the event that the health of the entire community is affected by some external factors, such as the exploitation of natural resources.

Moreover, the ADRIP incorporates a progressive provision on treaties between indigenous peoples and States. It foresees the possibility of submitting conflicts arising under these treaties also to international bodies.[537] It further enshrines the protection of indigenous peoples in voluntary isolation and also during an armed conflict.[538]

The last two articles of the ADRIP are of essential importance. They stipulate that nothing in the ADRIP may lower neither the already existing nor future standards of protection of indigenous peoples' rights.[539]

Due to this provision, considering that the UNDRIP offers in many ways a higher standard of protection, the fact that the ADRIP is regressive, should not diminish indigenous peoples' rights which they already have under the UNDRIP.

534 *Awas Tingni*, paras 151 and 164; YÁÑEZ FUENZALIDA, Nancy. *Analysis: OAS's American Declaration on the Rights of Indigenous Peoples* [online]. Copenhagen: IWGIA, 2016 (accessed on 20 April 2020). Available at: https://www.iwgia.org/en/news-alerts/archive?view=article&id=2417:analysis-oass-american-declaration-on-the-rights-o&catid=150; BLANCO, Cristina. *Declaración Americana sobre los Derechos de los Pueblos Indígenas: Breve balance de un esperado documento* [online]. Instituto de democracia y derechos humanos, 2016 (accessed on 24 April 2020). Available at: https://idehpucp.pucp.edu.pe/opinion/declaracion-americana-sobre-los-derechos-de-los-pueblos-indigenas-breve-balance-de-un-esperado-documento/.

535 REGINO MONTES, Adelfo. SERVICIOS DEL PUEBLO MIXE. *Organización de los Estados Americanos aprobó la Declaración Americana sobre los Derechos de los Pueblos Indígenas*. [online] Cultural Survival, 2016 (accessed on 10 May 2020). Available at: https://www.culturalsurvival.org/news/organizacion-de-los-estados-americanos-aprobo-la-declaracion-americana-sobre-los-derechos-de.

536 ADRIP, Article XVIII.

537 ADRIP, Article XXIV.

538 ADRIP, Articles XXVI., XXX.

539 ADRIP, Article XL.

This goes in line with the argumentation of the IACtHR which may not interpret the ACHR in a way, which would be more restrictive than under any other instrument which applies in the relevant case.[540] Therefore in the event that the IACtHR has both of these instruments before it, it will possibly interpret the ACHR in light of that instrument which offers higher protection.

Based on the foregoing, it can be assumed that those provisions of the ADRIP which constitute a step forward in the protection of indigenous peoples' land rights are significantly more important than those which constitute a step back.

What specific rights of indigenous peoples and relevant obligations of States concerning indigenous peoples' traditional lands stem from the jurisprudence of the Inter-American Court of Human Rights under Article 21 of the American Convention on Human Rights?

The IACtHR delivered its first judgement on indigenous peoples' rights – in the case of *Awas Tingni v. Nicaragua* – in 2001. Since then, it has ruled on twelve more cases concerning indigenous peoples' land rights.[541] As a result, it has produced a detailed set jurisprudence elaborating the rights and obligations under Article 21 ACHR (right to property) with respect to indigenous peoples' lands.

In its jurisprudence, the Court has established the following:

1) Article 21 of the ACHR protects not only private property rights but also indigenous and tribal peoples' communal property rights, including their distinctive spiritual relationship with their lands. It moreover also applies to the natural resources which indigenous peoples traditionally use.

2) Traditional possession of their ancestral lands without a formal title entitles indigenous peoples to obtain a real title to these lands.

3) Where indigenous peoples have been deprived of the possibility to occupy their ancestral lands, their claim to these lands persists.

[540] *Yakye Axa*, paras 127-130.

[541] By the end of 2019, the Court had decided 290 cases in total. See IACtHR. *Annual Report 2019*, p. 59. Out of these cases 12 concerned indigenous peoples' land rights.

4) However, when these lands have been transferred to third persons in good faith, it is up to the State to assess which right prevails. When balancing the two claims, the State must nevertheless take into account the special spiritual relationship of indigenous peoples with these lands. Moreover, such a restriction on a property right must comply with the general conditions of legality, necessity, proportionality and the pursuit of a legitimate aim. Additionally, any restriction of indigenous peoples' communal property rights must not endanger their survival as a people.

5) Also, where there is a good reason that ancestral lands cannot be returned to indigenous peoples, their relationship to these lands needs to be taken into account when assessing the form and amount of compensation. The compensation must, moreover, be agreed upon with the indigenous peoples concerned.

6) The Court has further specified a set of obligations related to indigenous communal property rights. The mere formal legal recognition of collective property rights does not suffice – indigenous peoples must be able to effectively control their lands. Moreover, the sole possibility of use of these lands does not suffice either – indigenous peoples have the right to legal certainty over permanent ownership of these lands. To comply with all these obligations, States must *delimit* and *demarcate* indigenous lands and must *issue a title deed*. Moreover, states must rid these lands of any legal defects, *i.e.* carry out their *regularisation*.[542] Those same obligations also apply to alternative lands provided to indigenous peoples as compensation.

7) Where the State is planning to grant concessions for projects of exploration or exploitation of the natural resources on the indigenous peoples' territory, it always has to comply with the following set of safeguards to ensure that the projects do not endanger their survival as a people. It has to:

- supervise a cumulative ESIA of all existing and potential projects prior to granting any concessions;
- provide the indigenous peoples with all necessary information regarding the potential impact of the project on their territory;

[542] For more specific information in chronological order, see Annexe.

- carry out consultations in good faith with the indigenous people concerned from the early stages of the planning of the project, according to their customs with the aim of attaining their free, prior and informed consent; and
- if such a project is launched, ensure that the peoples concerned receive a part of the benefits realised through the project, as a form of compensation for the adverse effects which it has on their territory.

The question of consultation in order to obtain a free, prior, and informed consent does not seem to have been fully resolved yet. It remains unclear, whether in some cases the State has an obligation to in fact obtain a free, prior and informed consent, or whether the obligation is always one of process. Hopefully, further developments of international law will cast more light on the issue.

The legal framework of protection of indigenous peoples' land rights is gradually becoming more comprehensive, and the standards, which it encompasses, are continually being raised. Strong international human rights standards are, however, only the first – albeit essential – step. Now, it is time for their implementation.

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Annexe I.

IACtHR case-law on Article 21 of the ACHR related to indigenous peoples' land rights

	Case	Year	Violation	New findings of the IACtHR which bear general relevance
1	*Mayagna (Sumo) Awas Tingni v. Nicaragua*	2001	-	- Communal property rights fall under the scope of protection under Article 21 ACHR (para 148). - Traditional possession of lands by indigenous peoples without a real title entitles them to require recognition of their property rights and issuing of a title (para 151). - Measures necessary for ensuring the property rights of indigenous communities are delimitation, demarcation and titling (para 164).
2	*Yakye Axa v. Paraguay*	Jun 2005	- Article 21 - Article 25	- The Court set out the conditions for weighing private property rights and indigenous communal property rights (para 144). - When the State is not able to return the ancestral lands to the indigenous people, it

				must offer compensation in the form of alternative lands or monetary compensation, depending on an agreement with the indigenous community reached through consultations according to the community's customs (paras 146-151).
3	*Moiwana Community v. Suriname*	Jun 2005	-	- The first IACtHR's ruling regarding indigenous and tribal peoples' communal property rights based solely on the ACHR (paras 124-134) and no other international agreements or national law. - The tribal community did not lose their claim to their ancestral lands despite not having a real title to these lands and having been deprived of the possibility to occupy these lands for 20 years (paras 133-134).
3	*Sawhoyamaxa v. Paraguay*	2006	- Article 21 - Article 25	- Where the lands have been transferred to third parties in good faith, the indigenous community has the right to restitution or substitute lands (paras 128,

				135).
4	*Saramaka v. Suriname*	2007	-	- The State must guarantee indigenous peoples ownership and effective control over their lands without any external interference (para 115). - Indigenous peoples have the right to own traditionally used natural resources. - Guarantees with which the State has to comply with respect to exploration and exploitation projects: a) effective participation of members of Saramaka b) reasonable benefit of the members of Saramaka c) environmental and social impact assessment before any permission is granted (para 129). - Free, prior and informed consent is required in the case of profound impact on property rights (para 137). - The IACtHR cited the ILO 169 although Suriname is not a member of the ILO 169 (para 130). - The IACtHR cited the UNDRIP (para 131).

5	*Xákmok Kásek v. Paraguay*	2010	- Article 21 - Article 25	- When lands have been transferred to third parties, indigenous peoples have the right to either restitution or substitution by land of the same extent and quality (para 109). - Article 21 also applies to nomadic peoples' communal property rights.
6	*Kichwa de Sarayaku vs. Ecuador*	2012	-	- Lack of access to their natural resources may prevent them from following their traditional health practices, and may lead to subhuman living conditions, epidemics, situations of vulnerability and may result in a violation of various other human rights (para 147). - It must be the State who carries out the consultations; it may not entrust it with a third party (para 187).
7	*Kuna de Madugandí y Emberá de Bayano vs. Panama,*	2014	-	- When the return of ancestral lands is not possible, the obligations of the State towards the indigenous community (*e.g.* guarantee of effective use) apply to alternative

				lands (para 122). - The Court reiterated the importance of collective ownership falling under the scope of Article 21 (paras 112-13).
8	*Garífuna de Punta Piedra vs. Honduras*	Oct 2015	-	- The Court mentioned regularisation for the first time (in Spanish *saneamiento*) as a means of guaranteeing the effective use and control of indigenous peoples over their lands. Regularisation consists of the process of removal of any type of 3rd party interference in the indigenous peoples' territory (para 181).
9	*Garífuna Triunfo de la Cruz v. Honduras*	Oct 2015	-	- The Court applied the standards which it had developed in the case of *Saramaka v. Suriname* for the free, prior and informed consultations required where development plans may affect indigenous territories (paras 167, 171, 179 and 182).
10	*Kaliña y Lokono v. Suriname*	Nov 2015	-	- Indigenous peoples may play an essential role in nature conservation (para

				173).
12	*Xucuru people v. Brazil*	2018	-	- The Court listed regularisation as an obligation of States to ensure indigenous peoples communal property rights (alongside delimitation, demarcation and titling) (paras 120, 124, 126 and 132).
13	*Asociación Lhaka Honhat v. Argentina*	2020	-	- The Court found that the lack of the possibility of the indigenous community to determine the development of their territory led to the violation of their right to take part in cultural life and their rights to cultural identity, a healthy environment, adequate food, and water (paras 287-289).

Annexe II.

Landmark instruments of international law concerning indigenous peoples' land rights – ratifications and votes

State	ACHR	Declaration of acceptance of IACtHR jurisdiction	ADRIP	ILO 107	ILO 169	UNDRIP	ICCPR	ICCPR Optional Protocol	ICCPR Declaration on other state party complaints	ICESCR	ICESCR Optional Protocol	ICESCR Declaration on other state party complaints	CESCR Inquiry	ICERD	ICERD Declaration on individual communications
Argentina	yes	yes	yes	yes, not in force	yes	yes	yes	yes	yes	yes	yes	no	no	yes	no
Bolivia	yes	yes	yes	yes, not in force	yes	yes	yes	yes	no	yes	yes	no	no	yes	yes
Brazil	yes	yes	yes	yes, not in force	yes	yes	yes	yes	no	yes	no	no	no	yes	yes
Chile	yes	yes	yes, with reservations	no	yes	yes	yes	yes	yes	yes	signed, not ratif.	no	no	yes	yes
Colombia	yes	yes	yes	yes, not in force	yes	abstained, later endorsed	yes	yes	no	yes	no	no	no	yes	no
Costa Rica	yes	yes	yes	yes, not in force	yes	yes	yes	yes	no	yes	yes	no	no	yes	yes
Cuba	no	no	not represented	yes	no	yes	signed, not ratif.	no	no	signed, not ratif.	no	no	no	yes	no
Dominican Republic	yes	no	yes	yes	no	yes	yes	yes	no	yes	no	no	no	yes	no
Ecuador	yes	yes	yes	yes, not in force	yes	yes	yes	yes	yes	yes	yes	no	no	yes	yes
El Salvador	yes	yes	yes	yes	no	yes	yes	yes	no	yes	yes	yes	yes	yes	yes
Guatemala	yes	yes	yes	no	yes	yes	yes	yes	no	yes	signed, not ratif.	no	no	yes	no
Haiti	yes	yes	yes	yes	no	yes	yes	no	no	yes	no	no	no	yes	no
Honduras	yes	yes	yes	no	yes	yes	yes	yes	no	yes	yes	no	no	yes	no
Mexico	yes	yes	yes	yes, not in force	yes	yes	yes	yes	no	yes	no	no	no	yes	yes
Nicaragua	yes	yes	yes	no	yes	yes	yes	yes	no	yes	no	no	no	yes	no
Panama	yes	yes	yes	yes	no	yes	yes	yes	no	yes	no	no	no	yes	yes
Paraguay	yes	yes	yes	yes, not in force	yes	yes	yes	yes	no	yes	signed, not ratif.	no	no	yes	no
Peru	yes	yes	yes	yes, not in force	yes	yes	yes	yes	yes	yes	no	no	no	yes	yes
Uruguay	yes	yes	yes	no	no	yes	yes	yes	no	yes	yes	no	no	yes	yes
Venezuela	yes	yes	yes	no	yes	yes	yes	yes	no	yes	yes	no	no	yes	yes
Suriname*	yes	yes	yes	no	no	yes	yes	yes	no	yes	no	no	no	yes	no
TOTAL**	19	18	19	5 in force	14	20	19	18	4	19	8	1	1	20	11

***** Suriname is not a Latin-American State. Information about Suriname is, however, included because of the case *Saramaka v. Suriname.* This case appears in the text various times, due to its significant role within the IACtHR's case law on indigenous peoples' land rights.

****** Suriname is not included in the total number of ratifications.

Abstract in Czech

Právo domorodých národů v Latinské Americe k půdě

Pro mnohé domorodé národy a jejich kultury je typický jejich kolektivní, duchovní vztah k půdě, který přechází z generace na generaci. Domorodé národy na svých územích mnohdy závisí nejen ekonomicky, ale také svou kulturně. Právě s půdou však souvisí také rozsáhlé porušování jejich lidských práv. Tradiční území domorodých národů jsou často zabírána a ekosystémy, které k těmto územím patří, jsou narušovány. To vede k zásahu do tradičního způsobu života těchto národů a k vymizení jejich původních kultur. Od osmdesátých let minulého století však domorodé národy postupně posilují své postavení, a to i na mezinárodněprávní úrovni. V roce 1989 byla přijata Úmluva Mezinárodní organizace práce č. 169, Úmluva o domorodých a kmenových národech v nezávislých zemích. Tato Úmluva zakotvila podstatně vyšší standardy ochrany práv domorodých národů k jejich územím. Zejména opustila patriarchální přístup starší Úmluvy, která se tomuto tématu věnuje – Úmluvy Mezinárodní organizace práce č. 107, Úmluvy o ochraně a integraci domorodého a ostatního kmenového a polokmenového obyvatelstva v nezávislých zemích. Úmluva č. 169 navíc označuje domorodé národy za „národy“ a nikoli za „obyvatelstvo“, jak tomu bylo u její starší verze. Tato Úmluva tak otevřela dveře dalším mezinárodním instrumentům, které práva domorodých národů posouvají zase o krok dál. Jedná se především o Deklaraci OSN o právech domorodých národů z roku 2007 a také Americkou deklaraci o právech domorodých národů z roku 2016. Tyto instrumenty již uznávají – ačkoli v omezené míře – také právo domorodých národů na sebeurčení. Toto právo sice dle mezinárodního práva náleží všem národům, ale domorodým národům bylo ještě donedávna upíráno. Přijetí Americké deklarace o právech domorodých národů vypovídá o zásadním odhodlání Latinské Ameriky zvýšit úroveň ochrany práv domorodých národů k jejich územím. O tomto trendu vypovídá také judikatura Inter-amerického soudu pro lidská práva za posledních dvacet let. V roce 2001 vydal tento soud první rozhodnutí zabývající se vlastnickým právem domorodých národů k půdě. Bylo to v případu *Mayagna (Sumo) Awas Tingni proti Nicaragui*. Soud v rozsudku vyložil článek 21 Americké úmluvy o ochraně lidských práv zakotvující právo na ochranu soukromého vlastnictví. Rozhodl, že tento článek poskytuje ochranu rovněž kolektivnímu vlastnictví typickému pro domorodé národy. Z judikatury soudu v současné době vyplývá již celá řada dalších práv, jež se z vlastnického práva odvíjí. Státy mají povinnost uznat tradiční držbu půdy domorodými národy za vlastnický titul. Dle *Saramaka proti Surinamu* navíc pod vlastnické právo k půdě spadají rovněž přírodní zdroje, které domorodý národ tradičně užívá.

V případu *Yakye Axa proti Paraguayi* Inter-americký soud řešil kolizi nároků domorodých národů a soukromého vlastnického práva. V nejnovějším rozhodnutí, v případu *Asociación Lhaka Honhat proti Argentině,* pak Soud shledal porušení práva na vodu, dostatečnou výživu, účastnit se kulturního života a na zdravé životní prostředí jako důsledek porušení právě práva na ochranu vlastnictví půdy domorodých národů.

Klíčová slova

Domorodé národy, právo k půdě, vlastnické právo

Abstract in English

Indigenous Peoples' Land Rights in Latin America

Indigenous peoples' cultures are known for their collective, spiritual, intergenerational relationship to their ancestral lands. Indigenous peoples not only depend on their territories with their subsistence but also with the preservation of their distinct cultures. Lands are, however, a significant factor in the vast human rights violations to which they subject. They are often faced with the dispossession of their traditional lands and the disruption of the ecological integrity of their territories. This also affects their traditional way of life and leads to the loss of their cultures. From the 1980s, indigenous peoples have started reclaiming their rights, which has also been reflected in their position under international law. In 1989, the International Labour Organisation Convention No. 169, the Indigenous and Tribal Peoples Convention was adopted. This Convention anchored significantly higher standards of protection of indigenous peoples' rights to their lands. Above all, it abandoned the patriarchal approach of the International Labour Organisation's Convention No. 107, the Indigenous and Tribal Populations Convention. Convention No. 169, moreover, addresses indigenous peoples as 'peoples' rather than 'populations', as was the case in its predecessor. This Convention laid firm foundations for instruments to follow, which advanced indigenous peoples' rights under international law even more. Namely, it was the United Nations Declaration on the Rights of Indigenous Peoples adopted in 2007 and the American Declaration on the Rights of Indigenous Peoples from 2016. These instruments recognise – albeit not in its full extent – indigenous peoples' right to self-determination. Under international law, this right pertains to all peoples. Nevertheless, until recently, indigenous peoples were not recognised as its subject. The adoption of the American Declaration on the Rights of Indigenous Peoples signals the commitment of Latin America to increase the level of protection of indigenous peoples' rights to their lands in the region. This trend can also be observed in the case-law of the Inter-American Court of Human Rights. In 2001, the Inter-American Court for Human Rights delivered its first judgement concerning indigenous peoples' land rights. It was in the case of *Mayagna (Sumo) Awas Tingni v. Nicaragua*. In its judgement, the Court ruled that Article 21 of the American Convention on Human Rights (enshrining the right to private property) also covers indigenous peoples' communal property rights. Since then, the Court has elaborated a complex body of rights of indigenous peoples which stem from the right to property. States are obliged to recognise indigenous peoples' traditional possession of lands as a real title. It follows from the *Saramaka v. Suriname* that indigenous peoples not only

have the right to lands but also to their traditionally used resources. In *Yakye Axa v. Paraguay,* the Court addressed the conflict between indigenous peoples' claim to their traditional lands and private property rights. In its most recent judgement in the case of *Asociación Lhaka Honhat v. Argentina,* the Court linked the violation of state's obligations concerning indigenous peoples' land rights under the right to property to the violation of the right to water, adequate food, healthy environment and to take part in cultural life.

Keywords

Indigenous peoples, land rights, right to property