

Vol. 5, No. 1 (2013)

**Special Issue:
The Law and Politics of Indigenous Peoples in
International Law**

Philosophical Backgrounds and Theoretical Foundations

“By What Right?": The Contributions of the Peninsular School for Peace to the Basis of the International Law of Indigenous Peoples
Sílvia Maria da Silveira Loureiro

Romanticization Versus Integration?: Indigenous Justice in Rule of Law Reconstruction and Transitional Justice Discourse
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Indigenous Peoples' Right to Land and Natural Resources

Protection and Realization of Indigenous Peoples' Land Rights at the National and International Level
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A Step Further on Traditional Peoples Human Rights: Unveiling the Key-Factor for the Protection of Communal Property
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Indigenous Peoples' Rights and the Extractive Industry: Jurisprudence From the Inter-American System of Human Rights
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Pascua Lama, Human Rights, and Indigenous Peoples: A Chilean Case Through the Lens of International Law
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“We Will Remain Idle No More”: The Shortcomings of ‘Canada’s Duty to Consult’ Indigenous Peoples
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**Indigenous Peoples' Right to Culture and Traditional Way
of Life**

Rights of Indigenous Peoples and the International Drug Control Regime: The Case of Traditional Coca Leaf Chewing
Sven Pfeiffer

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Editorial

Dear Readers,

this issue marks the beginning of the Goettingen Journal of International Law's fifth volume.

Since its foundation in December 2008, various persons and institutions have supported the journal in various manners. Such precious support enabled GoJIL to constantly improve its quality as well as to broaden its readership. Therefore many students, primarily from the Faculty of Law, have hitherto been engaged in the project.

We are particularly indebted to those members of the Scientific Advisory Board who from the very beginning have made vital contributions with their expertise to the journal's success. At the same time, we welcome the new members and we are looking forward to excellent future cooperation.

Likewise, the journal itself is in steady flux. This issue comes with a new appearance: our homepage and centrepiece www.gojil.eu has been comprehensively overhauled. Yet another modification pertains to the issues' layout, which hopefully benefits the journal's readability.

This issue is a special issue on the topic of "The Law and Politics of Indigenous Peoples in International Law". In the past years, the term "indigenous people(s)" has spurred vivid academic debate yielding a plenitude of publications from not only an ethnological or political but, likewise, a legal vantage point. In order to cast a light on the legal and political problems indigenous peoples are facing, we selected the following eight contributions:

The first article “By What Right”: The Contributions of the Peninsular School for Peace to the Basis of the International Law of Indigenous Peoples’ by *Sílvia Maria da Silveira Loureiro* provides a philosophical background to the issue of indigenous peoples’ rights. By analyzing the writings of Francisco de Vitória, Luis de Molina, and Francisco Suárez, the author outlines the main ideas of the so called *Peninsular School for Peace* arguing that this School may form the theoretical basis for the recognition of indigenous peoples as subjects of collective rights.

Subsequently, in ‘Romanticization Versus Integration?: Indigenous Justice in Rule of Law Reconstruction and Transitional Justice Discourse’ *Padraig McAuliffe* examines the role of indigenous justice in the process of transitional justice and the usually simultaneous rule of law reconstruction. The author concludes that indigenous legal processes have the capacity to significantly contribute to the processes of transitional justice if the persons working in this field learn from the process of de-romanticization the legal pluralists went through in the 1970s and 1980s and the experience of peace-building missions.

The ensuing articles are all based on the assumption that indigenous peoples have special relation to their environment, land, and resources.

Katja Göcke in ‘Protection and Realization of Indigenous Peoples’ Land Rights at the National and International Level’ analyzes the recognition and protection of indigenous land rights in the USA, Canada, Australia, and New Zealand, stating that the differing, yet somewhat similar national approaches do not in themselves entirely abide by international law standards and that States may mutually benefit from other States’ experiences in the implementation of such land rights.

Giovana F. Teodoro and *Ana Paula N. L. Garcia* analyze the protection of communal property rights under the Inter-American Human Rights System. In ‘A Step Further on Traditional Peoples Human Rights: Unveiling the Key-Factor for the Protection of Communal Property’, they conclude that the Inter-American Court of Human Rights has shown a progressive understanding of the protection of communal property rights but still needs to go further that way: All ethnic designations should be put aside to avoid the exclusion of communities who have a deep cultural relationship to their land but fail to meet the criteria for indigenous or tribal peoples.

Similarly in reference to the protection of human rights under the Inter-American system, *Efrén C. Olivares Alanís* in his article ‘Indigenous Peoples’ Rights and the Extractive Industry: Jurisprudence From the Inter-American System of Human Rights’ examines the handling of the conflict between indigenous peoples’ rights to their ancestral lands, territories, and natural resources and the interests of the extractive industry regarding these lands and resources. The author focuses on the development and contents of the right of indigenous peoples to consultation prior to resource extraction projects on their lands, positing that this right is well-established in the Inter-American System. The few details that still remain vague are likely to be clarified in the near future. In his conclusion, *Alanís, inter alia*, points to the Pascua Lama Project.

Gonzalo Aguilar Cavallo’s article ‘Pascua Lama, Human Rights, Indigenous Peoples: A Chilean Case Through the Lens of International Law’ then revolves around just this project. The article deals with one of the many examples of exploitation of natural living spaces of indigenous peoples on a domestic level which infringes upon the emerging body of international environmental law and the rights of indigenous peoples. The author delineates the interwoven nature of the different regimes. Moreover, the article reveals the persisting gap between international legal aspirations and domestic reality.

In their article “‘We Will Remain Idle No More’: The Shortcomings of Canada’s Duty to Consult Indigenous Peoples’ *Derek Inman, Stefaan Smis, and Dorotheé Cambou* elaborate on Canada’s recent legislative amendments, which were adopted without consultation of indigenous peoples’ representatives and their conformity with the internationally recognized duty to consult indigenous peoples before adopting measures that may affect them. Following a closer look on the evolution, content, and scope of the duty to consult in the jurisprudence of the Supreme Court of Canada, under international law, and under the Inter-American Human Rights System, the authors conclude that Canada has in fact violated its international legal obligations towards indigenous peoples.

The last article of this Special Issue ‘Rights of Indigenous Peoples and the International Drug Control Regime: The Case of Traditional Coca Leaf Chewing’ by *Sven Pfeiffer* explores the conflict between the international drug control regime and the rights of indigenous peoples, especially the clash between the traditional consumption of coca leaves and the UN Conventions on drug control. *Pfeiffer* argues that the conflict may be solved through an application of

the methods of treaty interpretation, but only to the disadvantage of indigenous peoples' rights.

We hope that this thoroughly chosen selection of articles provides for another worthwhile read to our readership.

The Editors

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Without the incredible support and help of the following people, we would not have been able to accomplish this project. We would like to thank:

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“By What Right?”: The Contributions of the Peninsular School for Peace to the Basis of the International Law of Indigenous Peoples

Sílvia Maria da Silveira Loureiro*

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Abstract¹

This paper aims to investigate the Peninsular School for Peace's contributions in the sixteenth and seventeenth centuries to the establishment of international law for indigenous peoples within a proper collective dimension. The recognition of collective rights of indigenous peoples is part of a phenomenon which occurred in the transition to the twenty-first century and is known as the collectivization of the international law of human rights. The first section of this article will discuss the inadequacy of modern human rights sources to recognize indigenous peoples as subjects of collective rights. This inadequacy stems from the lack of legal mechanisms that are able to reach the collective dimension of claimed international human rights in the context of contemporary indigenous movements. Thus, the second section will defend a pre-Westphalian conception of international law and support the return to its historic origins – in the *Jus Gentium* condition in an earlier view of the consolidation of the Modern Nation-State – in order to understand how the theorists from the Peninsular School for Peace faced questions of conscience generated by the collision between the Luso-Spanish kingdoms and indigenous sovereignty in the New World. For this purpose, the works of theologians Francisco de Vitória (1492-1546), Luis de Molina (1531-1600), and Francisco Suárez (1548-1617) provide insight. In this context, this paper endeavors to redeem the democratic peninsular doctrine towards a new reasoning for the international law of indigenous peoples.

A. Introduction

This article investigates the Peninsular School for Peace's possible contributions in the sixteenth and seventeenth centuries² to the current

¹ The author would like to express sincere thanks to Professor Dr. Pedro Calafate, for the knowledge imparted during the Post-Graduation Seminar, taught during the semester 2012/2013 in the Philosophy Course/Department of Letters, University of Lisbon. The author would also wish to thank the team of the Reading Blind Area of the National Library of Portugal, especially Carlos, Maria, and Paulo for their indispensable support. Certainly, this work would not have been possible without the support of these institutions and people. Finally, the author is also grateful to Joelson Rodrigues Cavalcante (Master in Environmental Law at University of the State of Amazonas) who carefully translated this text from the original in Portuguese to English.

² The historical background and philosophical concern of the Peninsular School for Peace will be discussed in subheading C. I. 2.

international law of indigenous peoples.³ This section lays the necessary theoretical ground for the consolidation of this new and original field of international human rights law within the jus-philosophical debate at that time, especially with regard to the justification of the conquest of the New World.

The preliminary section of this article argues for the return to the origins of this debate because, as later explained, the legal and philosophical bases developed from the movement of the internationalization of human rights protection were insufficient to reach the collective dimension of the rights claimed within the context of contemporary indigenous movements.

Thus, a pre-Westphalian conception of international law will be defended, and the return to its historic origins supported – in the *Jus Gentium* condition, in an earlier view of the consolidation of the Modern Nation-State – in order to understand how the theorists from the Peninsular School for Peace faced questions of conscience generated by the collision between the Luso-Spanish kingdoms and indigenous sovereignty in the New World.

The main theoretical frameworks consist of the writings of theologians Francisco de Vitória (1492-1546), Luis de Molina (1531-1600), and Francisco Suárez (1548-1617), the main proponents of the peninsular thought through successive historical periods at great institutions of that time: Salamanca, Évora, and Coimbra, respectively.

The second section of this article will examine three fundamental themes: namely the origin of temporal power and its relation with spiritual power, the criticism applied to the doctrine of just war in the conquest of America, and finally the defense of the right of American indigenous peoples to property as a corollary of their natural freedom.

After the analysis of the arguments propounded by Vitória, Molina, and Suárez, the article concludes that these theorists responded to the Indian issues raised in the intense debates of that time, positioning themselves firmly against those who favored conquering the American indigenous peoples via the doctrine of just war and its legal consequences: the servitude of the indigenous peoples and the dispossession of their property.

Finally, the article argues that the theoretical basis developed by the Peninsular School for Peace bears a close relationship with the Latin American

³ For the purpose of this article, the international law of indigenous peoples is denominated as a set of principles and rules of law arising in the international law framework, particularly from the late twentieth century, that assign to indigenous peoples the ownership and enjoyment of individual and collective human rights as well as the ability to act in the framework of international law for reparations in cases of violations of these rights.

indigenous peoples' fight for the recognition of their collective rights to self-determination, equality, and non-discrimination as well as the ownership of their ancestral lands.

B. The Inadequacy of the Modern Human Rights Basis to Recognize Indigenous Peoples as Subjects of Collective Rights

I. The Internationalization of the Human Rights Movement

The end of the Second World War is always seen as the landmark in the movement of internationalized human rights protection.⁴ The annihilation of human beings by regimes that were totalitarian, despite being constitutional, raised society's awareness of the fact that human rights issues could no longer be treated as matters of exclusive national competence.⁵ However, in order for that movement to be consolidated, old obstacles imposed by classical international law had to be overcome.

According to the Brazilian jurist and current judge of the International Court of Justice Cançado Trindade, the obstacles that had to be overcome were rooted in the Westphalian conception of international law, namely: a) the revision of the understanding of absolute sovereignty of States; b) the refusal to accept the existence of matters of exclusive national competence or reserved domains of States; c) the decline of reciprocity in human rights issues; d) the progressive transfer of jurisdiction to international supervisory bodies; and e) the redemption of the human being as subject of international law endowed with international procedural capacity.⁶

These extraordinary advances made during the second half of the twentieth century are undeniable, but only when considered from the standpoint of the international protection of individual rights. This is due to the fact that the foundations of the then-nascent branch of the international law of human rights

⁴ F. K. Comparato, *A Afirmação dos Direitos Humanos* (2003); C. Lafer, *A Reconstrução dos Direitos Humanos: Um Diálogo com o Pensamento de Hannah Arendt* (1988); F. Piovesan, *Direitos Humanos e Justiça Internacional: Um Estudo Comparativo dos Sistemas Regionais Europeu, Interamericano e Africano* (2006); H. J. Steiner et al., *International Human Rights in Context: Law, Politics, Morals* (2008).

⁵ H. Arendt, *The Origins of Totalitarianism* (1951).

⁶ A. A. Cançado Trindade, *A Proteção Internacional dos Direitos Humanos: Fundamentos Jurídicos e Instrumentos Básicos* (1990), 3-12.

stem from the liberal-philosophical traditions of the eighteenth⁷ century that were later incorporated in national constitutions. Therefore, human rights were defined ontologically as those rights inherent to the human person, endowed with reason and dignity.

Following World War II, the process of elaborating and generalizing the instruments for the international protection of human rights began, starting with the *Universal Declaration of Human Rights* in December 1948, preceded by only a few months by the *American Declaration of the Rights and Duties of Man*. Cançado Trindade⁸ named this process the *legislative stage* in the development of the international law of human rights. This stage intensified the drafting of texts of multilateral treaties regarding human rights at the global and regional level, and it extended the scope of their general protection and the number of specialized topics related to them.

Gradually, in the course of the legislative phase, the position of the human being, then a mere object of international law, changed, and it became to be regarded as legitimate subject and recipient of international standards.⁹ This cleared a path for the next step, referred to by Cançado Trindade¹⁰ as the *implementation* phase of those instruments.

The evolutionary steps from these two phases of development and implementation of international treaties on human rights resulted in the consolidation of the international system of protection¹¹ under the United Nations – UN (1948), the Council of Europe – CoE (1950), the Organization of American States – OAS (1948), and, later, the Organization of African Unity – OAU (1981) (now: African Union – AU).

However, in 1966, in the context of the Cold War, the decision by the UN to prepare two International Covenants to protect distinct “categories” of rights resulted in the categorization of human rights into civil and political rights, on the one hand, and economic, social, and cultural rights, on the other.¹²

⁷ C. Taylor, *Sources of the Self: The Making of the Modern Identity* (1992), 25-29.

⁸ Cançado Trindade, *supra* note 6, 521-522.

⁹ *The Effect of Reservations on the Entry Into Force of the American Convention on Human Rights*, Advisory Opinion of 24 September 1982, IACtHR Series A, No. 2, 8, para. 29.

¹⁰ Cançado Trindade, *supra* note 6, 521-522.

¹¹ These systems can be understood as a set of norms and organizations with an international mandate for supervising compliance with the human rights obligations assumed by their member States.

¹² *International Covenant on Civil and Political Rights*, 16 December 1966, 999 UNTS 171; *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, 993 UNTS 3.

The civil and political rights were established to be “susceptible of ‘immediate’ application, requiring *abstention* obligations by the State”.¹³ The adherence to these obligations is monitored by the Human Rights Committee, which may receive and consider individual complaints by victims of violations of these rights and which has quasi-judicial powers.¹⁴ The economic, social, and cultural rights, in turn, “were likely to apply only *progressively*, requiring positive obligations (acting) of the State”.¹⁵ Therefore, for a long time, compliance with these obligations was monitored only through a reporting mechanism, under which all States are required to report on the national implementation of these rights for the common benefit.¹⁶

Even though this dichotomy had been reviewed at the Conference on Human Rights in Tehran (in 1968) and Vienna (in 1993), as well as in *Resolution 32/130* of the UN General Assembly (in 1977) and successive resolutions of the Assembly itself,¹⁷ the mere political choice that led to the categorization has not yet been overcome by international law. For decades, international organizations have also failed in their effort to have collective human rights recognized – despite concrete demands for the recognition of such rights.

II. The Phenomenon of Collectivization of Human Rights Protection and the International Law of Indigenous Peoples

In the course of the twentieth century, several historic developments – in particular the decolonization of Africa in the 1960s and the indigenous movement of the 1990s triggered by the end of the Cold War – have resulted in collective demands for human rights. This phenomenon, which is called the *collectivization of the international law of human rights*, has increased the tension between the individual and the collective in the current conception of ownership of these rights.

Indeed, from the 1960’s onward, new rights became part of resolutions, declarations, and international treaties, such as the rights to self-determination, development, peace and global security, environmental stewardship, genetic

¹³ Cançado Trindade, *supra* note 6, 39 (translation by the author; highlighted in the original).

¹⁴ *Optional Protocol to the International Covenant on Civil and Political Rights*, 16 December 1966, 999 UNTS 302.

¹⁵ Cançado Trindade, *supra* note 6, 39 (translation by the author; highlighted in the original).

¹⁶ *Ibid.* See also *Optional Protocol to the International Covenant on Economic, Social and Cultural Rights*, 10 December 2008, UN Doc A/RES/63/117 annex, 1. It entered into force on 5 May 2013.

¹⁷ Cançado Trindade, *supra* note 6, 40.

heritage, ethnic and cultural diversity, access to information, and democracy. Such rights have been categorized and become widely designated as global rights by scholars. What is special about these rights is that they are not placed side by side with civil, political, economic, social, and cultural rights, but their collective or diffuse ownership has been recognized. In other words, they belong to a determined social group, a nation or humanity as a whole.¹⁸

This phenomenon is even more evident when one examines the political actions of organized groups who started presenting demands for the recognition and protection of collective rights, both in the domestic law of the States¹⁹ and in terms of international law, as occurs, for example, in indigenous movements, fighting for communal ownership of their ancestral lands and, as a consequence, the preservation of their way of life.²⁰

At the international level, some issues relevant to indigenous peoples, for example their own physical survival, cultural integrity, and maintenance of the bonds to their traditional territories, were being put before global and regional treaty monitoring bodies, even though the rights laid down in the treaties were originally designed to protect the rights of individuals.²¹ Despite the success with this strategy, the lack of an appropriate international instrument to guarantee the rights of indigenous peoples was finally provided in 1989, with the adoption of the *Convention No. 169* of the International Labour Organization, and later, in 2007, with the *United Nations Declaration on the Rights of Indigenous Peoples* (UNDRIP).

¹⁸ C. Weis, *Direitos Humanos Contemporâneos* (2010).

¹⁹ During the 1970s, a discussion arose on a new philosophical theory of justice and democracy in the context of liberal States. This debate emerged in 1971, with the publication of the *A Theory of Justice* by John Rawls and, later, with the work of Dworkin. In contrast, many scholars positioned themselves as communitarians (Charles Taylor and Michael Walzer) or multiculturalists (Will Kymlycka). However, these theories are not explored in this study, since they do not have a proper internationalist approach.

²⁰ For a detailed overview of this emancipatory process both within the United Nations and regional system, see R. L. Barsh, 'Indigenous Peoples in the 1990's: From Object to Subject of International Law?', 7 *Harvard Human Rights Journal* (1994), 33. Concerning the emancipatory movement of Latin American indigenous peoples from the 1960s to the first cases addressed by the Inter-American Human Rights System, see S. J. Anaya & R. A. Williams, 'The Protection of Indigenous Peoples' Rights Over Lands and Natural Resources Under the Inter-American Human Rights System', 14 *Harvard Human Rights Journal* (2001), 33.

²¹ For some significant examples of successful actions, see the text of the introductory note to the *United Nations Declarations on the Rights of Indigenous Peoples* by S. Wiessner, 'The Rights and Status of Indigenous Peoples' (2008), available at http://untreaty.un.org/cod/avl/pdf/ha/ga_61-295/ga_61-295_e.pdf (last visited 15 June 2013).

These two legal instruments, however, suffer from serious enforcement problems. On the one hand, despite the meticulous negotiations on issues such as the principle of self-determination for indigenous peoples and the right of consultation regarding the exploitation of natural resources on their ancestral territories, the *ILO Convention No. 169* was ratified by only 22²² of the 185 members of the Organization.²³ On the other hand, the instrument of the United Nations was adopted in form of a Declaration, which raises discussions as to its non-binding effect regarding the obligations assumed by States that have approved its articles.

Moreover, the rules that safeguard rights with a clear collective dimension are still faced with serious procedural obstacles to fully realize, for example, the demand for acknowledgement of indigenous ancestral lands, since such claims are submitted before implementation mechanisms strongly influenced by the liberal tradition, such as the system of petition, with a markedly individualistic bias.

Thus, the challenge of this research is to propose a new theoretical foundation that overcomes the liberal-individualist approach of the international protection of human rights, without losing sight of the great advances in the field of international human rights law made after the end of World War II as mentioned above by Judge Cançado Trindade.²⁴

C. The Democratic Peninsular Doctrine: Towards a New Reasoning for the International Law of Indigenous Peoples

I. Preliminary Explanations

Before delving into the analysis of this section's theme, three preliminary clarifications are necessary, so that the less familiar reader does not read this text on the basis of modern concepts derived from modern political philosophy. These modern concepts were formulated over five hundred years after the

²² ILO, 'Ratifications of C169 - Indigenous and Tribal Peoples Convention, 1989 (No. 169)' (2012), available at http://www.ilo.org/dyn/normlex/en/f?p=1000:12100:0::NO::P12100_INSTRUMENT_ID:312314 (last visited 15 June 2013).

²³ ILO, 'Alphabetical List of ILO Member Countries (185 countries)' (2012), available at <http://www.ilo.org/public/english/standards/relm/country.htm> (last visited 15 June 2013).

²⁴ Cançado Trindade, *supra* note 6, 3-17.

historic moment that serves as the basis for the reflections developed by the Peninsular School for Peace.

These warnings emphasize that the peninsular kingdoms' colonial project was not carried out with the cruel simplicity of wars of conquest. Rather, in the sixteenth and seventeenth centuries, the use of the doctrine of just war against the American indigenous peoples was triggered by a profound debate about the legitimacy of establishing domain over the New World. In these controversies, theologians were considered the highest authorities, not only because they were held to be universally wise, but also because they analyzed the treatment of indigenous peoples in light of divine and the natural law.

In order to provide a comprehensive background for these issues, three main subjects will be developed in this section: First, the article will explore the origins and the aggravation of the Indian issue caused by wars of conquest waged against the native peoples of America. Secondly, the article will discuss the role played by the Peninsular School for Peace as the central focus of almost all discussions derived from the Indian issue in Europe and overseas. And finally, the article will examine the importance of the theological view of the peninsular writings for the analyses of the Indian controversy from the divine and natural laws perspectives.

1. The Debate About the Indian Issue as a Matter of State in the Sixteenth Century

Since the early years, after the arrival of Columbus at Hispaniola, the Dominican missionaries had questioned *by what right* the wars of conquests in the New World were waged. They also denounced the exploitation and the mistreatment of the indigenous peoples under the system of *encomiendas*.

Suddenly, these issues became the subject of heated disputes on just-theological thought at the major universities of that time – Salamanca, Évora, and Coimbra. In this early period of colonization, jurists and theologians had the opportunity to develop solid doctrinal arguments to defend the basic rights of the Amerindian indigenous peoples.

At the end of the fifteenth century, the Luso-Spanish kingdoms that occupied the Iberian Peninsula kept the same medieval mentality of the *orbis christianus*, which revolved around the power struggles between the Popes and the Emperors. The issue of infidelity of Pagans, Jews, and heretics challenged the universalism of *orbis christianus*, as well as disputes over the legitimacy of the use of *just war* as a way of fighting paganism were at the centre of debates.

It is interesting to note that the different infidels, whose only similarity was that they were non-Christians and therefore outsiders of the *orbis christianus*, were treated completely differently under the legal system. The heretics were persecuted by the Inquisition because of their break of the previous legal-ecclesiastic bond – received with baptism – and their failure to comply with the duties to the church. The Jews lived under an extremely segregationist legislation, although they enjoyed some protection against physical attacks. The Pagans (moors or gentiles) lived in a permanent state of conflict with the Christian world, and the just wars were allowed against them.²⁵

The German cardinal and theologian Joseph Höffner reports that the concept of *war* qualified as *just* was applied to the gentile peoples in its full rigor. From this perspective, the prisoners of war's servitude was legitimate and, in this condition, these servants lost their rights over their property. The doctrine of *just war* was based on the scholastic tradition developed by the bishop of Hippo Saint Augustine, who influenced the Decree of Graciano, which, in turn, was transmitted to Saint Thomas Aquinas (*Summa Theologica, Question XL, Secunda Secundae*). Thus, quoting Saint Thomas Aquinas, the author articulates the three requirements for the use of just war, which were repeated by the thinkers of the Peninsular School for Peace within the scholastic disputes about the injustice of wars of conquest against American Indians:

“For a war to be fair, three requirements should be fulfilled. ‘First, the authority of the prince must have a mandate to pursue war.’ Private wars are not licit. Only the prince has a legitimate right to use the sword against the enemies both internal and external. ‘Second, there must be a just cause. For those against whom the war is directed, they should have deserved such aggression by any their own fault [...]. Third, war is supposed to be waged with the right intention; that is, for the purpose of promoting the good and combating evil.’ Because of this, Saint Augustine says: ‘It is quite rightly mislabeling to regard a war as just when there is a [...] and revenge [...]. Whoever wars with similar intentions incurs a serious guilt, even though the government has initiated the war for a just cause.’”²⁶

²⁵ J. Höffner, *La Etica Colonial Española del Siglo de Oro: Cristianismo y Dignidad Humana* (1957), 3-95.

²⁶ *Ibid.*, 75-76 (translation by the author).

Based on this medieval tradition, convinced of Christian civilization's superiority and aware of its evangelizing mission under the Bulls of Pope Alexander VI,²⁷ the nascent Spanish kingdom undertook overseas discoveries. However, the violent reality of colonial politics on the Hispaniola Island quickly called into question the political and legal bases upon which the Spaniards affirmed the legitimacy of the conquest expeditions and the system of *encomiendas* – servitude system under which indigenous peoples were exploited and mistreated in pursuit of wealth. Soon the crisis triggered by this colonial system arrived on the Hispaniola Island.

The Amercian historian Lewis Hanke records that the first major and revolutionary public protest against the treatment that the Spanish colonists imposed upon native Americans took place in a humble church on the Hispaniola Island, on Sunday, 21 December 1511. In his sermon, the Dominican friar Antonio de Montesinos sowed the seeds of doubt about the direction the Spanish colonial process was taking;

“[...] [t]ell me, by what right or justice do you keep these Indians in such a cruel and horrible servitude? On what authority have you waged a detestable war against these people, who dwelt quietly and peacefully on their own land? [...] Why do you keep them so oppressed and weary, not giving them enough to eat or taking care of them in their illness? For with the excessive work you demand of them, they fall ill and die, or rather you kill them with your desire to extract and acquire gold every day. And what care do you take that they should be instructed in religion? [...] Are these not men? Have they not rational souls? Are you not bound to love them as

²⁷ Professor Carlos E. Castañeda, from Texas University, remarks that the force of the bulls of Alexander VI “derived from a medieval concept, one that had been well established long before the King and Queen of Spain requested confirmation of their title, already unquestionably established by the recognized pre-emption of first discovery”. The author catalogues many examples, since 1016, of papal bulls that granted to Christian rulers, lands on condition that they instruct the natives in the Christian faith and convert them to Christianity. Until the arrival of Columbus in America and the issue of the Inter Caetera bull in 1493, “no outcry was raised in those days against the authority and the power of the Pope to make such grants”. According to the Bull of 1493, an imaginary line was divided across the oceans of the world between Spain and Portugal. This was not accepted by the other Christians crowns, for instance, the French and Dutch kingdoms. (C. E. Castañeda, ‘Spanish Medieval Institutions in Overseas Administration: The Prevalence of Medieval Concepts’, 11 *The Americas* (1954) 2, 115, 117).

you love yourselves? [...] Be certain that, in such a state as this, you can no more be saved than the Moors or Turks.”²⁸

The Spanish settlers’ reaction to the preaching of Montesinos followed immediately. When Montesinos warned the settlers in his preaching the following Sunday that no friar would receive them in confession and absolve their sins if they continued with their errors, they appealed to King Fernando and to the Superior of the Dominican Order, Friar Alonso de Loaysa, asking them to make Montesinos stop preaching.²⁹ Montesinos appealed to the King of Spain at the same time the settlers sent their attorney, the Franciscan friar Alonso de Espinar,³⁰ to court.

As a consequence of the reactions triggered by the Montesinos’ speeches, King Fernando summoned the *Juntas* of Burgos and Valladolid (1512-1513). Among the results of the works of the Juntas, the *Requerimiento* by the Spanish jurist Juan López de Palacios Rubios of 1513 is of special interest for this study.

The *Requerimiento* was influenced by the presentation made by Martin Fernández de Enciso at the meeting held in the Dominican convent of San Pablo, at Valladolid, in late July 1513. Enciso was a celebrated lawyer, cosmographer, and member of the expeditions of Pedrarias, which had been delayed by order of the King until the Spanish occupation of America could be justified. In his memorial, Enciso founded his argument in favor of the continuation of the expeditions of conquest, in the Bulls of Pope Alexander VI and in the Old Testament.

In his memorial, Enciso held that, just as God had given the Jews the Promised Land, God also gave the Spaniards the New World through the Pope. For this reason, much as Joshua regained Canaan by force, the Spaniards had legitimate grounds to declare a just war against the indigenous peoples who refused the opportunity to convert peacefully. As a last reason, the fight against idolatry of indigenous Americans was a sufficient argument for war, to take possession of their goods and reduce them to servitude, as Joshua did in the Promised Land.³¹

²⁸ L. Hanke, *The Spanish Struggle for Justice in the Conquest of America* (1959), 16-17 [Hanke, *The Spanish Struggle for Justice*].

²⁹ *Ibid.*, 18.

³⁰ L. Pereña, *La Idea de Justicia en la Conquista de América* (1992), 32 [Pereña, *La Idea de Justicia*].

³¹ Hanke, *The Spanish Struggle for Justice*, *supra* note 28, 30-32.

According to the lessons of the Spanish theologian Isacio Fernández, who is one of the most important specialists in the work of Fray Las Casas, the *Requerimiento* can be defined as a general normative legal document, which set a practice which was used in the occupation of the Canary Islands and, later by Columbus when he took possession of the New World in the name of Queen Isabella.³² It is based on a theocratic worldview and, as its name suggests, it contains the formal requirement that the native Indians convert to the Catholic faith and submit themselves as vassals to the kings of Spain, otherwise, as punishment, a just war would be waged against them. Professor Isacio Fernández asserts that

“[t]he ‘Requerimiento’, therefore, was not being required by the Dominicans, but by those supporting conquests. It was an ingenious solution by which they tried to make the conquests look like honest and legitimate military actions; but the condition was utopic, i.e. an official text apt to be read at the study table, but not to be read with regard to occasions and places that the same document was being applied to. In fact, in practice, from the first moment, it turned into a farce [...]”³³

By reference to the theocratic medieval doctrine of Pope Gregory VII and Pope Innocent III, which was updated by Palácios Rubios³⁴ and became the final doctrine for America,³⁵ Luciano Pereña, Professor at the Pontifical University of Salamanca, teaches that, under the single title of power and universal jurisdiction of the Pope, the Catholic kings, in all fairness, could enslave the Indians and require them to deliver goods and services to compensate for the expenses incurred in the conquest and government of those lands.

According to Professor Luciano Pereña, the Hispaniola Island conflict became a matter of State. In the early sixteenth century, it led to the emergence of two opposing views, two antagonistic trends, regarding the legitimacy of the *encomiendas* and the treatment of the Indians. Indeed, this conflict called the legitimacy of the Spanish conquest of America in itself in question.³⁶

³² I. P. Fernández, *El Derecho Hispano-Indiano: Dinámica Social de su Proceso Histórico Constituyente* (2001), 130.

³³ *Ibid.*, 131 (translation by the author).

³⁴ Pereña, *La Idea de Justicia*, *supra* note 30, 37-38.

³⁵ *Ibid.*, 37-38.

³⁶ *Ibid.*, 32.

2. The Peninsular School for Peace's and the University's Answers to the Indian Question

After the conquests of Mexico and Peru between 1519 and 1533, based on the text of *Requerimiento*, the crisis of national consciousness about the justice of the wars waged against the native peoples in America deepened further. Charles V officially raised this question when he summoned another *Junta* at Valladolid, in 1550, to hear both sides of the controversy.

The debate was centered on two outstanding figures of that time: Bartolomé de las Casas and Juan Ginés de Sepúlveda. The first was a Dominican Friar and the Bishop of Chiapas, who defended the assertion that the Amerindians were free and equal to Spaniards and therefore their property rights should be respected. The other, a Franciscan humanist, argued on the basis of the Aristotelian tradition that the American Indians should be considered as natural slaves of the Spaniards and that their alleged crimes against nature (such as cannibalism) should be punished.³⁷

It is important to note that this famous disputation reveals more than a personal antagonism between Las Casas and Sepúlveda. Rather, it shows the theoretical backdrop of two intellectual positions on the same practical problem: How should the colonial politics in the New World be oriented? The birthplace of these reflections was undoubtedly Salamanca and its most distinguished thinker was Francisco de Vitória.

According to Professor Luciano Pereña, it is a historical fact that Vitória's *Relecciones* (1526-1546) exceptionally influenced the ethics of the conquest. In the author's view, the Victorian hypotheses, based on the natural law, is the fundamental source of the Salamanca School. Professor Pereña also explains that the Salamanca School was a doctrinal centre and its three generations of Vitória's disciples can be characterized by their dynamic thinking, consciousness of unity, and expansionary strength. In short, they were academics working from the same sources and their own reflections were added to the collective effort of the School.³⁸

³⁷ For a detailed study of this debate see L. Hanke, *All Mankind is One: A Study of the Disputation Between Bartolomé de las Casas and Juan Ginés de Sepúlveda in 1550 on the Intellectual and Religious Capacity of the American Indians* (1974) and L. Hanke, *Aristotle and the American Indians: A Study in Race Prejudice* (1970).

³⁸ L. Pereña, 'La Escuela de Salamanca', in L. Pereña (ed.), *La Etica em la Conquista de América: Francisco de Vitória y la Escuela de Salamanca*, Vol. XXV (1984), 291, 305-308.

The first generation is *inter alia* composed of Domingo de Soto, Melchor Cano, Diego de Covarrubias, and Martín de Azpilcueta; that is, the inner circle of Vitória's disciples who learned his ideas directly at Salamanca. The second and the third generation represent the movement of expansion in Salamanca thoughts to other universities in Spain, Portugal, and America. Particularly in Portugal, Professor Luciano Pereña asserts that, through the university's official channels, the Victorian answer to the Indian question became prominent at Évora and Coimbra and was established as an "ideological trade" between Evora, Coimbra, and Salamanca, as existed in Spain among Salamanca, Valladolid, and Alcalá:

"The handwritten teachings by scholars from Salamanca were received almost instantly at the Portuguese universities, and in turn manuscripts from Evora and Coimbra arrived quickly to Spanish universities. Today one of the richest collections of scholars from Salamanca can be found in the Coimbra University Library, and among Spanish funds, at the *Colegios Mayores* of Salamanca, one discovers the most important lectures from Coimbra. This constant communication of ideas contributed to the progress of the school and further strengthened its doctrinal unity."³⁹

Considering this vivid exchange, the Portuguese scholar Professor Pedro Calafate proposed to combine these academic efforts at the Peninsular School for Peace.⁴⁰ Professor Calafate suggests that the major theoretical pursuit of peninsular thought is the search for peace through the rule of law. To reach this end, the peninsular scholars defended the subordination of politics to ethics and the prevalence of humanist values.⁴¹

Although the birthplace of the Peninsular School for Peace is Salamanca, and its central figure is Francisco de Vitória, the ideas born in the San Esteban Monastery crossed the Spanish border and spread overseas. Another important historical fact to be remembered in this context is the Iberian Union, between 1580 and 1640, when Portugal and Spain formed a single political unit under

³⁹ *Ibid.*, 308.

⁴⁰ This term was coined by Professor Dr. Pedro Calafate Villa Simões, in the scope of the research project *Corpus Lusitanorum de Pace: The Portuguese Contribution to the Peninsular School for Peace (XVI and XVII Centuries)*, currently under development at the University of Lisbon (Philosophy Center/Department of Letters).

⁴¹ P. Calafate, *Da Origem Popular do Poder ao Direito de Resistência: Doutrinas Políticas no Século XVII em Portugal* (2012).

the crown of Philip II. It is also of note that, in the fifteenth and sixteenth centuries, the inhabitants of the Iberian Peninsula used to designate themselves as Hispanics.⁴²

The two outstanding figures of the Portuguese branch of the peninsular doctrine are Luís de Molina, who taught at the University of Évora (1574-1583), and the Jesuit Francisco Suárez and disciple of Salamanca, who taught at the University of Coimbra (1594-1616).⁴³ The Peninsular School for Peace in Portugal did more than just repeat Salamanca's lectures. The Portuguese authors confronted the distinct realities in the Lusitanian Empire and tested the Victorian hypotheses there. They summarized their own conclusions and thus contributed to the collective work of the School.⁴⁴

Hence, it follows that the Peninsular School for Peace reunited a doctrinal current formed by Hispanic theologians and jurists who, in scholastic fashion, debated and deepened essential themes of their times in search of universal truths. The sources studied by the peninsular authors were those of common knowledge to Western Christian culture, such as Greek philosophy (mainly the texts of Cicero and Aristotle), the Roman law and their medieval glosses, the works of Church scholars (mainly Saint Augustine and Saint Thomas Aquinas), ecclesiastical documents, and the Bible itself.

Among the main topics of concern to the jus-theologians of this school are: a) the disputes between theocrats and monarchists; b) the popular source of power and the right of resistance against tyranny; c) the achievement of universal empire; d) the law of war and the maintenance of peace; e) the discussion of title domain in the American lands and the role of ethics in the process of colonization. On this last issue rests, more specifically, 'the Indian question', which is discussed in the context of political philosophy traced by the previous themes.

⁴² See F. C. Weffort, *Espada, Cobiça e Fé* (2012), 19-20.

⁴³ It is important to mention the writings of Martín de Ledesma, Pedro Simões, Fernando Pérez, and Fernando Rebello. These works are still unpublished but they are being translated from Latin to Portuguese in the research project *Corpus Lusitanorum de Pace: The Portuguese Contribution to the Peninsular School for Peace (XVI and XVII Centuries)* (*supra* note 40). Other important figures that deserve to be mentioned are the Jesuits Manoel da Nóbrega and Antonio Vieira who carried out the Brazilian colonial project based on this peninsular thought.

⁴⁴ For example, the Brazilian indigenous peoples were very different from the Mexican and Peruvian ones. Despite the temporary political union, Portugal and Spain had different colonial projects. Therefore, the Portuguese Jesuits found other strategies quite different from those of the Spanish Dominicans.

3. The Theological Character of the Texts of the Peninsular School for Peace

This third section, which is directly related to the earlier explanations, refers to the accusation that the texts resulting from these studies are ‘theological’. In defense, the author of this article will address this misunderstanding based on the work of the Spanish philosopher Jesús Cordero Pando, who examines this in relation to the Victorian doctrine. According to this author, it is an adjective often used to disqualify, in a way, the texts of that time from the perspective of political philosophy. However, this decontextualized attitude creates anachronisms, prejudicing the comprehension of these texts’ basis, scope, and meaning.⁴⁵

Also, according to Jesús Cordero Pando, in the historical and intellectual moment in which Francisco de Vitória lived (like other peninsular authors), it was the duty of the theologian to know all matters related to human behavior, both individually and collective: the Dean of Theology was the most important and best paid in the university and the Professor of Theology was considered as ‘universal wise’. Therefore, in that context, a distinction between different functions like philosopher and theologian was totally out of place.⁴⁶

Cordeiro Pando warned that, beside the all-encompassing nature of theology, which enabled the theologian to pronounce on any human subject, the vision was no longer one of the medieval theocentrism. Therefore,

“[in the] new theological conception, and since the focus that gives Vitória, [...] the universal referent is the man. It is a more *anthropocentric* approach, the humanism renaissance of Christianity itself. Undoubtedly, it is seen that the man is a creature of God and open to Him, with a destiny that transcends the present history; but, under this condition, it is interesting that it studies itself and, with all the realism, in the problems that are concerned with humanity.”⁴⁷

⁴⁵ F. de Vitória, *Sobre El Poder Civil: Estudio Preliminar, Tradução e Notas de Jesús Cordero Pando* (2009), 21 [de Vitória, *Sobre El Poder Civil*].

⁴⁶ *Ibid.*, 21-22.

⁴⁷ *Ibid.*, 22-23 (translation by the author; highlighted in the original).

Cordero Pando continued, adding that:

“Within this mentality, this ‘professional’ theological consciousness, it is clear that he is forced to know this human reality, to address their problems, incorporating their treatment, integrating the totality of knowledge that regarding to them: theology and the Law. But it is especially the theologian’s use of more rigorous reasoning, reflecting until having exhausted its own capacity to argue a point. Thus, it is designed as a rigorous philosophical discourse. The direct recipients of their lessons are Christians believers, who profess the truth of the doctrine transmitted by the Bible and recognize the authority of the Christian tradition, inevitably supporting this teaching in these other arguments, thus, realizing also a theological discourse.”⁴⁸

Indeed, it is Francisco de Vitória himself, who, in the prologues of his lessons about temporal power (1528) and about the Indians (1539), exposes the reasons that enable him as a theologian,⁴⁹ to address political issues even with greater authority than the jurist would treat them.⁵⁰ This is especially true with regard to the question of the indigenous peoples because, for him, this issue should not be discussed in the light of positivist European law, but in the framework of divine and natural law, which makes the theological approach more appropriate.⁵¹

⁴⁸ *Ibid.*, 23 (translation by the author).

⁴⁹ In the lesson about temporal power, Vitória said: “The work and the task of the theologian encompasses to a certain extent, that no argument, no controversy, no matter seems to be out of the profession and object care of the theologian. This may be the cause, as the orator Cicero said, that there is so great a scarcity of good, solid theologians, since there are so few illustrious and excellent men in all kinds of disciplines and all arts. Well, certainly, theology is the first of all disciplines and world studies, one to which the Greeks called the Treaty of God. Therefore, it should not seem at all strange that there are not many fully competent in so difficult a subject.” (de Vitória, *Sobre El Poder Civil*, *supra* note 45, 55) (translation by the author).

⁵⁰ In the lesson about the Indians, to introduce the problems Vitória says: “Secondly, I note this discussion does not belong to the jurists, at least exclusively. Because those barbarians are not the subject, as I shall say soon, of the positivist law, and therefore things are not to be considered by human laws, but by the divine, which jurists are not competent enough to define themselves such questions.” (F. de Vitória, *Relectio de Indis o Libertad de los Indios* (1967), 13 (translation by the author) [de Vitória, *Relectio de Indis*]).

⁵¹ de Vitória, *Sobre El Poder Civil*, *supra* note 45, 31.

II. The Peninsular Democratic Doctrine as a Humanist Response to the Indian Question

Under the premises explained above, the author will examine the three main themes that have been the object of profound reflections of the authors selected in this article, in order to contribute to building the university's answer to the Indian question, namely: the origin of the temporal power and its relation with spiritual power, the criticism to the just war doctrine as applied in the conquest of America, and finally, the defense of the right of domain of the American indigenous peoples over their properties as a corollary to their natural freedom.

This article began with an analysis sharing the same opinion of Professor Pedro Calafate, to whom the origin of temporal power, allied to the additional problem of relations between temporal power and spiritual power, is the more structural theme to understand peninsular thought.⁵² Also, according to Pedro Calafate, the thesis of the divine origin of the temporal power should be considered as a starting point for Christian peninsular thought of that time.⁵³

From this premise, however, came three distinct theses about to whom God transmitted the temporal power. That is, did God give this power directly to the king, to the pope, or to the people? These theoretical positions are based on three distinct doctrines, which looked at the tenuous solution and the conflicted relationship between the temporal and spiritual power. For the purpose of this article, we designate these doctrines as monarchist, theocratic, and democratic, according to their argument as to who is immediate recipient of the temporal power assigned by God: the King, the Pope or the people.

Depending on these different doctrinal theses about the relation between the temporal and the spiritual powers, different solutions to the Indian question were presented in the sixteenth century:

The monarchist doctrine favored strengthening the absolute monarchy. This doctrine emerged in the wake of the conflict between Henry VIII (and later James I) and the Catholic Church.⁵⁴ To the supporters of this doctrine, the King received the power directly from God, like Saul and David according to the Old Testament, and that is why the Kings could interfere in the temporal affairs of the Church. Ultimately, therefore, the Bulls of Pope Alexander VI, and

⁵² Calafate, *supra* note 41, 12-13.

⁵³ *Ibid.*, 17.

⁵⁴ F. Suárez, *De Juramento Fidelitatis. Defensio Fidei VI. Coleção Corpus Hispanorum de Pace* (1979).

later the commercial monopoly of peninsular kings over the New World, would be questionable in light of this doctrine.

The theocratic doctrine advocated a universal sovereignty of the Pope, both temporal and spiritual. With this universal lordship, the Pope had power and jurisdiction over both Christians and Pagans. Thus, this thesis perfectly served the peninsular kings' interests because, as explained in the previous section, the Catholic kings could legitimize the occupation of the New World based on the Alexandrian Bulls and, therefore, the *Requerimiento* itself.

The democratic doctrine, defended by the scholastics of the Peninsular School for Peace, argues that the temporal power is transferred immediately from God to all men, when they come together in a political community.⁵⁵ The two pillars of this doctrine are in the understanding of God's creation of man as a social and free being. The immediate source of temporal power, therefore, is in God, but is transmitted to men by natural right and not by divine or human laws.

The first pillar of the democratic doctrine (the social nature of man) is discussed by Francisco de Vitória in the lesson about temporal power, starting with the Aristotelian tradition, according to which the man, who is endowed with reason, is fragile and helpless if compared to other animals. Thus, for him, the source and origin of the cities and republics is in nature itself, as a consequence of the needs of men for mutual defense and conservation.⁵⁶ Vitória advocates this more assertively in the lesson about the Indians, using the famous phrase of the Greek poet Plautus, saying that man is not a wolf to his fellow man.⁵⁷

⁵⁵ For theological and Roman sources of this doctrine, see Calafate, *supra* note 41, 18-19.

⁵⁶ de Vitória, *Sobre El Poder Civil*, *supra* note 45, 69.

⁵⁷ "And as they say in the *Digesto* law, nature has established certain kinship among men. It goes against natural law that a man hates another man without reason. No man is a wolf to his fellow man, says Plautus, but is rather a man." (Cf. de Vitória, *Relectio de Indis*, *supra* note 50, 80). Remarking on this social nature of man, Pedro Calafate adds that: "This is one the most fundamental bases of scholastic anthropology and inherent contractualism: society is constituted by the free expression of will of men, in obedience to a natural necessity; man is not a wolf to man, as Plautus said [...]" (Calafate, *supra* note 41, 26). In another passage, Calafate also clarifies the basis of scholastic contractualism in opposition to the Hobbesian theory: "For the scholastic society is the affirmation of human nature and not the result of degeneration of the natural qualities of man, nor the result of fear that everyone moves when they are not submitted to an absolute authority. Accordingly, there was no principal contradiction between the state of nature and social state because man is not the wolf to man, and the natural law is not exhausted in the act of the social contract, as in Hobbes." (*Ibid.*, 18-19).

In order to discuss the source of temporal power, Francisco de Vitória reaffirms the Pauline foundation of Christian thought. According to the Pauline foundation, there is no power that does not come from God, but this power is constitutive of society, reinforcing once again the foundations of this doctrine in the social nature of man and the source of natural law.⁵⁸

The second pillar of this doctrine, as stated above, is God's creation of man as a free being. It can be understood as the human decision to transfer the collective temporal power to another individual man, senate or assembly, adopting as a result one of the Aristotelian forms of government. Sustaining this argument, Luís de Molina affirms that the simple agreement of men to form the body of the State, generates the State power over its members to govern, legislate, administer justice, and punish them.⁵⁹

As Suárez confirms, God created man naturally free, and they received the power from God to master the "brute animals" and the "inferior beings". According to him, the right of one man over another is God's will and has its origin in sin or some adversity. Applying this same rule to the freedom of every person to form an association with other human beings, Suárez laid the foundation to understand the issue of American indigenous sovereignty.

Suárez defines a human collectivity as

"[...] a special act of will or common consent, where men are integrated into a political body with a social bond to help each other to a political end. Thus, they form one collective organism that is called one in a moral sense and, consequently, needs also only one leader. Well, in this community, as such, by its nature lies the power of sovereignty, in a way that now no longer depends on the human free will that integrates them socially in that way and do not accept this power."⁶⁰

Hence, Suárez traces the guidelines of the freedom of the human communities in the following definition:

"Because being ruled directly by God through the natural law, is free and owns itself. This freedom does not exclude the power to govern

⁵⁸ de Vitória, *Sobre El Poder Civil*, *supra* note 45, 71.

⁵⁹ L. de Molina, *De Iustitia et Iure: Libro Primero de la Justitia* (1946), disp. XXII.

⁶⁰ F. Suárez, *De Legibus* (III, 1-16 *De Civili Potestate*): *Coleção Corpus Hispanorum de Pace* (1975), 21-50 (translation by the author).

itself and its members, but includes them. Rather, it excludes the subjection [of the State] to another man while it depends only on the natural law. To any man God has given immediately such power, while it is not transferred to an individual through an institution and human election.”⁶¹

Pedro Calafate notes that the theorists of that time have chosen broadly the monarchical form under the argument that it is the form of government that “best guarantees unity and social peace, that increased the claim of ontological superiority on the multiplicity, which is the axis of Christian metaphysics [...]”.⁶²

Analyzing the Indian question in the light of these two pillars, one can easily deduce why the thinkers of the Peninsular School for Peace fought with the conquerors and *encomenderos* for the freedom and sovereignty of the peoples of the New World. If the temporal power was brought about by natural law in the moment of constitution of a human community, the temporal power of indigenous peoples is legitimate and is comparable to the power of any other Christian kingdom’s sovereignty.

Therefore, if the temporal power stems from the need for community meetings, nobody, under natural law has universal lordship over the whole world. Thus, the domain of peninsular kings over the peoples of the New World would only be appropriate if transferred by legitimate means, which does not include a war of conquest unfairly fought against the indigenous peoples of America. On that account the universal lordship of the emperor was not a fair motivation to submit the indigenous sovereignty to the dominion of the Christian kings.

According to this natural law perspective, the peninsular theorists equate American and European sovereignty because of something that was common to both worlds: human nature. That is why they eschewed the debate about the differences in customs and positivist laws that undeniably existed among both peoples. Similarly, they would not accept the argument of the Amerindians’ alleged inferiority based on the Aristotelian theory of natural servitude.

This sense of equality is very clear in the lesson of Vitória where he asserts that the true owners of the American lands were the Indians who inhabited those territories before the Spaniards’ arrival, refuting the idea of Indians’ inferiority.

⁶¹ F. Suárez, *Defensio Fidei III: Principatus Politicus o La soberania Popular* [1965], 25 (translation by the author).

⁶² Calafate, *supra* note 41, 12. See also *ibid.*, 221.

“[...] [they] are not some of unsound mind, but have, according to their kind, the use of reason. This is clear because there is a certain method in their affairs, for they have polities which are orderly arranged and they have definite marriage and magistrates, overlords, laws, and workshops and a system of exchange, all of which call for the use of reason; they also have a kind of religion.”⁶³

If the Emperor was not the lord of the New World, neither was the Pope. In the wake of the democratic peninsular thought, the relations between the temporal and spiritual power were established in different spheres. The power of the Pope was only the spiritual power over the Christians. If any temporal power was granted to the Pope, this power was indirect, recognized only in those matters that were necessary to manage spiritual matters, such as the evangelization of the peoples of the New World. Hence, the Pope had no spiritual or temporal power over those who are outside the Church, that is, the infidels.⁶⁴

Examining the position of the Pope in relation to those who were outside the Church, Luis de Molina trod the same theoretical path as Vitória, saying that infidelity is not a legitimate cause for the loss of domain:

“Moreover, there is no more power of the Pope in temporal things than in spiritual. That is why he has no spiritual power over the infidels. As Saint Paul said [...] ‘Haply, it is not for me to judge those outside?’, because it has only the right to propose and explain to them the Gospel, to invite them to embrace the faith. So it is not their temporal lord; nor, therefore, is it a universal lord.”⁶⁵

In the disputes about the American problems, this question assumes great importance because, as discussed earlier, the advocates of theocratic doctrine justify the conquest of indigenous territories under the argument of papal donation to the Catholic kings. The Spanish crown could prosecute the just war against infidels who neither submitted themselves to the universal lordship of

⁶³ F. de Vitória, *De Indis et de Iure Belli Relectiones* (1917) (using the Latin version of his name, “Victoria”) *apud* S. J. Anaya, *Indigenous Peoples in International Law*, 2nd ed. (2004), 17, 36. Later in the same lesson, Vitória argues that the supposed unsound mind of indigenous peoples may be due in large part to their “bad and barbarian education”, because he also saw among Spanish men from the fields that differed very little from the “brute animals”. Cf. de Vitória, *Relectio de Indis*, *supra* note 50, 29-30.

⁶⁴ *Ibid.*, 43-54.

⁶⁵ de Molina, *supra* note 59, 435 (translation by the author).

the Pope nor wanted to be vassals to the Catholic kings. Therefore, when the arguments of the theocratic doctrine are confronted with the democratic thesis, it is clear how supporters of the former defend the conquest of the New World under the *Requerimiento* and the latter represents the antagonistic view.

However, considering that Vitória, Suárez, and Molina were Christian theorists, they believed that salvation was at the heart of the Catholic Church and therefore the peaceful preaching of the gospel was a fundamental duty for them.

If the Pope had lordship neither in the temporal, nor in the spiritual world, three immediate consequences resulted from the democratic doctrine. First, the spiritual power of the Pope was restricted to Christians. He had no power over the infidels of the New World. Second, the temporal power of the Pope was indirect; the Pope could choose to assign the evangelizing mission to the peninsular kings, leaving out other Christian kings. Third, the infidelity could not be a legitimate basis for war, slavery or the dispossession of the Indians.⁶⁶

III. The Peninsular Democratic Doctrine as a Theoretical Basis for the Recognition of Indigenous Peoples as Subjects of International Law

For nearly three centuries, since the modern law of Nations was established with the conclusion of the *Westphalia Peace Treaties* in 1648 as a landmark of international law, an eurocentric and monosubjective idea of this legal discipline was spread. The *jus gentium* (that was being generated by the Peninsular School for Peace) was replaced by the new Westphalian law of Nations. Under the Westphalian system, the State is at the centre of international relations. The Westphalian system also has a strong voluntarist and positivist doctrinal bias.

Consequently, indigenous peoples were excluded from the international framework of national sovereignty derived from the Westphalian model. If, in the early American colonization, some treaties were signed between the indigenous authorities and European kings, after the establishment of Nation States, the indigenous peoples were absorbed by them. The instruments of this assimilationist and segregationist process were forced displacement, the dispossession of their ancestral lands, and even a state policy of genocide.

The Westphalian model reached its demise with the two world wars in the twentieth century, which witnessed many atrocities perpetrated against humans

⁶⁶ Calafate, *supra* note 41, 193.

within the States' regulatory framework. However, according to Lillian Aponte Miranda:

“the early post-World War II era of human rights bypassed **indigenous** peoples. The post-World War II decolonization project, grounded in human rights precepts, advanced the right of peoples to self-determination. However, self-determination applied only to an overseas colonial territory as a whole, irrespective of pre-colonial enclaves of **indigenous** peoples existing within the colonial territories and colonizing states. Accordingly, the international decolonization process also failed to recognize **indigenous** peoples' inherent sovereignty.”⁶⁷

Undoubtedly, after the colonial and post-colonial experiences of near extermination, a new awakening of the universal juridical conscience in favor of recognizing the rights of indigenous peoples was built. As Professor Lillian Miranda affirms,

“Despite this historical exclusion under the international framework, including the early human rights framework, **indigenous** peoples continued to advocate for a collective right to self-determination. Specifically, **indigenous** peoples began to use the human rights discourse of self-determination as a starting point, and umbrella, for the assertion and design of additional particularized rights, including: (1) the right to own, use, occupy, and control ancestral lands and resources; (2) the right to recognition of independent and distinct governance and political structures; and (3) the right to meaningful consultative processes where state decisions implicated their interests. The assertion of these rights began to resonate from distinct communities of **indigenous** peoples across the globe, including those in Latin America.”⁶⁸

⁶⁷ L. A. Miranda, 'Uploading the Local: Assessing the Contemporary Relationship Between Indigenous Peoples' Land Tenure Systems and International Human Rights Law Regarding the Allocation of Traditional Lands and Resources in Latin America', 10 *Oregon Review of International Law* (2008) 2, 419, 426 (emphasis added).

⁶⁸ *Ibid.*, 419 (emphasis added).

The repertoire of international bodies for the protection of human rights, both in the universal system of the UN and in the regional systems, have instances of successful reparations obtained on behalf of groups or indigenous communities victimized by human rights violations. The recognition of the *jus standi* of indigenous peoples as authentic subjects of rights at the international level is still missing from the general approach.

In this sense, the Inter-American Court of Human Rights is a trend-setter. The Court took about a decade to recognize indigenous peoples as subjects of international law arguing that Article 1 (2) of the *American Convention on Human Rights* (American Convention) has defined the person as every human being. Paradoxically, during the same period, the Court developed a progressive jurisprudence regarding collective reparations in favor of indigenous and tribal peoples, in the light of a creative and evolutionary interpretation of Article 21 of the same Convention.⁶⁹

In 2005, when Judge Cançado Trindade explained his reasoning in *Moiwana Community v. Surinam*, he asserted that the recognition of human beings, individually and collectively as subjects of international law is an approach of our time because the protection of indigenous peoples' rights is trending towards recognition in individual and collective or social dimensions. He observes that, until that time, it was the human beings, members of such groups, who were the *titulaires* of those rights. This statement was established in the Inter-American Human Rights System by the decision of the case of *Community Mayagna (Sumo) Awas Tingni v. Nicaragua* (2001), in which the Court safeguarded the right to communal property of the Mayagna's ancestral lands under Article 21 of the *American Convention*, to the benefit of the members of that indigenous community.

⁶⁹ To understand the initial discussion see the Concurring Opinion of Judge García Ramírez, *Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, Judgment of 31 August 2001, IACtHR Series C, No. 79; Separate Opinion of Judge García Ramírez, *Masacre Plan de Sánchez v. Guatemala*, Judgment of 19 November 2004, IACtHR Series C, No. 116; and Concurring Opinion of Judge García Ramírez, *Yatama v. Nicaragua*, Judgment of 23 June 2005, IACtHR Series C, No. 127. To divergent opinions see the Separate Opinion of Judge Cançado Trindade, *Moiwana Community v. Surinam*, Judgment of 15 June 2005, IACtHR Series C, No. 124 and Separate Opinion of Judge Cançado Trindade, *Sawhoyamaxa Indigenous Community v. Paraguay*, Judgment of 29 March 2006, IACtHR Series C, No. 146. See also Concurring Opinion of Judge Vio Grossi, *Xákmok Kásek Indigenous Community v. Paraguay*, Judgment of 24 August 2010, IACtHR Series C, No. 214.

“11. In this respect, the endeavours undertaken in both the United Nations and the Organization of American States (OAS), along the nineties, to reach the recognition of indigenous peoples’ rights through their projected and respective Declarations, pursuant to certain basic principles (such as, e.g., that of equality and non-discrimination), have emanated from human conscience. Those endeavours, - it has been suggested, - recognize the debt that humankind owes to indigenous peoples, due to the „historical misdeeds against them“, and a corresponding sense of duty to „undo the wrongs“ done to them [...].

12. This particular development has, likewise, contributed to the expansion of the international legal personality of individuals (belonging to groups, minorities or human collectivities) as subjects of (contemporary) international law. International Human Rights Law in general, and this Court in particular, have contributed to such development. Under human rights treaties such as the American Convention, to identify the individuals belonging to given communities presents the advantage of conferring upon them the corresponding enforceable subjective rights [...]. In the present Judgment in the *Moiwana Community* case, the Inter-American Court has rightly pointed out that the petitioners are the *titulaires* of the rights set forth in the Convention, and to deprive them of the faculty to submit their own pleadings would in fact constitute an “undue restriction” of “their condition as subjects of the International Law of Human Rights” (par. 91). Beyond that, there remains the question of the evolving condition of peoples themselves as subjects of international law [...].”⁷⁰

After this long jurisprudential debate, in the recent case of *Indigenous Peoples of Kichwa of Sarayaku v. Ecuador*, the Inter-American Court revised its position, recognizing the collective subjectivity of those peoples. That is, indigenous peoples have guaranteed rights in a clear collective dimension and they have legal capacity to claim those rights as a group, independently from their individual members.

⁷⁰ Separate Opinion of Judge Cançado Trindade, *Moiwana Community v. Surinam*, *supra* note 69, 4-5, paras 11-12.

“On previous occasions, in cases concerning indigenous and tribal communities or peoples, the Court has declared violations to the detriment of the members of indigenous or tribal communities and peoples. However, international law on indigenous or tribal communities and peoples recognizes rights to the peoples as collective subjects of international law and not only as members of such communities or peoples. In view of the fact that indigenous or tribal communities and peoples, united by their particular ways of life and identity, exercise some rights recognized by the Convention on a collective basis, the Court points out that the legal considerations expressed or indicated in this Judgment should be understood from that collective perspective.”⁷¹

However, these advances lack an appropriate theoretical framework as noted in the first part of this article. Indeed, as emphasized by Judge Cançado Trindade in his votes in the case of *Moiwana v. Surinam* and the case of *Sawhoyamaxa Indigenous Community v. Paraguay*, the violations of indigenous peoples’ rights, and the reparations granted to them, have their roots in the historical processes of the laws of nations’ formation, in which indigenous peoples were considered as true subjects of rights.⁷² In this sense, the author suggests that this doctrinal gap can be filled by the democratic peninsular thought.

Peninsular thought’s first contribution to a theoretical basis for the international law of indigenous peoples is the respect for the inherent sovereignty of the peoples of the New World. Rejecting the theories of an Emperor’s and Pope’s lordship over the Indians’ domains, the theologians and jurists of the Peninsular School for Peace compared the Indian nations with the European kingdoms. For this reasoning, all the rules of customary international law that were valid in Christendom should have strictly applied in America, e.g. the principles of just war doctrine.

Since the international decolonization process in the 1960’s did not provide a satisfactory solution to the recognition of indigenous peoples’ inherent sovereignty, these guidelines drawn by the democratic peninsular doctrine offer a more authentic theoretical ground to the right of indigenous peoples to self-

⁷¹ *Kichwa Indigenous People of Sarayaku v. Ecuador*, Judgment of 27 June 2012, IACtHR Series C, No. 245, 66, para. 231.

⁷² Cf. the Separate Opinion of Judge Cançado Trindade, *Moiwana Community v. Surinam*, *supra* note 69, and the Separate Opinion of Judge Cançado Trindade, *Sawhoyamaxa Indigenous Community v. Paraguay*, *supra* note 69.

determination. Nowadays, it should be emphasized that the indigenous peoples' claim to self-determination is not a declaration of secession. Rather, they claim their right to keep their particular way of life with their political, legal, economic, and cultural institutions, as well as their right to consultative processes in any decision affecting them, and the guarantee of participation as citizens of the State in which they live.

The refusal of the domain titles of the Emperor and the Pope also explained that the mere fact of the arrival of the Portuguese and Spanish ships in America did not legitimize the native nations' loss of property rights. The thinkers of the Peninsular School of Peace were emphatic that the native nations were the true owners of those lands. Hence, the foundations of the right to own, use, occupy, and control ancestral lands and resources can be found in this doctrine.

Furthermore, the natural law perspective proposed by the Peninsular School for Peace to answer the Indian question permitted a respectful approach of both Indian and European institutions, avoiding what was contrary to the natural law itself. Following this reasoning, the proponents of the democratic peninsular doctrine strongly rejected the idea of slavery of the American natives based on the Aristotelian tradition. Instead, they defended the rational nature of indigenous peoples as any other member of humankind. Indeed, this analysis provides a collective dimension to the indigenous peoples' right to equality and non-discrimination.

D. Conclusion

The purpose of this article was to investigate the possible contributions of the Peninsular School for Peace from the sixteenth and seventeenth centuries and to set the basis of current international law of indigenous peoples. The theoretical framework chosen to achieve this goal was found in the works of Francisco de Vitória, Luis de Molina, and Francisco Suárez as representative proponents of democratic peninsular thought. The jus-philosophers of that time triggered a profound debate about the justice of the conquest of the New World and this backdrop served as an important starting point for the reflections about indigenous peoples' rights.

In the first part of this article, the author argued that the emphasis of international instruments and mechanisms created after 1948 lays on the protection of individual civil and political rights, influenced by liberal thought. That is the reason why special attention should be given to facilitating the access of organized groups to international systems, in order to enable them to claim collective rights, as was the case with regard to indigenous peoples rights

recognized in terms of *ILO Convention No. 169* and the UNDRIP of 2007.

In the second part of this article, the author held that the theoretical basis for a comprehensive approach of collective indigenous peoples' rights in international law could be found in the nascent *jus gentium* of the sixteenth century. It is precisely in the awakening of Christian conscience in the Peninsular School for Peace, in the context of the intense debate about the Indian question, that these foundations could be redeemed and updated. According to the author's investigations, the democratic peninsular doctrine shared by Vitória, Molina, and Suárez, based its origin on the creation of man as a social and free being. Thus, the immediate source of temporal power was in God, but it was transmitted to men through natural law. It was not in divine or human law. Therefore, the indigenous peoples were free and sovereign human collectivities, which, like any other Christian kingdom, had their right to govern themselves and dispose of their properties, as lawful actors, according to the precept of natural law.

Ultimately, this article argues that the democratic doctrine developed by the Peninsular School for Peace provides a more authentic theoretical foundation for the recognition of indigenous peoples as true subjects of collective rights to self-determination, equality and non-discrimination as well as to ownership of their ancestral lands.

Romanticization Versus Integration?: Indigenous Justice in Rule of Law Reconstruction and Transitional Justice Discourse

Padraig McAuliffe*

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Abstract

There is great optimism in transitional justice literature that indigenous legal processes can capture the meaning of conflict in ways that more remote, state- or international-based processes cannot. However, if the innovations in terms of inclusiveness, gender, and fairness that transitional justice invariably promote when employing indigenous justice processes are to make a long-term, sustainable impact beyond the transitional moment, greater attention must be given to how their employment as a form of transitional justice might interact with the usually simultaneous process of rule of law reconstruction. If transitional justice actors are to interact productively with justice sector reformers and national governments to establish traditional dispute resolution mechanisms in post-conflict States, they will have to abandon some of their more romantic notions evident in the literature and policy documents of indigenous justice as something inherently restorative, as an antidote to the shortcomings of legal formalism or as a site of resistance to the State Leviathan. Enthusiasts for the employment of indigenous mechanisms in transitional justice can learn lessons from the processes of de-romanticization that legal pluralism went through and the experiences of peace building missions in recent decades.

A. Introduction

One of the key areas where the rights of indigenous peoples have been recognized is in the support found in international human rights law for their customs and institutions of normative ordering. This is most apparent in the admittedly non-binding 2007 *United Nations Declaration on the Rights of Indigenous Peoples* which recognized the rights to autonomy in local affairs (Article 4) and maintenance of autochthonous legal institutions (Article 5), before going on to declare in Article 34 that “indigenous peoples have the right to promote, develop and maintain their institutional structures and their distinctive customs, spirituality, traditions, procedures, practices and, in the cases where they exist, juridical systems or customs, in accordance with international human rights standards”.¹ This builds on similar prescriptions in earlier normative instruments such as Articles 8 and 9 of the International Labour Organization *Convention Concerning Indigenous and Tribal Peoples in*

¹ *United Nations Declaration on the Rights of Indigenous Peoples*, 13 September 2007, Art. 34, GA Res. 61/295 annex, UN Doc A/RES/61/295, 1, 9.

*Independent Countries*² and Article 4 of the 1992 *United Nations Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities*.³ Peace agreements and times of political transition are often a time for renegotiating relationships between the State and indigenous communities, such as those between India and the Bodo community, Nicaragua and the Miskito or Bangladesh and the Chittagong Hill Tract peoples, and to address issues of discrimination and inequality that give rise to conflicts. These agreements tend to be dual – the State recognizes the separate identity, autonomy and land rights of indigenous peoples, while indigenous peoples recognize they are part of the State, even if the record of state adherence to agreements is chequered.⁴

Few practitioners or scholars in the fields of either rule of law reconstruction or transitional justice would today quibble with the principles found in the above agreements, having largely embraced indigenous mechanisms of dispute resolution as part of their peace building strategies in post-conflict and post-authoritarian States after initially dismissing them as irredeemably inimical to the type of democratic, modernizing polity the teleology of international intervention emphasizes. A role for indigenous justice, either in the form of discrete institutions for dispute resolution or substantive norms, now forms a core element of international best practice in these areas, as recognized in the UN Secretary-General's seminal *Rule of Law and Transitional Justice Report*.⁵ However, though superficially similar and supposedly mutually supporting, the fields of transitional justice and rule of law reform are distinctly different in terms of personnel, outlook, and approach to national systems of justice at any level, and a large degree of bifurcation has emerged between them.⁶ A disparity in the treatment of indigenous justice has emerged in the practice and scholarship of both fields. Transitional justice's engagement with indigenous law in the likes of the *mate oput* of Uganda, the *lisan* of East Timor, and the *gacaca* in

² International Labour Organization, *Convention Concerning Indigenous and Tribal Peoples in Independent Countries*, Arts 8 & 9, 27 June 1989, 28 ILM 1382, 1386.

³ *United Nations Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities*, Art. 4, 18 December 1992, GA Res. 47/135 annex, UN Doc A/RES/47/135, 3, 5.

⁴ J. Gilbert, 'Indigenous Peoples & Peace Agreements: Transforming Relationships or Empty Rhetoric?', in G. O. Aguilar & F. Gomez Isa (eds), *Rethinking Transitions: Equality and Social Justice in Societies Emerging from Conflict* (2011), 207, 220-221.

⁵ UN Secretary-General, *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*, UN Doc S/2004/616, 23 August 2004, 12, para. 36.

⁶ N. Kritz, 'Policy Implications of Empirical Research on Transitional Justice', in H. van der Merwe, V. Baxter & A. R. Chapman (eds), *Assessing the Impact of Transitional Justice: Challenges for Empirical Research* (2009), 13, 16.

Rwanda draws to a significant degree on Western theories of restorative justice as an antidote to formalist state/international criminal justice mechanisms. As a consequence, indigenous justice has been valorized as a bottom up alternative to elitist settlements and presented as a commendable alternative to formal justice, largely resenting any role for the State in directing, supervising or monitoring it. By contrast, rule of law reconstructors view indigenous and formal justice in less dichotomized terms and situate their treatment of the former in a broader national and temporal framework. This viewpoint sees a role for the State in the operation of indigenous mechanisms as both desirable and legitimate. There is an awareness that indigenous norms and state institutions present a “clash of two goods” – respect for local traditions and practices, on the one hand, and the goals of sustainable, rights-based, non-discriminatory State building on the other.⁷ Through the process of integrating indigenous justice with the formal system, justice sector reformers endeavor “to build mutually beneficial linkages between the systems [...] to harness the positive aspects of each system and mitigate the negative”.⁸ However, the rich policy debates this position has stimulated in peace building and justice sector reform about rights, jurisdictional issues, enforcement and justice gaps have made little impact on transitional justice discourse and its embrace of indigenous social ordering. Transitional justice as a field should be commended for broadening its horizons to include indigenous forms of justice. However, these horizons have not been stretched far enough to generate the institutional safeguards that would make the rights-based, non-discriminatory alterations that indigenous processes transitional justice actors promote in response to crimes of the past sustainable once the attention of donors and activists switch elsewhere.

An obvious, initial explanation for this disparity lies in the failure of scholars and practitioners in the fields of both transitional justice and rule of law reconstruction to draw on the research of the other. The majority of the voluminous literature on indigenous justice in justice sector reform is anthropological in nature, with a marked focus on legal pluralism.⁹ Legal pluralism in essence is a concept used to comprehend interactions between legal and social rule

⁷ T. Barfield, N. Nojumi & J. A. Thier, ‘The Clash of Two Goods: State and Nonstate Dispute Resolution in Afghanistan’, in D. Isser (ed.), *Customary Justice and the Rule of Law in War-Torn Societies* (2011) [Isser, Customary Justice], 159, 185.

⁸ Barfield, Nojumi & Thier, *supra* note 7, 189.

⁹ L. Huyse, ‘Introduction: Tradition-based Approaches in Peacemaking, Transitional Justice and Reconciliation Policies’, in L. Huyse & M. Salter (eds), *Traditional Justice and Reconciliation After Violent Conflict: Learning from African Experience* (2008) [Huyse & Salter, Traditional Justice], 1, 10 [Huyse, Introduction].

systems embedded at various layers in the State.¹⁰ However, as Hinton notes, legal anthropology has been “largely silent” on the topic of transitional justice, engaging little with overall theory.¹¹ Though one can point out particularized studies in legal pluralist literature of individual indigenous justice processes that are employed in the service of transitional justice, they tend to be viewed solely through that pluralist lens with little or no attention to their perceived potency in post-conflict justice.¹² Hinton argues that this disengagement is best explained by transitional justice’s teleological impetus towards democratization and modernization which implicitly deprecates ostensibly more “backward” or even “barbaric” traditional practices in a manner reminiscent of the civilizing missions of colonialism.¹³ This indignation is somewhat misplaced; if anything, as this article goes on to argue, indigenous law and custom have more often been idealized in transitional justice literature.

This indifference is reciprocated in transitional justice scholarship. Though increasingly welcoming of indigenous justice processes, including references to the international legal standards noted above, eminent theorists in legal anthropology or legal pluralism generally are conspicuous by their absence. The few links between transitional justice and anthropology “have been tangential or indirect through related literatures on the anthropology of genocide, political violence, human rights, social suffering, and international law”.¹⁴ Only a handful of writers urging greater use of indigenous mechanisms in transitional justice have examined those processes in the context of the post-conflict or post-authoritarian State’s attempt to permanently regulate their relationship with subnational legal or customary orders.¹⁵ Consequently,

¹⁰ The most useful and most widely cited introductions to legal pluralism are S. Merry, ‘Legal Pluralism’, 22 *Law & Society Review* (1988) 5, 869 and J. Griffiths, ‘What is Legal Pluralism?’, 24 *Journal of Legal Pluralism and Unofficial Law* (1986) 1, 1.

¹¹ A. L. Hinton, ‘Introduction: Toward an Anthropology of Transitional Justice’, in A. L. Hinton (ed.), *Transitional Justice: Global Mechanisms and Local Realities After Genocide and Mass Violence* (2010), 1, 6 [Hinton, Introduction].

¹² A good example is the treatment of Rwanda’s *gacaca* and East Timor’s Community Reconciliation Process in the influential B. Connolly, ‘Non-State Justice Systems and the State: Proposals for a Recognition Typology’, 38 *Connecticut Law Review* (2005) 2, 239, which were examined purely as examples of legal pluralism, at pages 267-270 & 276-280 respectively.

¹³ Hinton, ‘Introduction’, *supra* note 11, 6-7.

¹⁴ *Ibid.*, 6.

¹⁵ Notable examples include P. Clark, who places indigenous justice more holistically within post-conflict reconstruction processes (‘Hybridity, Holism and “Traditional Justice”: The Case of the Gacaca Courts in Post-Genocide Rwanda’, 39 *George Washington International*

the literature tends to assume the form of simplified, dichotomized debates on subsets of the quotidian restorative justice versus criminal justice debate: justice for the people versus justice as a tool of the State,¹⁶ African justice versus Western justice,¹⁷ and “embedded” versus “distanced” justice.¹⁸ This focus tends to exclude perspectives on more prosaic issues of legal pluralism which form the basis for the understanding of indigenous justice in long-term rule of law reconstruction, perhaps illustrating once more the “familiar but self-deceiving separation of law, human rights, truth commissions and reconciliation from questions of nation-building” that has persisted in transitional justice.¹⁹ Legal anthropologists have long understood that the complexities inherent in a legal order composed of multiple layers may be “invisible” to outsiders.²⁰

This dichotomic presentation tends to obscure the commonalities of interest between indigenous justice processes and national rule of law reconstruction processes in post-conflict States. As Shaw points out, “[m]ost post-conflict [S]tates of the global South have dualist legal systems: formal state law and informal customary law”.²¹ However, the separation and interpenetration of indigenous justice in a dualist national legal system is a question that transitional justice scholarship has largely ignored, preferring instead to devote attention to issues like whether employment of indigenous law might influence admissibility of Sudanese cases to the ICC,²² or the extent to which traditional dispute resolution

Law Review (2007) 4, 765); Huyse & Salter, *Traditional Justice*, *supra* note 9, whose edited volume is the first sustained attempt to place transitional justice in a pluralist state justice reconstruction context, and E. Mobekk & R. Kerr who examine the use of informal justice mechanisms to deal with past atrocities and their interaction with the formal justice system (*Peace and Justice: Seeking Accountability After War* (2007), 151-172).

¹⁶ A. Meyerstein, ‘Between Law and Culture: Rwanda’s Gacaca and Postcolonial Legality’, 32 *Law & Social Inquiry* (2007) 2, 467, 495.

¹⁷ R. Nagy, ‘Transitional Justice and Legal Pluralism in Transitional Context: The Case of Rwanda’s Gacaca Courts’, in J. R. Quinn (ed.), *Reconciliations(s): Transitional Justice in Postconflict Societies* (2009), 86, 103, rejecting this dichotomy.

¹⁸ P. Gready, ‘Reconceptualising Transitional Justice: Embedded and Distanced Justice’, 5 *Conflict, Security and Development* (2005) 1, 3.

¹⁹ R. A. Wilson, ‘The Sizwe Will Not Go Away: The Truth and Reconciliation Commission, Human Rights, and Nation-Building in South Africa’, 55 *African Studies* (1996) 2, 1, 14 & 20.

²⁰ L. Chirayath, C. Sage & M. Woolcock, *Customary Law and Policy Reform: Engaging With the Plurality of Justice Systems* (2006), 4.

²¹ R. Shaw & L. Waldorf, ‘Introduction: Localizing Transitional Justice’, in R. Shaw *et al.* (eds), *Localizing Transitional Justice: Interventions and Priorities After Mass Violence* (2010), 3, 15.

²² Mobekk & Kerr, *supra* note 15, 165-166.

might be accommodated within the penological templates of transitional justice,²³ or the ethical superiority of localized mechanisms vis-à-vis positivistic secular law.²⁴ By contrast, little or no attention is devoted to the more practical issue of the relationship between these mechanisms and simultaneous domestic rule of law reconstruction. For example, transitional justice scholarship is greatly concerned about whether the *mato oput* tradition of Uganda's Acholi people can satisfy the ICC's complementarity requirements,²⁵ but the more pressing issue in the long-term may be whether the State or local communities would be content to see their local mechanisms being given so unprecedented a responsibility. In Burundi, a clash has emerged between international donors and NGOs who are attempting to rehabilitate the traditional *bashingantaha* process for the purposes of transitional justice, and the national government that resists using it in this way.²⁶

To the extent that transitional justice acknowledges pluralistic legal orders, it does so in an over-simplistic binary manner that views state and indigenous systems as separate formal/retributive and informal/restorative spheres, failing to comprehend the ambiguous, competitive, intertwined and mutually inter-dependent relationships between them. Without attention to such complexities, any promotion, improvement or reappraisal of indigenous law fostered by transitional justice will be self-contained or diverge too far from on-going processes of rationalizing formal-informal justice relationships. The benchmarks by which the use of indigenous law as a form transitional justice are assessed, such as trust between antagonistic groups, empathy for the other's position, psychosocial healing and democratic dialogue, are far removed from the more prosaic pluralist-organizational issues justice sector reformers consider when they approach indigenous justice from a more long-term perspective: how formal or informal should the relationship between state and indigenous justice systems be? What matters and punishments can indigenous justice deal

²³ M. A. Drumbl, 'Punishment Post-Genocide: From Guilt to Shame to Civis in Rwanda', 75 *New York University Law Review* (2000) 5, 1221.

²⁴ J. O. Latigo, 'Northern Uganda: Tradition-Based Practices in the Acholi Region', in Huyse & Salter, *Traditional Justice*, *supra* note 9, 85, 101.

²⁵ I. Eberечи, 'Who Will Save These Endangered Species – Evaluating the Implications of the Principle of Complementarity on the Traditional African Conflict Resolution Mechanisms', 20 *African Journal of International and Comparative Law* (2012) 1, 22, 31-32.

²⁶ B. Ingelaere & D. Kohlhagen, 'Situating Social Imaginaries in Transitional Justice: The Bashingantaha in Burundi', 6 *International Journal of Transitional Justice* (2012) 1, 40, 41 [Ingelaere & Kohlhagen, *Transitional Justice*].

with or apply and what can it not? What framework should exist for appeals or resolution of conflicting principles? How applicable are constitutional standards of human rights and non-discrimination?

This article examines the consequences of the failure of transitional justice to marry its strong support for indigenous justice to an appreciation of the complexities of legal pluralism of which their brethren in rule of law reconstruction are more aware. It argues that while rule of law reconstructors and transitional justice practitioners have a similar appreciation of both the values and dangers of indigenous justice, the latter's tendency to romanticize and isolate indigenous mechanisms (largely born of a belief in their restorative potential) will contribute less to securing the autonomy of these mechanisms, respect and full-functioning as the State consolidates after transition than the more pragmatic and integrationist approach of the former. The view of indigenous law in transitional justice is too self-contained and insufficiently dynamic to contribute usefully to the simultaneous processes in which the State and peace builders attempt to reconcile local perceptions of social order with national concerns over human rights, jurisdictional disputes and the gaps in the rule of law.

This article argues that when indigenous law is being employed as a form of transitional justice, it should complement, or at least not obstruct, the usually simultaneous process by which the State and peace builders attempt to accommodate these customs in an invariably ravaged national justice system. Section B examines why practitioners in the fields of transitional justice and rule of law reconstruction are largely in agreement on the strengths and weaknesses of indigenous law. Section C examines the support for the integration (to greater or lesser degrees) of indigenous justice with the State in rule of law reconstruction. Section D examines the radically different restorative justice roots of the support for indigenous law in transitional justice, and why this has led to antipathy or indifference towards the merits of integration with the formal justice system that rule of law reconstruction has latterly embraced. Section E examines how those enthusiastically advocating the employment of indigenous law as a form of transitional justice can then take advantage of its high profile, the involvement of NGOs and the relative flexibility of indigenous justice in periods of political flux to serve a more immediately realizable, sustainable, and more mundane role as a model for a rights-based, more inclusive interaction of non-state and state-based justice in the long-term.

B. *Ad Idem*: The Strengths and Weaknesses of Indigenous Justice

There exists no universal or generally accepted definition of what constitutes indigenous law. An indigenous group may be defined by its nation, ethnicity, or locality and identified by its practice of unique traditions or retention of social, cultural, economic, and political characteristics that are distinct from those of the dominant societies in which they live. Typical definitions of indigenous justice to the effect that it is an accumulation of historical practices, locally defined and applied by the whole community, guided by a distinct world vision and holistically organized (rather than atomized into isolated subject areas) are not inaccurate.²⁷ However, they draw attention to the fact that the characteristics of what we might call indigenous justice overlap to a significant extent with a plethora of conceptually distinct dispute resolution mechanisms that fall outside the scope of the formal justice system, labeled as *customary*, *traditional*, *non-state*, *subnational*, *non-state*, *informal* and *popular*, which are generally used interchangeably with indigenous justice (the question of whether these mechanisms are legal or merely normative is beyond the scope of this paper). Within these categories, differing norms will be applied by differing institutions on differing subject matters among differing population sub-groups. The characteristics of what I label indigenous justice systems are heterogeneous, therefore, and will of course vary in strength, coercive and restorative potential, symbolic power and allegiance of the indigenous group. Among the key attributes are the following:

- The resolution of disputes is a predetermined responsibility of political, hereditary or spiritual authorities who are appointed from within an indigenous community.
- Crimes and disputes are viewed as relating to the entire community, as opposed to only the parties most immediately involved.
- Decisions are arrived at after consultation.
- The applicable norms, procedures, and sanctions exist for the primary purposes of maintaining internal community equilibrium and protecting cultural values.

²⁷ X. Albó, 'Como Manejar la Interculturalidad Jurídica en un País Intercultural?', in Instituto de la Judicatura de Bolivia (ed.), *Justicia Comunitaria en los Pueblos Originarios de Bolivia* (2003), 85, 89-90.

- The process is voluntary, even if enforcement of decisions requires social pressure from the community.
- The process is informal, lacks rules of evidence and eschews legal representation.

Bearing in mind these characteristics, one sees shared assumptions about the strengths and weakness of traditional justice in the literature, policy documents, and practice of those in justice sector reform and transitional justice. The emphasis on traditional justice in both transitional justice and justice sector reform is the result of a consensus that top down, formal, national level processes alone were insufficient to reckon with the legacy of past abuses or to build a more comprehensive justice system respectively, and that more bottom up perspectives with national ownership were essential to empower vulnerable groups and create access to justice. Nevertheless, the engagement of both justice sector reformers and transitional justice practitioners with customary law was less the product of conscious policy than the generic post-conflict or post-authoritarian ecology of the States to which they were deployed. In States attracting the attention of peace builders and transitional justice, the formal legal system generally manifests significant degrees of dysfunctionality.²⁸ In transitions from authoritarian rule to democratic rule, there will usually be some continuity between the old and new legal dispensations. Even in the most fragile and conflict-torn of transitions, a *tabula rasa* in relation to rules and norms is unlikely to be present. Though there may be a vacuum in terms of formal legal structures, highly resilient and historically embedded forms of traditional justice usually fill the gaps until the point where their competences are snapped. For example, the customary *xeer* system gained in importance in the course of Somalia's twenty-year civil war, especially in the areas of peace and security.²⁹ Consequently, the existence in the transitional environment of these systems, invariably more entrenched, legitimate, and accessible than the formal justice system, is an inevitable element of most rule of law reconstruction. In these contexts, non-recognition of customary justice is entirely unrealistic as either a security vacuum would emerge or the structures would operate underground.³⁰

²⁸ For a generic description of common conditions see B. Baker & E. Scheye, 'Multi-layered Justice and Security Delivery in Post-Conflict and Fragile States', 7 *Conflict, Security and Development* (2007) 4, 503, 507-511.

²⁹ J. Gundel, *The Predicament of the 'Oday': The Role of Traditional Structures in Security, Rights, Law and Development in Somalia* (2006), 4-13.

³⁰ D. Mearns, *Looking Both Ways: Models for Justice in East Timor* (2002), 54.

Similarly, transitional justice also has to reckon with a pre-existing traditional justice sector more readily available than the *ad hoc* mechanisms it can formulate. Refusal to engage with indigenous law has generally proven impossible, given the tendency of indigenous mechanisms to self-activate as transitional justice processes for re-integration of offenders before the State can formulate a response in the likes of Burundi,³¹ Peru³² and Mozambique.³³

In terms of strengths, both viewpoints accept the necessity of informal justice given the formal legal system's chronic weakness – previous association with an illegitimate regime, human rights abuses, and the sheer lack qualified professionals in formal institutions of justice which prevents the reconstructing State from penetrating beyond metropolitan areas into rural areas. Some conflicts in local social relationships are entirely unsuited to state intervention. Consistent figures of around 80-90 per cent of all legal disputes are resolved outside the formal system in most of the developing world.³⁴ Where no functioning justice options are available, increased vigilantism usually occurs.³⁵ However, indigenous mechanisms should not be regarded merely as poor substitutes for the State, but rather as something deeply embedded within local cultures.³⁶ Beyond their evident utility, customary laws might have spiritual roots that resound with the indigenous world view. Above all, the popularity of these processes may flow from their emphasis on communal ownership, participation, compromise and compensation, which is more likely to defuse the type of social acrimony whose avoidance is necessary in economically marginal, interdependent localities.³⁷ Wrongdoing is rarely understood as a crime to be punished, but may instead be conceptualized as an action against the social order or circulation of values which

³¹ A. Naniwe-Kaburahe, 'The Institution of Bashingantahe in Burundi', in Huyse & Salter, *Traditional Justice*, *supra* note 9, 149, 161.

³² K. Theidon, 'Justice in Transition: The Micropolitics of Reconciliation in Postwar Peru', 50 *Journal of Conflict Resolution* (2006) 3, 433, 456.

³³ A. Honwana, 'Healing and Social Integration in Mozambique and Angola', in E. Skaar *et al.* (eds), *Roads to Reconciliation* (2005), 83.

³⁴ B. Z. Tamanaha, 'The Rule of Law and Legal Pluralism in Development', 3 *Hague Journal on the Rule of Law* (2011) 1, 1, 4 [Tamanaha, Rule of Law].

³⁵ E. Harper, 'Engaging With Customary Justice Systems', in J. Ubink (ed.), *Traditional Justice: Practitioners' Perspectives on Legal Empowerment* (2011), 29, 39.

³⁶ D. Isser, 'Understanding and Engaging Customary Justice Systems', in Isser, *Customary Justice*, *supra* note 7, 325, 327 [Isser, Understanding and Engaging Customary Justice Systems].

³⁷ Penal Reform International, 'Access to Justice in Sub-Saharan Africa: The Role of Traditional and Informal Justice Systems' (2000), available at <http://www.gsdr.org/docs/open/SSAJ4.pdf> (last visited 15 June 2013).

must be rebalanced. Indigenous justice tends to be more accessible, cheaper, and responsive on account of its informality and proximity, though popularity will vary from group to group, territory to territory. Finally, indigenous justice systems tend to deal with bread and butter issues most appropriate for, and susceptible to, localized resolution such as family, land claims, and community disputes. They incorporate issues that the criminal justice system cannot deal with like sorcery, the supernatural and family break-ups that can bitterly divide societies.³⁸

However, while indigenous justice mechanisms are popular, this does not mean they are immune to abuses or marginalization of weaker members of society. While much is made of their harmonizing potential, “indigenous law [...] is not always the expression of harmonious egalitarianism. [It] often reflects narrow and parochial concerns; it is often based on relations of domination; protections that are available in public forums may be absent.”³⁹ Two of the most commonly aired complaints from within and outwith indigenous groups about their justice mechanisms relate to their tendency to reinforce power hierarchies and the frequency of human rights abuses. Indigenous justice, like all systems of justice, may reflect elite capture of power structures within their communities. Those who administer customary law often tend to be older “Big Men” from dominant families who generally tend to be financially prosperous, while the lack of any organized accountability to their community may exacerbate the ever-present risk that considerations of power would take precedence over equity.⁴⁰ Vulnerable groups like women, the young, AIDS victims, and those considered as outsiders to the indigenous group find themselves marginalized by a system that is rarely sensitive to their needs. As Connolly argues, “weaker members of the community [...] may accept the jurisdiction of the traditional forum less voluntarily, and sanctions imposed against them may reflect their weaker position in society”.⁴¹ Given this risk, the search for consensus and harmony may in fact result in the unhealthy muffling of legitimate resentments.

³⁸ Department for International Development (DFID), ‘Briefing: Non-state Justice and Security Systems’ (2004), available at <http://www.gsdr.org/docs/open/SSAJ101.pdf> (last visited 15 June 2013), 1 & 10.

³⁹ M. Galanter, ‘Justice in Many Rooms: Courts, Private Ordering, and Indigenous Law’, 19 *Journal of Legal Pluralism and Unofficial Law* (1981), 1, 25.

⁴⁰ International Development Law Association, ‘Customary Justice: Challenges, Innovations and the Role of the UN’, in J. C. Botero *et al.* (eds), *Innovations in Rule of Law: A Compilation of Concise Essays* (2012), 55, 56.

⁴¹ Connolly, *supra* note 12, 246.

Human rights abuses tend to be the most frequent source of criticism of traditional justice, even when they are grounded in complex, context-specific rationales based in culture and socio-economics. Procedural complaints are the most common – indigenous justice mechanisms often incur allegations of “miscarriage of justice, favouritism, coercion, arbitrary imprisonment or extended detention without trial”,⁴² problems which are exacerbated by the lack of review. A further concern is the harsh physical punishments and banishments employed like torture, honor killings, or payment of blood money.⁴³ Even where restorative methods are preferred, these systems can still uphold traditional practices that violate the rights of the vulnerable. Again, indigenous justice often has the effect of undermining the socio-economic status of women who may not be able to own or inherit property, and may be subservient within the family, while in some cultures women may be forced to marry their rapists, be punished for suffering sexual abuse, or see compensation given to their kin group collectively for her loss in marital value.⁴⁴ The patriarchal dominance of indigenous justice operates to preclude a role for females in decision-making.

A further problem is that of competence. Indigenous justice systems may work well internally when dealing with problems that predictably arise within the group, but struggle when trying to restrain bodies outside the community like the government, civil service or corporations.⁴⁵ If the boundaries of what constitutes the indigenous group are made ambiguous by migration or inter-marriage, the customary law may be of little utility when some groups or individuals are considered to lie outside of its remit.⁴⁶ Indigenous processes are generally unsuited to very serious crimes like murder or organized crime which expose the limits of community solidarity. Here it is often recognized by both the indigenous group itself and the State that the formal system’s emphasis on rights, adversarialism and punitive sanctions may be more appropriate. This tendency is also visible in transitional justice discourse where a division of labor is usually envisaged between international or national trials and/or truth commissions for the most serious offenders or offences, and more localized processes for those lower in the hierarchy. A problem emerges when this division of labor turns into a complete separation.

⁴² F. M. Deng, ‘Customary Law in the Cross Fire of Sudan’s War of Identities’, in Isser, *Customary Justice*, *supra* note 7, 285, 316.

⁴³ International Development Law Association, *supra* note 40, 55.

⁴⁴ See generally the special edition entitled ‘Women’s Rights and Traditional Law: A Conflict’, 13 *Third World Legal Studies* (1995).

⁴⁵ Isser, ‘Understanding and Engaging Customary Justice Systems’, *supra* note 36, 331.

⁴⁶ Barfield, Nojumi & Thier, *supra* note 7, 174-175.

C. Better Late Than Never: The Embrace of Non-State Justice in Peace Building

For non-state justice processes like those of indigenous law to form a core part of a rule of law reconstruction strategy, two things had to happen. Firstly, peace builders on the ground had to overcome an instinctive antipathy to non-state forms of ordering which would lie largely beyond their immediate control or that of the State which they were helping rebuild. Secondly, those coming from a legal-pluralist background who were best placed to assist in this process needed to overcome an aversion to state influence on indigenous justice.

I. How Indigenous Legal Ordering Came in From the Cold in Rule of Law Reconstruction

To begin with the former, those involved in intensive “third generation” peace building were slow to concede that the accessibility, legitimacy, and popularity of indigenous justice systems meant that it regulated how a majority of people actually ordered their lives. This disinclination is generally explained by the perceived pervasiveness of human rights shortcomings canvassed above, and the sheer fact of the unfamiliarity of non-state regulation to those from States where the formal justice system long exercised hegemony. Some argued that they were so far removed from the goals of the rule of law that “justice strategies should seek to replace rather than engage them [...] [a]ccording to this argument, any official recognition of customary systems is tantamount to sanctioning human rights violations”.⁴⁷ Normative structures outside of the State were variously viewed as “disorderly, corrupt, unimportant or even potentially subversive”.⁴⁸ Indigenous justice emerged more as a competitor than a complement to the formal justice sector, with the consequence that enduring discriminatory or abusive practices went unchallenged. The failure of rule of law reconstruction in the likes of Cambodia, Afghanistan, East Timor concerned exclusively with rebuilding centrally organized courts, prisons, and police demonstrated that narrow technical formalism could not ground the rule of law as it neglected the everyday, lived dynamics of the social order outside the major cities.

⁴⁷ Isser, ‘Understanding and Engaging Customary Justice Systems’, *supra* note 36, 341.

⁴⁸ J. Faundez, ‘Legal Pluralism and International Development Agencies: State Building or Legal Reform?’, 3 *Hague Journal on the Rule of Law* (2011) 1, 18, 18.

In light of these failures and the evident capacity gaps in justice provision, rule of law reconstruction now focuses on strengthening and reforming non-state justice institutions and linking them to the formal legal system. Even though indigenous systems of justice may not meet ideal rule of law requirements, they fulfill rule of law functions insofar as they establish and maintain rule governed behavior among citizens.⁴⁹ Consequently, this reversal of policy should not be mistaken for a turn towards restorative justice, justice from below as something meritorious in itself, or a rejection of a role for the State at the local level. Nevertheless, the embrace of non-state justice should not be regarded as merely “the messy compromise which the ideology of legal centralism feels itself obliged to make with recalcitrant social reality”.⁵⁰ The concentration on justice gaps was allied with a more positive case for integration that built on the new understanding of underdevelopment which emphasized that poverty was as much about powerlessness and lack of availability of protection from the law as it was about material deprivation.⁵¹ As peace builders recognized that the old rule of law orthodoxy, which was premised on the reform of courts, legislature and police enjoying a trickle-down effect to benefit the poor, yielded negligible results, it was gradually assumed that indigenous justice would be inherently more empowering for people who could collaboratively control it.⁵² As practice made apparent the reality that rebuilding the formal rule of law system might take decades to complete, integration of indigenous mechanisms with the formal sector moved from an interim strategy to form a core part of any effective justice sector reform:

“The general view among leading policy-makers is that customary law should not only be recognized and applied by the traditional institutions but should be the main source of legislation and governance in all areas except those where modern exigencies require adopting from outside sources. This is a radical departure from

⁴⁹ Tamanaha, ‘Rule of Law’, *supra* note 34, 15.

⁵⁰ Griffiths, *supra* note 10, 7.

⁵¹ UNDP, ‘Programming for Justice: Access for All: A Practitioner’s Guide to a Human-Rights-Based Approach to Access to Justice’ (2005), available at <http://www.unrol.org/doc.aspx?d=2311> (last visited 15 June 2013), 5.

⁵² See generally S. Golub, ‘Beyond Rule of Law Orthodoxy: The Legal Empowerment Alternative’ (2003), available at <http://www.carnegieendowment.org/files/wp41.pdf> (last visited 15 June 2013).

earlier approaches that relegated customary law to a subordinate position.”⁵³

This focus is typically both pragmatic and normative. Peace builders and state agencies may legislate to regulate troublesome aspects of non-state law, clarify indigenous law, build links like monitoring, appeals or advice from the formal legal system, develop the capacity of indigenous authorities in areas like mediation and administration, and engage in human rights and gender awareness raising. Though indigenous justice will inevitably endure some loss of voluntariness and flexibility, all forms of integration attempt “to combine the virtues of traditional legal institutions (accessibility, informality, economy of time and money, and familiarity of legal norms) with those of the state legal system (impartiality, uniformity of law and [state] legitimacy)”.⁵⁴ Some of the uniqueness and flexibility of the law is regrettably lost in this way, but this is an inevitable by-product of using indigenous mechanisms to fulfill rule of law functions that the State is unable to provide in a manner that is accountable and standards-driven. In response, the State must demonstrate greater sensitivity to indigenous socio-political structures and co-operate with them strategically and sustainably in delineating the blurry lines between formal and informal law.

II. Overcoming Antipathy to Integration With the State

However, a more assertive role for the State in monitoring, regulating or sharing responsibility with indigenous justice systems goes somewhat against the grain of a significant strand of what might be labeled “classical” legal pluralist thought. The abandonment of a purely formalist approach to rule of law reconstruction in the first decade of this century mirrors the early rejection by legal pluralists in the 1970s and 1980s of what they described as “legal centralism”, namely the notion that “legal reality, at least in ‘modern legal systems’, more or less approximates to the claim made on behalf of the [S]tate”.⁵⁵ Rejecting this legal-centralist “false ideology”, pluralists pushed for an expansive understanding of the term “law” to embrace multiple sub-state legal orders, from sports associations to the family to indigenous justice.⁵⁶ The antipathy to legal centralism is not surprising given fact that legal anthropologists have little

⁵³ Deng, *supra* note 42, 314.

⁵⁴ Penal Reform International, *supra* note 37, 129.

⁵⁵ Griffiths, *supra* note 10, 4.

⁵⁶ Galanter, *supra* note 39.

interest or professional inclination to examine state legal systems – part of the impetus for the emergence of legal pluralism came from the determined assertion that legal centralism “impaired our consciousness of ‘indigenous law’”.⁵⁷ The recognition of non-state orders as law was welcome, but as Tamanaha argues, it also had a political impetus in that, by raising the prestige of informal non-state “law”, it deliberately tended to lessen the stature of state law.⁵⁸ Legal pluralists moved away from emphasizing the equivalence of indigenous justice to state law, to a process of contrasting it favorably with state law.⁵⁹ As Sharafi puts it, there was a notable tendency for ideologically committed scholars in the field to aggressively assert that non-state law was more egalitarian and less coercive than state law.⁶⁰ Given the colonial roots of legal pluralism in the study of how imperialist States imposed centralized legal systems and regulated indigenous structures as forms of divide-and-rule, cheap administration, or to fashion compliant labor forces for the colonial exploitation of natural resources, this new focus was seen as a valuable corrective.⁶¹ As such, legal pluralism as a field was “embedded in relations of unequal power” between a dominant class and an oppressed one, and implied a suspicion of the superior hierarchical position and coercive power of the formal legal system.⁶² For some, this was a struggle against Western state-centric ethnocentrism,⁶³ while others saw it as a conscious distancing from dominant legal ideologies.⁶⁴

Even after colonialism formally ended in national independence, to the extent that an informal legal system was brought pluralistically within the State’s legal order, it was considered to still lie within the ideology of legal centralism and was pejoratively labeled as a “weak legal pluralism”, “a fixture of the colonial experience [...] proving one of the most enduring legacies of

⁵⁷ *Ibid.*, 18.

⁵⁸ B. Z. Tamanaha, ‘The Folly of the “Social Scientific” Concept of Legal Pluralism’, 20 *Journal of Law and Society* (1993) 2, 192, 205 [Tamanaha, The Folly].

⁵⁹ *Ibid.*, 209.

⁶⁰ M. Sharafi, ‘Justice in Many Rooms Since Galanter: De-Romanticizing Legal Pluralism Through Cultural Defence Galanter Influenced Scholars’, 71 *Law & Contemporary Problems* (2008) 2, 139, 139.

⁶¹ Merry, *supra* note 10, 874 & 870.

⁶² *Ibid.*, 874.

⁶³ M. Chiba, ‘Toward a Truly International Sociology of Law Through the Study of the Legal Pluralism in the World’, in A.-J. Arnaud (ed.), *Legal Culture and Everyday Life* (1989), 129, 134.

⁶⁴ F. v. Benda-Beckman, ‘Distance or Submission: On Difference in Socio-Legal Studies’, address to the Socio-Legal Groups Annual Conference 1989, cited in Tamanaha, ‘The Folly’, *supra* note 58, 198.

European expansion”.⁶⁵ The embrace by independent, post-colonial States of indigenous justice as a form of nation building was viewed as an inherently oppressive homogenization and subordination of indigenous societies.⁶⁶ Given the obvious risks of cultural disintegration in modernizing States and the observable tendency for many relationships between States and indigenous peoples to be confrontational, this caution was understandable. Though legal pluralism made a valuable contribution in recognizing the heterogeneity of the normative realm and undermining the claim of state monopoly of law, attempts to understand legal pluralism as bodies of norms constituting the “real” legal order administered parallel to, but separate from, the State faltered for a number of inter-related reasons.

First and foremost, legal pluralism changed from a purely analytical concept employed by the academy to explain issues surrounding the various layers of normative regulation to a policy concept applied in practice to messy realities in developing States.⁶⁷ Scholars and practitioners recognized that a binary analysis of state versus indigenous justice could not take account of the reality on the ground that there is no clear-cut distinction between the two, “but instead a continuum of differentiation and organization of the generation and application of norms” which at various points complement and frustrate each other.⁶⁸ Though newly independent States in the developing world continued to manifest relationships of domination and subordination, it became impossible to re-apply a colonizer-colonized relationship of subjugation and exploitation as inevitable consequences of the State establishing a relationship with indigenous ordering.⁶⁹ Certainly, after colonialism, newly independent States would view increased supervision of these mechanisms as furthering nationalization projects against both the old colonial power and separatist elements within the State.⁷⁰ The extent to which the State recognizes (or does not) the various customary

⁶⁵ Griffiths, *supra* note 10, 5-6.

⁶⁶ For an exposition of this idea (not an espousal of the position), see L. Nader & H. F. Todd, ‘Introduction: The Disputing Process’, in L. Nader & H. F. Todd (eds), *The Disputing Process – Law in Ten Societies* (1978), 1, 32.

⁶⁷ A succinct description of the two variants is found in H. M. Kyed, ‘The Politics of Legal Pluralism: State Policies on Local Pluralism and Their Local Dynamics in Mozambique’, 59 *Journal of Legal Pluralism and Unofficial Law* (2009), 87.

⁶⁸ Merry, *supra* note 10, 877.

⁶⁹ G. D. Westermarck, ‘Court is an Arrow: Legal Pluralism in Papua New Guinea’, 25 *Ethnology* (1986) 2, 131, 131.

⁷⁰ M. Toufayan, ‘When British Justice (in African Colonies) Points Two Ways: On Dualism, Hybridity, and the Genealogy of Juridical Negritude in Taslim Olawale Elias’, 21 *Leiden Journal of International Law* (2008) 2, 377, 402.

mechanisms within its borders has implications for national public order as it determines the reach of the State at local the level and how that reach is exercised. Some degree of control, supervision, or co-operation may allow the state leadership to check local power structures and assert its monopoly on the legitimate use of force.

As post-colonial States became embedded in social reality at all levels, the pluralist insistence that non-state law could be conceptualized independently of state law on the basis that “the [S]tate is not a universal social fact but a temporally and geographically contingent occurrence”⁷¹ gave way to the realization that even the remotest communities could not be insulated from the State’s power.⁷² Motives for state interaction with indigenous legal systems are many, varying from the benign (economic development, human rights and non-discrimination, legitimation) to the baleful (repression, exploitation). In light of these complexities, it was slowly acknowledged within legal pluralist scholarship that the view of all law as the product of the ruling class was too reductionist⁷³ and reliant on an overly simplistic view of the positivist legal tradition of law as the hierarchically organized product of the sovereign.⁷⁴ For example, some States embraced indigenous mechanisms to extend or decentralize the state justice system on the basis of the simple principle that two (or three, or four) justice systems may be better or more legitimate than a single weak one. The expansion of the state sector did not necessarily militate against the complementary expansion of the non-state sector.

As debates over legal pluralism shifted from colonial and post-colonial mindsets to begin examining the limits of tolerance in multi-cultural societies, discomfort increased with the simplistic binary approach of ideologically endorsing non-state law and deprecating the formal legal system.⁷⁵ The acceptance of the need for the State to intervene against human rights breaches and discriminatory practices has been sketched out earlier, and its general acceptability to indigenous societies will be canvassed in Section E. Even those urging the use of customary justice as an antidote to exploitation of indigenous groups and formalist legal orthodoxy argue that non-state processes operate best when it integrates with other types of state legal services.⁷⁶ Of course, by the

⁷¹ Tamanaha, ‘The Folly’, *supra* note 58, 201.

⁷² G. Woodman, ‘How State Courts Create Customary Law in Ghana and Nigeria’, in B. W. Morse & G. R. Woodman (eds), *Indigenous Law and the State* (1988), 181, 209.

⁷³ Merry, *supra* note 10, 885.

⁷⁴ Tamanaha, ‘The Folly’, *supra* note 58, 194, 195 & 196.

⁷⁵ Sharafi, *supra* note 60, 140.

⁷⁶ Golub, *supra* note 52, 35.

time of the explosion of peace building from the 1990s onwards, the need to synthesize the seemingly opposed cultures of the state and indigenous society was long accepted in legal pluralist discourse, and the separatist position was eclipsed. However, it is relevant insofar as the attitudes essayed therein endure in the view of indigenous legal systems in transitional justice discourse.

III. Advantages of Integration

Isser lists the most pertinent advantages in linking state and non-state systems as follows:

- alleviation of case-loads in the overburdened formal system
- oversight of the customary system
- mitigation of the effects of forum-shopping
- recognition of multiculturalism⁷⁷

Considerations of space preclude a detailed survey of the ways in which state and indigenous law are interpenetrated. There is no ideal ratio of state to customary mechanisms to which peace builders or governments should aspire. For example, Connolly has identified four general ways in which States engage with non-state mechanisms, namely abolition, non-incorporation, partial incorporation, and full incorporation,⁷⁸ while Forsyth outlines seven potential models ranging from repression by the State to complete incorporation.⁷⁹ None of these models is mutually exclusive; they will display infinite variation and may be present in more than one form at any given time. Whichever mix of these approaches is taken will reflect the history, culture, and political economy of the State, the level of assimilation of the indigenous group and the relative strengths of formal and indigenous mechanisms. At the most integrative end of the spectrum, governments might engage in the codification of customary laws or registration of decisions by indigenous authorities, undertake human rights and technical training, fund traditional processes or even depute state officials to take part. However, even this type of recognition should not be presumed to require active, intrusive regulation. At a more basic level (assuming they do not intend on abolition), governments will have to clarify the role of indigenous

⁷⁷ Isser, 'Understanding and Engaging Customary Justice Systems', *supra* note 36, 359.

⁷⁸ Connolly, *supra* note 12, 239.

⁷⁹ M. Forsyth, 'A Typology of Relationships Between State and Non-State Justice Systems', 56 *Journal of Legal Pluralism and Unofficial Law* (2007), 67, 70.

justice mechanisms in jurisdictional terms and assess their conformity with the emerging or revived constitutional order and international human rights law.

To begin with the clarification of jurisdiction, the risk of conflict between two different sources of legal authority is self-evident. Owing to the weakness of the formal justice system, bureaucratic guidelines will need to be developed to determine which of the state or indigenous mechanisms should assume responsibility for dealing with a certain offence, what the enforcement role for the State is if the power of community shaming is not enough to force recalcitrant parties to compromise, and how jurisdictional disputes should be resolved procedurally. Indigenous communities are often keen to avoid the inefficiencies that flow from aggrieved parties forum-shopping in both state and indigenous mechanisms to resolve a dispute. Without some degree of jurisdictional allocation, a “two-track system” where the wealthy enjoy access to state justice and the poor make do with an ostensibly second-class process may result.⁸⁰ Overall, pluralist legal models rarely stray far from one where the State retains jurisdiction over issues of government, commerce and serious crime and non-state processes cover some family, property and religious disputes, in addition to minor crime.

In terms of human rights, because the State remains the primary duty-bearer in this area, a State that recognizes the resolutions of indigenous mechanisms tend to do so (in theory if not always in practice) to the extent that they comply with constitutional human rights guarantees. As such, international human rights norms replicate in a more legitimate form some of the functions of old colonial repugnancy clauses.⁸¹ Exemplary appeals to higher courts to challenge instances of abuse of power, overly harsh punishment and unaccountable decision-making in indigenous processes might provide some top down human rights protection. Indigenous mechanisms will not require the whole panoply of procedural rights to be guaranteed in the formal system, and full compliance with constitutional or international human rights guarantees may be impossible, but with integration of the systems, progress can be made. It is on the presumption that fair and rights respecting informal justice supports stability (while discriminatory or abusive instantiations of it increase potential for conflict) that peace building missions of the UN and NGOs promote human rights standards and monitoring within them,⁸² though the UN and most INGOs are in any case required to operate within a normative framework of

⁸⁰ R. Mani, *Beyond Retribution: Seeking Justice in the Shadows of War* (2002), 37-38.

⁸¹ Toufayan, *supra* note 70, 400.

⁸² Harper, *supra* note 35, 4.

internally accepted human rights standards. In affirming the UN's commitment to legal pluralism as a policy on the ground, the UN Secretary-General called on States to clarify the relationship between their informal and formal legal systems as a means of bringing the former into line with international human rights standards and ensuring access to justice for marginalized groups.⁸³ Without some human rights monitoring, state preservation of the indigenous justice system might result less in access to justice for the poor than in "poor justice for poor people".⁸⁴

Of course, successful integration to assuage jurisdiction and human rights concerns is easier said than done. Faundez notes that most interaction between state and non-state justice systems rarely yields improvements on the rule of law or produces results that further good governance.⁸⁵ The state system might be utterly unprepared to understand or apply radically different indigenous norms, while the autonomy, non-coerciveness and flexibility of customary mechanisms might suffer without any assurance the conflict between rule systems will dissipate or that the moral authority of either will endure undiminished. Nevertheless, transparent, accountable, and mutually agreed co-operation can generate incremental benefits, mitigating certain persistent problems, even if some remain unresolved, without displacing the traditional functions of indigenous justice.

D. Restoration, Idealization and Transitional Justice

While peace builders must grapple with the modalities of the coexistence of legal orders with different sources of authority, there is little evidence that such contingencies inform policy where international actors working in transitional justice apply or assist in the application of indigenous law to the legacy of conflict or authoritarianism. This may be explained by a conscious distancing by those who advocate the use of non-state systems of justice of those systems from the State. Much like the growth of legal pluralism can be attributed to a rejection of legal centralism, the mindset animating the move to non-state forms of law in transitional justice can be explained by a dissatisfaction with the

⁸³ UN Secretary-General, *Report of the Secretary General on Delivering Justice: A Programme of Action to Strengthen the Rule of Law at the National and International Levels*, UN Doc A/66/749, 16 March 2012, 6, para 18.

⁸⁴ M. Stephens, 'Typologies, Risks and Benefits of Interaction Between State and Informal Justice Systems', paper given at Customary Justice and Legal Pluralism in Post-Conflict and Fragile Societies Conference, 17-18 November 2009, Washington DC.

⁸⁵ Faundez, *supra* note 48, 20.

formalized template of national trials and national truth commissions, the “one-size fits all” formula so routinely discommended in the transitional justice policy making.⁸⁶ Like the legal pluralists of the 1970s and 1980s, many in transitional justice in the 1990s and 2000s worried about the effectiveness of formal state institutions and the extent to which they represent imperialist standard setting. The turn towards traditional justice was motivated by the laudable realization that decontextualized attempts to replicate the ideal of Western justice in post-conflict States were doomed to failure.⁸⁷ Formal systems were criticized for failures to give voice to victims’ experiences, to resolve contested truths, or to address broader structural causes of human rights abuses.⁸⁸ The dependence of criminal law on fixed categories of perpetrator and victim and fixed categories of guilt or innocence was deemed insufficient to address the grey areas of society-wide participation or complicity.⁸⁹ Implicit in this critique was the notion that formalist methods excluded more legitimate, participatory, and effective indigenous approaches that respected the constructive agency of those most affected.⁹⁰ Scholars would argue that top down processes of national reconciliation were inferior and less useful than more localized, day-to-day reconciliation among intimate (former) antagonists who must now live side by side.⁹¹ The embrace of an ostensibly more context specific approach interacted with an emergent strand of transitional justice scholarship which emphasized the need for holistic, multi-faceted responses to atrocity as a spectrum of mutually supportive mechanisms harmonizing as many perspectives as possible over the previous binary divisions of “truth v. justice” understandings.⁹²

I. Inherently Restorative Indigenous Justice?

In a scholarly climate increasingly hostile to formalist approaches that were viewed as irredeemably flawed, indigenous systems of justice in particular

⁸⁶ UN Secretary-General, *supra* note 5, 1, Preamble (para. 1), 1.

⁸⁷ K. McEvoy, ‘Letting Go of Legalism: Developing a “Thicker” Version of Transitional Justice’, in K. McEvoy & L. McGregor (eds), *Transitional Justice From Below: Grassroots Activism and the Struggle for Change* (2008) [McEvoy & McGregor, Transitional Justice], 15, 41-42 [McEvoy, Letting Go of Legalism].

⁸⁸ J. Ramji-Nogales, ‘Designing Bespoke Transitional Justice: A Pluralist Process Approach’, *32 Michigan Journal of International Law* (2010) 1, 1, 10-11.

⁸⁹ Clark, *supra* note 15, 773.

⁹⁰ M. A. Drumbl, ‘Collective Violence and Individual Punishment: The Criminality of Mass Atrocity’, *99 Northwestern University Law Review* (2005) 2, 539, 597.

⁹¹ Theidon, *supra* note 32, 455-456.

⁹² Ramji-Nogales, *supra* note 88, 4.

found favor for their local reach and potential synthesis of the values of criminal trials and truth commissions. As Nagy notes, the rationale for embracing *gacaca*, like other traditional mechanisms, “is perhaps best understood against the foil of what has not worked”.⁹³ Transitional justice scholarship began to echo the call in Western nations to revolutionize the way in which States respond to crime and socially disruptive behavior. In so doing, it drew on restorative justice principles as the primary iteration of this would-be revolution – restorative justice has long been posited as the conceptualization of justice most congruent with indigenous forms of justice. As a result, the groundswell of enthusiasm for applying indigenous law as a response to conflict stems less from a pluralist gaps analysis of how post-conflict or post-authoritarian States should respond to justice capacity shortfalls than from a belief in the value of restorative justice, which is premised on the belief that trial of crime by the State privileges law and “steals” the property of conflict from the excluded victim and immediate community to whom it belongs.⁹⁴

Defining the widely contested concept of restorative justice is a difficult task. An elusive notion, it tends to draw strong support from many people who nevertheless have wildly divergent opinions about what it is. What one is ultimately left with is a motley assortment of characteristics and aspirations. Overall, restorative justice

“revolves around the idea that crime is, in essence, a violation of a person by another person (rather than a violation of legal rules); that in responding to a crime our primary concerns should be to make offenders aware of the harm they have caused, to get them to understand and meet their liability to repair such harm and to ensure that further offences are prevented; that [this] should be decided collectively by offenders, victims and members of their communities through constructive dialogue in an informal and consensual process; and that efforts should be made to improve the relationship between offender and victim to re-integrate the offender into the law-abiding community.”⁹⁵

⁹³ Nagy, *supra* note 17, 91.

⁹⁴ J. Larson Sawin & H. Zehr, ‘The Ideas of Engagement and Empowerment’, in G. Johnstone & D. W. Van Ness (eds), *Handbook of Restorative Justice* (2007), 41, 42.

⁹⁵ G. Johnstone, *Restorative Justice: Ideas, Values, Debates* (2002), ix.

There is no agreement on whether it should be viewed as a process or as an outcome, whether it is a set of values or practices, and, if the latter, what particular practices can be included within its orbit.⁹⁶ This general uncertainty over what restorative justice is has two main consequences. The first is a tendency to unite over the near unanimous consensus of what it is not, namely formal (criminal) justice. Restorative justice has consequently been explained by a polarized contrast with a formal justice system invariably essentialized as retributive.⁹⁷ As one of the first advocates of what we now label as restorative approaches put it, punitive justice manifests hostility to the law breaker, labels him the enemy and fosters retribution or exclusion, in contradistinction to a more reconstructive attitude that attempts to comprehend the causes of conflict, remedy its effects and prioritizes future good over past desserts.⁹⁸ What is important is that this presentation has evolved into a binary oppositional rhetoric in which “all the elements associated with restorative justice are good, whereas all those associated with retributive justice are bad”,⁹⁹ which can only serve to distort the general understanding of what modern criminal justice systems do. This bias, to the extent that it is replicated in relation to indigenous systems of justice, is not conducive to a considered appraisal of what societies may need in the context of transition. Justice sector reformers argue that similarly indiscriminate critiques of liberal legalism, such as that also in evidence in classical legal pluralism, too often leads to a “state law bad, folk law good” attitude which not only obscures the harm of some indigenous practices, but also unduly fetters the ability of that state law to mitigate these harms.¹⁰⁰

The second consequence of the general failure to define *practices* that meet the threshold of restorative and those that do not is a concentration on the *values* of restorative justice. The values associated with restorative justice are entirely unobjectionable – honesty, humility, empathy, responsibility, respect, equality, inclusion, care, and trust.¹⁰¹ Viewed purely in these terms, all forms of restorative justice run an obvious risk of romanticization. However, when coupled with the

⁹⁶ K. Daly, ‘The Limits of Restorative Justice’, in D. Sullivan & L. Tift (eds), *The Handbook of Restorative Justice: A Global Perspective* (2006), 134, 135.

⁹⁷ J. Braithwaite, *Restorative Justice and Responsive Regulation* (2002), 5.

⁹⁸ G. Mead, ‘The Psychology of Punitive Justice’, in D. Melossi (ed.), *The Sociology of Punishment: Socio-structural Perspectives* (1998), 33.

⁹⁹ K. Daly, ‘Restorative Justice: The Real Story’, 4 *Punishment & Society* (2002) 1, 55, 59 [Daly, Restorative Justice: The Real Story].

¹⁰⁰ M. J. Trebilcock & R. J. Daniels, *Rule of Law Reform and Development: Charting the Fragile Path of Progress* (2008), 36.

¹⁰¹ K. Pranis, ‘Restorative Values’, in Johnstone & Van Ness, *supra* note 94, 59, 61-62.

observable tendency among scholars in restorative justice to glorify indigenous law “as the consensus process of wise and peaceful peoples, ignorant of the power struggles that lie beneath”, the risk of romanticizing indigenous justice as restorative justice is significantly exacerbated.¹⁰² Western restorative justice discourse typically self-presents as embattled, faced with a highly skeptical public more comfortable with the under-performing but nevertheless hegemonic state justice system. In this milieu, advocates use origin myths of the superior traditional forms of restorative justice that existed before the imposition of the formal justice system to “maintain a strong oppositional contrast of the good and the bad justice [...] to move an idea into the political and policy arena”.¹⁰³ On similar lines, transitional justice advocacy is often presented in heroic terms, speaking truth to power on behalf of disenfranchised masses, selflessly enduring rocky relationships with the State, and reacting against the cynicism and betrayal of values inherent in the sovereign control of justice.¹⁰⁴

What is significant about the embrace of indigenous systems in transitional justice is that it is not rooted in the mechanics of how the transitional state should respond to the existence of sub-state legal systems, but rather in the more familiar appropriation by restorative justice of indigenous legal processes in Western States. Indeed, the employment of indigenous justice for past human rights abuses is usually legitimized in the literature by references to trends in the West.¹⁰⁵ The inspiration come less from the pluralist accommodations of a Bolivia or a Botswana than from the restorative police cautioning schemes, family group conferences and victim-offender mediation employed in Australasia and North America which superficially replicate the ideal indigenous justice principles of communication between victim and perpetrator, reparation of harm etc. Prominent transitional justice scholars such as Dyzenhaus, Mani, Huyse, and Leebaw have located the attraction of transitional justice to customary law in the application of indigenously influenced victim-offender mediation, sentencing circles, community reparations boards and family group conferencing in States

¹⁰² Connolly, *supra* note 12, 245.

¹⁰³ Daly, ‘Restorative Justice: The Real Story’, *supra* note 99, 63.

¹⁰⁴ E. Brahm, ‘Transitional Justice, Civil Society, and the Development of the Rule of Law in Post-Conflict Societies’, 9 *International Journal of Not-For-Profit Law* (2007) 4, 62, 62.

¹⁰⁵ Huyse, ‘Introduction’, *supra* note 9, 20 & 21 and L. Waldorf, ‘Mass Justice for Mass Atrocity: Rethinking Local Justice as Transitional Justice’, 79 *Temple Law Review* (2006) 1, 1, 14-16.

like Canada, Australia, and New Zealand,¹⁰⁶ the “informal justice” movement of the 1970s that emerged due to dissatisfaction with the state criminal justice system,¹⁰⁷ and alternative dispute resolution practices like indigenous courts and juvenile justice programs.¹⁰⁸ These programs have been born of a belief that the rationales for criminal law in the West are unsatisfactory, counter-productive, and remote from the needs of victims. This belief has been transplanted uncritically to the radically different milieu of transition.

However, the employment of indigenous justice practices to generate and promote restorative justice theories in the West is increasingly criticized as an Orientalist appropriation of these customs by essentializing the societies from which they spring as static and overlooking the heterogeneity of identities, experiences and relationships with the State among indigenous populations.¹⁰⁹ Of course, this Orientalism differs significantly from traditional Orientalism in that while the latter did so to promote the idea of Western society as rational and superior, the more modern Orientalism deprecates these characteristics.¹¹⁰ The “Orientalizer” is now less the European imperialist of the 18th and 19th centuries, but rather a romantic, present-day outsider shaped, like the classical legal pluralists before them, by anti-imperialism. Difference is elided not with weakness, as before, but with strength. However, the objectification and description characteristic of the old Orientalism now goes hand-in-hand with a process of unproblematically subject-object structured valorizing of the “other”.¹¹¹ The restorative justice gaze can lead to reductivist oversimplifications of indigenous processes (a) as the needs of indigenous people are defined in association with dominant and prevailing images of indigeness (for example, as harmonious communities hermetically sealed from the State)¹¹² and/or (b) to

¹⁰⁶ L. Huyse, *All Things Must Pass Except the Past* (2009), 190-191 and D. Dyzenhaus, ‘Judicial Independence, Transitional Justice, and the Rule of Law’, 10 *Otago Law Review* (2003) 3, 345, 367.

¹⁰⁷ Mani, *supra* note 80, 36-37.

¹⁰⁸ B. A. Leebaw, ‘The Irreconcilable Goals of Transitional Justice’, 30 *Human Rights Quarterly* (2008) 1, 95, 104.

¹⁰⁹ M. Cain, ‘Orientalism, Occidentalism and the Sociology of Crime’, 40 *British Journal of Criminology* (2000) 2, 239.

¹¹⁰ On Orientalism generally, see E. W. Said, *Orientalism* (1978).

¹¹¹ M. E. Turpel, ‘Aboriginal Peoples and the Canadian Charter: Interpretative Monopolies, Cultural Difficulties’, 6 *Canadian Human Rights Yearbook* (1989-90), 3, 31.

¹¹² M. Blaser, ‘Life Projects: Indigenous Peoples’ Agency and Development’, in M. Blaser *et al.* (eds), *In the Way of Development: Indigenous Peoples, Life Projects and Globalization* (2004), 26, 31-32.

facilitate understanding of their practices in order co-opt them for export to Western States.¹¹³

II. A Binary Opposition with Formal Legal Structures

As transitional justice views indigenous law through a similarly restorative lens, the tendencies within that field to celebrate distance from the inferior formal system and romanticize indigenous processes are evident. To begin with the latter, Kerr and Mobekk argue that “[t]here has been a tendency in international interventions to equate the concept of ‘traditional’ with ‘fair’, ‘good’ and ‘impartial’, particularly in situations where international interveners are sensitive to stepping on the culture of the country”.¹¹⁴ Given the presumed rootedness of traditional justice in indigenous culture and its equally assumed “bottom up” authenticity, the potential for making grandiose claims about what it can achieve in a transitional context are obvious. The potential use and impact of traditional mechanisms have been reviewed more favorably than their modest record would suggest appropriate – “awareness of the many weaknesses was not lacking, but they were too often kept in the shade”.¹¹⁵ Community-based healing in Mozambique is deemed to have ended cycles of violence there,¹¹⁶ the restorative customs of the *campesinos* in Peru are esteemed as “several steps” ahead of that at the national level,¹¹⁷ and the Rwandan *gacaca* is viewed as an “inherently a participatory and communal enterprise” and “an important mechanism for promoting democratic values”.¹¹⁸ These optimistic analyses evoke the tendency of restorative justice to make imprecise claims or to oversell tales of repair and goodwill to transcend adversity that comes from the hegemonic status of well-established, formalized systems lest, the nascent idea of restorative justice meet a premature death.¹¹⁹ After all, it is hard to draw causal connections between any post-conflict policy and the end of violence given the

¹¹³ J. Tauri, ‘Indigenous Perspectives and Experiences: Maori and the Criminal Justice System’, in R. Walters & T. Bradley (eds), *Introduction to Criminological Thought* (2011), 187, 196.

¹¹⁴ Kerr & Mobekk, *supra* note 15, 167.

¹¹⁵ Huysse, ‘Introduction’, *supra* note 9, 6.

¹¹⁶ H. Cobban, ‘The Legacies of Collective Violence: The Rwandan Genocide and the Limits of Law’, *27 Boston Review* (2002) 2, available at <http://bostonreview.net/BR27.2/cobban.html> (last visited 15 June 2013).

¹¹⁷ Theidon, *supra* note 32, 456.

¹¹⁸ E. Daly, ‘Between Punitive and Reconstructive Justice: The Gacaca Courts in Rwanda’, *34 New York University Journal of International Law and Politics* (2002) 2, 355, 375-376 [Daly, *Between Punitive and Reconstructive Justice*].

¹¹⁹ Daly, ‘Restorative Justice: The Real Story’, *supra* note 99, 66 & 73.

myriad alternative explanations rooted in economics or politics, “several steps” does not amount to a precise measurement, and participation in *gacaca* has often been forced in a very undemocratic manner. It is only recently with the opening of transitional justice to greater empirical scrutiny that the “myth-making”,¹²⁰ “blanket support”¹²¹ and “overselling”¹²² that has characterized the approach to non-state justice processes is now being revised. Allen’s argument that scholars have accepted too readily the potential for restoration in the Acholi community’s mechanisms in Uganda is one that applies equally to many other transitions where indigenous justice has been bruited or applied.¹²³

Some now argue that theories on traditional justice’s superior applicability to formal justice in transition have been overly positive.¹²⁴ The most obvious realization is one alluded to earlier, namely that traditional mechanisms are frequently quite punitive. While traditional justice in the likes of Mozambique and East Timor followed a restorative template, physical punishments were employed in places like Sierra Leone and Liberia. Where ostensibly restorative modes of justice were pursued, they diverged significantly from facile Western imaginings of communitarian harmony. While Western restorative justice is victim-centered, communal stability emerges in many indigenous iterations of transitional justice as the primary aim – the search for consensus tends to favor the interests of the community as a whole over those of victims, and is often coercive towards them.¹²⁵ Superficial reintegration of offenders into communities and “pretended peace” on the part of victims have been the order of the day in many communities.¹²⁶ Indigenous justice’s perpetual inability to deal with situations involving people from different communities, recalcitrant armed groups and government officials is compounded by the vertical nature of mass conflict originating from or against the state security apparatus, cross-hatching the internal borders that mark the limits of communities. Conflicts are often fought between and not within indigenous groups, meaning that the common bonds that undergird customary justice are absent. Customary

¹²⁰ Huyse, ‘Introduction’, *supra* note 9, 6.

¹²¹ Kerr & Mobekk, *supra* note 15, 161.

¹²² McEvoy, ‘Letting Go of Legalism’, *supra* note 87, 30.

¹²³ T. Allen, ‘Ritual (Ab)use? Problems With Traditional Justice in Northern Uganda’, in N. Waddell & P. Clark (eds), *Courting Conflict? Justice, Peace and the ICC in Africa* (2008), 47, 47.

¹²⁴ Waldorf, *supra* note 105, 44-46.

¹²⁵ L. Arriaza & N. Roht-Arriaza, ‘Social Reconstruction as a Local Process’, 2 *International Journal of Transitional Justice* (2008) 2, 152, 161.

¹²⁶ Nagy, *supra* note 17, 96.

mechanisms have struggled to reckon with crimes that have cross-regional dimensions such as those committed between the Acholi and Langi in Uganda¹²⁷ or by transient paramilitary groupings in Rwanda.¹²⁸ Though suited to restoring harmony when property disputes, family disturbances, or minor crime upset community relations, crimes committed in the context of conflict, rebellion, or state repression lie far outside its competences. Observers most familiar with *bashingantabe*,¹²⁹ *mato oput*¹³⁰ and *gacaca*¹³¹ contend that these mechanisms are unsuited to dealing with gross human rights violations, and only the latter has consistently done so. The obvious implication is that there must be some role for the state justice system in deciding which crimes can be devolved to the local level and which cannot.

However, progress towards tempering these weaknesses in transitional justice deployments has been impaired by the second notable tendency in restorative justice discourse, which is to advocate distance from the formal justice system. Though all transitional justice advocates believe there is a role for the State in trying the most serious crimes or stimulating national reconciliation through a truth process, there is a sense in the literature that localized processes should enjoy as splendid an isolation from the State as possible. In this, it mirrors the position of many restorative justice advocates who assume the ideal justice system should be pure and not contaminated by others in its field of operations.¹³² As Daly describes it, with echoes of the earlier wave of classic legal pluralists:

“If the first form of human justice was restorative justice, then advocates can claim a need to recover it from a history of ‘takeover’ by state-sponsored retributive justice. *And*, by identifying current indigenous practices as restorative justice, advocates can claim a need to recover these practices from a history of ‘takeover’ by white colonial powers that instituted retributive justice.”¹³³

¹²⁷ L. Huyse, ‘Conclusion and Recommendations’, in Huyse & Salter, *Traditional Justice*, *supra* note 9, 181, 189.

¹²⁸ T. Longman, ‘Justice at the Grassroots? Gacaca Trials in Rwanda’, in N. Roht-Arriaza & J. Marriezcurrena (eds), *Transitional Justice in the Twenty-First Century: Beyond Truth Versus Justice* (2006), 206, 220.

¹²⁹ Ingelaere & Kohlhagen, ‘Transnational Justice’, *supra* note 26, 52.

¹³⁰ Latigo, *supra* note 24, 114.

¹³¹ UNHCR, *Gacaca: Le Droit Coutumier de Rwanda* (1996).

¹³² Daly, ‘Restorative Justice: The Real Story’, *supra* note 99, 59.

¹³³ *Ibid.*, 62.

The influence of Western restorative justice theory on transitional justice is most evident in the tendency of scholars in the latter field to criticize the formal justice system, to advocate distance from it, and to resist any role of the State in guiding, overseeing or standardizing the application of customary law to the problems of transition. Most analyses in academia and journalism of the applicability of indigenous justice in transition are premised on a romantic (and arguably caricatured) endorsement of traditional mechanisms as authentically African/Amerindian/Asian and therefore better at dealing with the past than “Western” and “retributive” justice. To begin with the latter categorization, when drawing comparisons between what the formal system and indigenous justice can offer, the formal system is invariably described as retributive or punitive¹³⁴ and is contrasted with alternative systems that are unquestioningly presented as restorative, reconstructive or community building.¹³⁵

State-based justice is also generally described as “Western”,¹³⁶ implying that the State is an alien imposition inherently divorced from the interests of the communities that constitute it. For example, Chopra, Ranheim & Nixon warn that “a new justice system will become dominated by elites unfamiliar with local realities or intent on introducing a foreign and inaccessible justice system”.¹³⁷ This approach casts indigenous justice and the supposedly alien notion of state law as irreconcilably separate phenomena. In transitional justice, discourse interference by the State in indigenous justice is typically presented as compromising the pristine, restorative nature of localized justice processes. Certainly, even the loosest incorporation by the State may compromise voluntariness, and enforcement by the State of global human rights standards may mar their effectiveness. However, integration is not a zero-sum game

¹³⁴ B. Oomen, ‘Justice Mechanisms and the Question of Legitimacy: The Example of Rwanda’s Multi-layered Justice Mechanisms’, in K. Ambos *et al.* (eds), *Building a Future on Peace and Justice: Studies on Transitional Justice, Peace and Development* (2009), 175, 187 [Oomen, Justice Mechanisms]; Eberchi, *supra* note 25, 109; C. Villa-Vicencio, ‘Transitional Justice, Restoration, and Prosecution’, in Sullivan & Tift, *supra* note 96, 387, 387.

¹³⁵ Daly, ‘Between Punitive and Reconstructive Justice’, *supra* note 118, 367 & 378.

¹³⁶ L. Hovil & J. Quinn, ‘Peace First, Justice Later: Traditional Justice in Northern Uganda’ (2005), available at http://www.refugeelawproject.org/working_papers/RLP.WP17.pdf (last visited 15 June 2013), 22; A. R. Iliff, ‘Root and Branch: Discourses of “Tradition” in Grassroots Transitional Justice’, 6 *International Journal of Transitional Justice* (2012) 2, 253, 264; Longman, *supra* note 128, 218; D. E. Peachey, ‘The Elusive Quest for Reconciliation in Northern Uganda’, in N. Palmer *et al.* (eds), *Critical Perspectives in Transitional Justice* (2012), 289, 306.

¹³⁷ J. Chopra, C. Ranheim & R. Nixon, ‘Local-Level Justice Under Transitional Administration: Lessons from East Timor’, in Isser, *Customary Justice*, *supra* note 7, 119, 155.

where a stronger role for the State automatically corresponds with a weakening or corrupting of indigenous law. The portrayal of the State as foreign and inappropriate is not how all or even most citizens in these States regard the formal justice system. To begin with, the preference of indigenous communities for their customary justice processes may be symptomatic of poor access to a functioning formal justice system, as opposed to a normal or ethical preference for the former.¹³⁸ Formal legal structures may be unpopular not because the idea of state justice is illegitimate *per se*, but because justice has been administered badly in the past. Justice sector reformers recognize, in a way that transitional justice scholarship has not, that citizens' institutional preferences for justice are guided more by the options available to them than by the incumbency of a legal culture.¹³⁹ Most rule of law reconstruction is premised on the assumption that a society's perception of the judicial system changes if it is seen to work. Avoidance of the criminal justice system because people do not have faith in it risks becoming self-perpetuating.

Furthermore, most indigenous communities with traditional justice mechanisms willingly concede a role for the State and recognize a role for state oversight in relation to crimes that test the limits of the social order. In most pluralist States, sophisticated moral economies of justice apply to questions of jurisdiction. For example, in East Timor 69 per cent of people would use local justice and 13 per cent the formal system for theft, while 91 per cent recognize the formal system as the appropriate mechanism for murder trials.¹⁴⁰ Liberians generally believe that cases should progress upwards from customary mechanisms if resolution at this level proves impossible, while offences above a threshold of seriousness should only be dealt with by state courts.¹⁴¹ As Allen argues in the context of Uganda, significant numbers in indigenous communities do not reject the use of formal justice to address unprecedentedly serious offences.¹⁴² Incorporation of indigenous justice into the state system may allow marginalized

¹³⁸ Harper, *supra* note 35, 2.

¹³⁹ Oomen, 'Justice Mechanisms', *supra* note 134, 180.

¹⁴⁰ P. Pigou, *The Community Reconciliation Process of the Commission for Reception, Truth and Reconciliation* (2004), 34.

¹⁴¹ S. C. Lubkeman, D. H. Isser & P. A. Z. Banks III, 'Unintended Consequences: Constraint of Customary Justice in Post-Conflict Liberia', in Isser, *Customary Justice*, *supra* note 7, 193, 219.

¹⁴² Allen, *supra* note 123, 85.

members of the community to appeal apparently prejudicial resolutions from traditional mechanisms to the state legal system.¹⁴³

With any increase in the State's role, the basic principles and procedures of indigenous justice might be modified, while integration or incorporation with the State cannot be assumed to be an apolitical "benign recognition" of socio-cultural diversity or what already exists.¹⁴⁴ Regulating traditional forms of justice by the State is as much a political process as a technical one.¹⁴⁵ The involvement of the State in indigenous justice may realign local political balances and may increase the State's legitimacy and hierarchical power to the extent that it can define who indigenous authorities are and what competences they enjoy. However, the presumption that formal law would "exercise a constant pressure in the desired direction" of absorption into the State or gradual resemblance to formal law does not take account of the weakness of the State where rule of law reconstruction and transitional justice are employed.¹⁴⁶ For reasons discussed in greater detail in Section E, the typical asymmetry in power between indigenous groups and the State may be radically revised in transition. Any relationship between outright repression (practically impossible because the transitional State is too weak) or outright control (again, practically impossible for the same reason) will tend to be fluid, allowing both systems to be flexible and influenced by local circumstances in their relations with each other.¹⁴⁷ Indeed, research suggests "that it is likely that if a [S]tate co-opts the non-state justice system in a way which limits, rather than increases effective access to justice, then a non-state-authorized version of the same system will develop simultaneously with the state form".¹⁴⁸ In effect, norms may be driven underground if the State trespasses too far. Even if integration is more limited, it may in fact "invigorate competition between state and non-state providers over authority and 'clients'".¹⁴⁹ Indigenous groups in post-conflict States have long recognized that though the state legal system may penetrate their legal mechanisms, it will rarely dominate it – "there is room for resistance and autonomy".¹⁵⁰ Even as tradition is regulated, it can be

¹⁴³ C. Nyamu-Musembi, 'Review of Experience in Engaging with "Non-State" Justice Systems in East Africa' (2003), available at <http://www.gsdrc.org/docs/open/DS37.pdf> (last visited 15 June 2013), 27.

¹⁴⁴ Kyed, *supra* note 67, 89.

¹⁴⁵ *Ibid.*, 90.

¹⁴⁶ Griffiths, *supra* note 10, 8.

¹⁴⁷ Forsyth, *supra* note 79, 75.

¹⁴⁸ *Ibid.*, 71.

¹⁴⁹ Kyed, *supra* note 67, 90.

¹⁵⁰ Merry, *supra* note 10, 878.

invoked to resist the imposition of unwelcome laws.¹⁵¹ The ultimate outcome of state legal pluralism is unpredictable – pre-existing social arrangements may be too strong for formal or informal influence from above to affect it significantly. As Tamanaha argues, authorities in non-state legal systems “will defend and exert the power of their particular systems in situations of a clash, not only because of their genuine commitment to and belief in the system, but also because their identities, status and livelihoods are linked to it”.¹⁵²

Of course, any such contestation may not arise – many States in transition will be reluctant to risk social upheaval by undermining indigenous law and may acknowledge formally or informally that they may not be efficient providers of justice services for many years, if ever. Integration might better be understood as an organized decentralization of legal services, rather than as the power-grab seemingly feared by earlier legal pluralists and the later transitional justice literature. The greater concern in some indigenous communities will be the power of local elites and not the distant State. Devolution or tempering of local authority from these elites inevitably requires state intervention.¹⁵³

III. Thinking Like the State?

However, one sees in transitional justice literature a distinct sense that those who administer and rely on indigenous mechanisms reject state encroachment on their processes as corrupting and illegitimate, which underlies a misleading conception of indigenous justice as bastions of resistance to the overweening, centralizing State. As noted above, there is a risk that values of indigenous justice may be lost or weakened while the State itself can be abusive and cynically use traditional justice to consolidate local power bases. However, the State might also strengthen the indigenous justice system, particularly if it has been weakened through conflict and repression, a danger examined later in Section E. Optimists argue “the complete incorporation of [non-state justice systems] into the formal state justice system will ensure that the decisions of the newly official courts are backed by the enforcement power of the [S]tate”.¹⁵⁴ While indigenous leaders in some States discourage their communities from using the state legal system

¹⁵¹ T. W. Bennett, ‘Comparative Law and African Customary Law’, in M. Reimann & R. Zimmermann (eds), *The Oxford Handbook of Comparative Law* (2006), 662, 665.

¹⁵² B. Z. Tamanaha, ‘Understanding Legal Pluralism: Past to Present, Local to Global’, 30 *Sydney Law Review* (2008) 3, 375, 400.

¹⁵³ Harper, *supra* note 35, 6.

¹⁵⁴ Connolly, *supra* note 12, 271.

as they view it as weakening their credibility,¹⁵⁵ in others, accountability to the State may in fact bolster their legitimacy. In particular, a credible threat of resort to the state justice system has consistently been shown to induce compliance with settlements from informal system processes (though it could hardly do otherwise).¹⁵⁶ Arguments like those of Sarkin to the effect that the new *gacaca* process “may see the politicization of these structures, thus making them lose their traditional function in [the] future”¹⁵⁷ pose a distinct risk of Orientalism by constructing and essentializing traditional mechanisms as entirely outside of the national political and legal context¹⁵⁸ or presenting their communities as ahistorical and unchanging.¹⁵⁹ Recognition by the political power-holders is often welcome – some customary authorities have pro-actively “defined their objectives, functions, structure and jurisdiction in the form of regulations, sought out human rights training or lobbied for state endorsements”.¹⁶⁰

Transitional justice’s presentation of state criminal law as inherently retributive or Western flows from, and re-enforces, the rigidly stratified images of indigenous justice as bottom up and state justice as top down that dominate the view of the former which in turn tends to lead to an unhelpfully atomized view of the mechanisms in a post-conflict environment. Like the legal pluralists of the 1970s and 1980s, “from below” perspectives are generally welcomed for their “resistant” and “mobilizing” character in response to powerful hegemonic political, social or economic forces.¹⁶¹ As McEvoy and McGregor note, the emphasis on bottom up approaches builds on earlier subaltern studies that reasserted the agency of persons who are socially, politically, and geographically excluded from a society’s established structures for political representation, in place of an earlier emphasis on the dispositions of “elites”.¹⁶² These “from below” perspectives are normally assumed to operate outside of the structures

¹⁵⁵ Harper, *supra* note 35, 14.

¹⁵⁶ Galanter, *supra* note 39, 24.

¹⁵⁷ J. Sarkin, ‘Promoting Justice, Truth and Reconciliation in Transitional Societies: Evaluating Rwanda’s Approach in the New Millennium of Using Community Based Gacaca Tribunals to Deal With the Past’, 2 *International Law Forum* (2000) 2, 112, 119.

¹⁵⁸ A risk noted in B. Oomen, ‘Donor-Driven Justice and its Discontents: The Case of Rwanda’, 36 *Development and Change* (2005) 5, 887, 903 [Oomen, Donor-Driven Justice and its Discontents: The Case of Rwanda].

¹⁵⁹ Nagy, *supra* note 17, 100.

¹⁶⁰ Harper, *supra* note 35, 15.

¹⁶¹ K. McEvoy & L. McGregor, ‘Transitional Justice From Below: An Agenda for Research, Policy and Praxis’, in McEvoy & McGregor, *Transitional Justice*, *supra* note 87, 1, 3 [McEvoy & McGregor, Transitional Justice From Below: An Agenda for Research].

¹⁶² McEvoy & McGregor, ‘Transitional Justice From Below: An Agenda for Research’, 4-5.

of the State.¹⁶³ However, a problem that emerges is one that was also apparent in earlier legal pluralism, i.e. that employing alternative mechanisms as a site of resistance to the State is seen as imperative regardless of the transitional context – autonomy from governmental influence is applauded irrespective of whether the government is elected, consensual, majoritarian, or merely disguised authoritarianism; irrespective of whether that government intends to oppose, tolerate, welcome or control alternative forms of justice; irrespective of whether that particular brand of justice from below is tolerant, abusive, exclusionary or inclusionary. For example, Lundy and McGovern argue for the promotion of local ownership and control, but do so because it transfers power “from the dominant, decision-making people and institutions to those who are subordinated during the process”.¹⁶⁴ Likewise, Daly argues that applying non-state forms of justice in the process of transitional accountability would permit citizens to define justice for themselves in preference to having it imposed on them from above, instantiating a transfer of power from central government to the people.¹⁶⁵

This presumption that the citizens of a State are automatically subordinated by involvement of that State in transitional justice may bear little relation to the lived reality of many communities. Similarly, the common and distinctly pejorative usage of “elites” to describe any and all transitional governments regardless of how representative, legitimate or accountable they may be is one that needs to be examined, as it implies a level of remoteness from, or disdain for, indigenous initiatives that may bear little relation to reality.¹⁶⁶ Scholars warn generally of “the risks of political capture”,¹⁶⁷ the “dissemination of state authority”,¹⁶⁸ the need “to keep a safe distance from formal power under the [S]tate”,¹⁶⁹ and the risk that a given mechanism might benefit elites more than

¹⁶³ *Ibid.*, 6.

¹⁶⁴ P. Lundy & M. McGovern, ‘The Role of Community in Participatory Transitional Justice’, in McEvoy & McGregor, *Transitional Justice*, *supra* note 87, 99, 109.

¹⁶⁵ Daly, ‘Between Punitive and Reconstructive Justice’, *supra* note 118, 376.

¹⁶⁶ The word is used, *inter alia*, by S. Robins, ‘Transitional Justice as an Elite Discourse: Human Rights Practice Where the Global Meets the Local in Post-Conflict Nepal’, 44 *Critical Asian Studies* (2012) 1, 3; A. Senier, ‘Traditional Justice as Transitional Justice: A Comparative Case Study of Rwanda and East Timor’, 23 *Fletcher Journal of Human Security* (2008), 67, 76; Arriaza & Roht-Arriaza, *supra* note 125, 153.

¹⁶⁷ Ramji-Nogales, *supra* note 88, 54.

¹⁶⁸ Iliff, *supra* note 136, 261.

¹⁶⁹ Latigo, *supra* note 24, 111.

local communities,¹⁷⁰ but these warnings are premised on a number of dubious presumptions – that the interests of the State and indigenous communities share no overlap, that state involvement is inherently domineering, and that the remote State presents a greater threat to the individual or community cohesion than local dispute resolution practices. On this presentation, the division of the State into dominant elites and disempowered indigenes begins to look every bit as simplistic as the division of humankind into victims and perpetrators that sparked the search for alternative forms of justice in the first place. The study of modern legal pluralism reveals a more dialectical, dynamic, and interactive relationship of penetration and resistance between the layers.¹⁷¹

Nevertheless, there is resistance to an assertive role for the State in the regulation of traditional mechanisms on the basis that if transitional justice “sees like the [S]tate” it may undermine developing lines of ownership and accountability to the communities they were bound to serve.¹⁷² Though the danger is real, two things already noted earlier should be remembered – firstly, the legacy of conflict is often such that old modes of ownership and accountability have been sundered, and secondly, a role for the State does not automatically mitigate against ownership and may augment existing local accountability.¹⁷³ Injunctions by others that the sovereign authority should not co-opt local justice,¹⁷⁴ formalize it¹⁷⁵ or “administratize” it¹⁷⁶ when dealing with past human rights abuses comes close to wishing away the State. It echoes the earlier regret of the pluralists at state encroachment, though this gave way to a realization that ignoring the role of the State made history incomprehensible, denied the ongoing importance of power relationships,¹⁷⁷ and ignored the inevitability of a clash between orders.¹⁷⁸ As Forsyth argues, the Nation State is a permanent fixture as the political form of the modern world system – “there is no jurisdiction where state law does not at least have *theoretical* capacity to regulate local disputes”.¹⁷⁹ If, as advocates of

¹⁷⁰ L. Waldorf, ‘Rwanda’s Failing Experiment in Restorative Justice’, in Sullivan & Tift, *supra* note 96, 422, 426.

¹⁷¹ Merry, *supra* note 10, 884, 889 & 890.

¹⁷² McEvoy, ‘Letting Go of Legalism’, *supra* note 87, 28.

¹⁷³ McEvoy & McGregor, ‘Transitional Justice From Below: An Agenda for Research’, *supra* note 161, 10.

¹⁷⁴ Waldorf, *supra* note 105, 9.

¹⁷⁵ Arriaza & Roht-Arriaza, *supra* note 125, 170.

¹⁷⁶ Meyerstein, *supra* note 16, 486.

¹⁷⁷ J. Zorn, ‘Lawyers, Anthropologists and the Study of Law: Encounters in the New Guinea Highlands Review Essay’, 15 *Law & Social Inquiry* (1990) 2, 271, 293.

¹⁷⁸ P. Fitzpatrick, ‘Law and Societies’, 22 *Osgoode Hall Law Journal* (1984) 1, 115, 117.

¹⁷⁹ Forsyth, *supra* note 79, 71.

a role for non-state law in transitional justice argue, informal justice processes can make a valuable contribution to the success of transition (and, by corollary, its failure could jeopardize it), it is to be expected that the State will take a close interest in them, though this is not say this attention necessarily conduces to better justice or more reconciliation. The resentment in transitional justice over a role for the State assumes the same sense of resentment is preponderant within the indigenous group. However, it is entirely possible that the indigenous community want the state and traditional justice systems to work in tandem to fill rule of law gaps, rein in the influence of abusive local elites or tackle abuses at the community level. As Betts argues, too often, transitional justice's analysis of indigenous justice entails a return to an idealized indigenous social world that may never have existed.¹⁸⁰ The presumption that weakening the role of government may enhance the trust that people have in the process,¹⁸¹ or that there is merit in leaving "as much power as possible" to those outside the central state power structure¹⁸² may reflect the concerns of Western restorative justice more so than the needs of women, the young and the "other" in communities where customary law applies.

E. Transition as Opportunity

One sees in the restorative justice-rooted transitional justice literature of the last twenty years many of the same impulses that animated classical legal pluralism in the 1970s and early 1980s – a progressive identification with the disempowered and a commensurate disdain for accumulated power, be it national or imperial, a rejection of the hegemonic claims of formal law, and the gradual shading of a discourse based on the equivalence of indigenous law with state law to one asserting its superiority. However, after a period of over-exuberant theorizing and greater involvement with indigenous justice on the ground, the initial classical legal pluralist tendency to "celebrate nonstate law as inherently less objectionable than state law" was forced towards "a less polemical and politically invested approach to legal pluralism".¹⁸³ There are signs that the treatment of indigenous law in transitional justice discourse may yet enjoy a similarly productive revision – advocacy of traditional forms of law by its

¹⁸⁰ A. Betts, 'Should Approaches to Post-Conflict Justice and Reconciliation be Determined Globally, Nationally or Locally?', 7 *European Journal of Development Research* (2005) 4, 735, 738.

¹⁸¹ Daly, 'Between Punitive and Reconstructive Justice', *supra* note 118, 377.

¹⁸² *Ibid.*, 376-377.

¹⁸³ Sharafi, *supra* note 60, 146.

enthusiasts in the literature occasionally features pleas not to over-eulogize¹⁸⁴ or romanticize¹⁸⁵ it and to beware its “seductive appeal”.¹⁸⁶ However, the tendency persists to draw dichotomies with the state justice sector and to separate the two spheres. Until transitional justice begins to engage with the work of later legal pluralists and justice sector reformers in dualist States, there will be no positive policy to inform these negative cautions and it may do little to promote the long-term recognition and empowerment it fosters in its short-term engagements.

This is all the more unfortunate because the paradigmatic setting for transitional justice, namely societies emerging from authoritarianism or conflict, represents the most radical opportunity both to vindicate indigenous justice in the new State’s political and judicial structures and to ameliorate some of the human rights and discrimination concerns shared by the international human rights community and domestic reform constituencies. There are two main reasons for this. Firstly, while typically the State’s relationship to indigenous justice evolves or regresses organically, when periods of conflict or authoritarianism give way to a government committed at least minimally to the rule of law and liberalization, the organic process is ruptured significantly. The role of indigenous justice before the transition will have a significant effect on attitudes to non-state law after it. Secondly, transitional justice involves an influx of INGOs and UN actors normatively committed to state-building, human rights and non-discrimination, who have significant scope to work with both the State and indigenous reform constituencies.

I. Internal Factors

To begin with the former, the legacy of conflict or authoritarianism will significantly affect the functioning and legitimacy of indigenous justice, even if the wide variations in experience make even the most general of conclusions hazardous. Because violent conflict is synonymous with forced relocations in affected rural areas to towns or refugee camps, indigenous social structures might be ruptured (for example Sierra Leone),¹⁸⁷ indigenous leaders might be killed in significant numbers (for example Guatemala),¹⁸⁸ or traditional ceremonies

¹⁸⁴ Lundy & McGovern, *supra* note 164, 100.

¹⁸⁵ Arriaza & Roht-Arriaza, *supra* note 125, 161.

¹⁸⁶ Mani, *supra* note 80, 38.

¹⁸⁷ J. A. D. Alie, ‘Reconciliation and Traditional Justice: Tradition-based Practices of the Kpaa Mende in Sierra Leone’, in Huyse & Salter, *Traditional Justice*, *supra* note 9, 123, 140.

¹⁸⁸ J. A. Hessbruegge & C. F. O. Garcia, ‘Mayan Law in Post-Conflict Guatemala’, in Isser, *Customary Justice*, *supra* note 7, 77, 96.

became impossible, as in Uganda.¹⁸⁹ The brutality of conflict may see taboos disregarded and sacred places violated, while the widespread availability of weapons might make hitherto obedient groups or individuals unwilling to accept settlements dictated by traditional authorities in the event of disputes. For example, militia leaders in Afghanistan commandeered customary justice previously applied by the traditional *jirgas*.¹⁹⁰ Traditional authorities may have been complicit in war crimes, such as in Rwanda where one in six *gacaca* judges had to be replaced because of suspicion of complicity in genocide,¹⁹¹ or failed to prevent them, as in Burundi.¹⁹² The way indigenous justice operated in the past may itself be a significant factor in catalysing conflict – the marginalization of young men motivated many to join Sierra Leone’s rebel RUF who went on to target chiefs,¹⁹³ while traditional rites have been used to frame the worldview of young recruits to the LRA in Uganda.¹⁹⁴ In authoritarian regimes, traditional justice might also be degraded – for example, Malawi’s chiefs were discredited by the manner in which they lent support to the repressive rule after independence.¹⁹⁵ In these conditions of weakness, the indigenous justice system might need, and welcome, state assistance, particularly in relation to enforcement of decisions.

On the other hand, Section B has already illustrated that in some situations of armed conflict, informal justice institutions “often gain more importance due to the breakdown of the formal court system”.¹⁹⁶ As noted earlier, most dualist States, and in particular those emerging from conflict, tend to maintain that dualism primarily because they have no choice given the parlous State of the formal legal system, though it also tends to increase state legitimacy, functionality and power. Indigenous dispute resolution might emerge stronger in the process of democratization, such as in Samoa where the authority of traditional leaders (*matai*) was recognized in legislation as a “sweetener” for the loss of their political

¹⁸⁹ Hovil & Quinn, *supra* note 136, 26.

¹⁹⁰ Barfield, Nojumi & Thiers, *supra* note 7, 172.

¹⁹¹ B. Ingelaere, ‘The Gacaca Courts in Rwanda’, in Huyse & Salter, *supra* note 9, 25, 34 [Ingelaere, Gacaca Courts].

¹⁹² Naniwe-Kaburahe, *supra* note 31, 161.

¹⁹³ S. Archibald & P. Richards, ‘Converts to Human Rights? Popular Debate About War and Justice in Rural Central Sierra Leone’, 72 *Africa: Journal of the International African Institute* (2002) 3, 339, 344.

¹⁹⁴ Allen, *supra* note 123, 50.

¹⁹⁵ DFID, *supra* note 38, 10.

¹⁹⁶ T. J. Röder, ‘Informal Justice Systems: Challenges and Perspectives’, in Botero *et al.*, *supra* note 40, 58, 58.

dominance with the introduction of universal suffrage.¹⁹⁷ In the world's newest independent State of South Sudan, the Juba government promotes traditional justice as central to the country's self-image in recognition of the war-time role it played in affirming a distinct national identity contrasting with Khartoum's use of *sharia*.¹⁹⁸ Indigenous justice might enjoy sufficient legitimacy to form an explicit part of a peace settlement, such as in Guatemala's peace accords (where the Government agreed to recognize and integrate Mayan law) or Burundi's Arusha accords which speak of rehabilitating *bashingantabe*.

The transitional government's attitude to non-state means of normative ordering will inform the simultaneous process of state building. If indigenous justice is strongest where the State is weak, then it may decline in importance as the State develops judicial capacity that extends across the whole national territory. Support for the separation as far as possible of the two systems flows from the fear that "customary law is not equipped to compete with the monolithic strength of introduced law systems and will be the inevitable loser in any circumstances where there is a choice between the systems".¹⁹⁹ Changes in politics and economics will change behavior and alter demand as the distribution of rights, responsibilities and resources is in flux. Certain duties and prerogatives will be lost over time, particularly in relation to criminal law where risks of human rights abuses and the desire for state control are greatest. The sheer fact of the existence of a formal system might alter the choice of dispute resolution forum on the part of indigenous litigants – the presumption among rule of law reformers is that (re)building the state system will create competition that will force indigenous processes to adapt,²⁰⁰ though many hope some of the modalities of the non-state sector will reciprocally inform state justice.²⁰¹ Beyond this, the seemingly unstoppable march of globalization and capitalism might have the biggest impact on indigenous justice, irrespective of state policy, by loosening kinship ties, narrowing traditional duties of individuals, and undermining the need for social solidarity by increasing self-sufficiency.²⁰² Even if peace builders and most States have moved beyond regarding traditional law as a problem to

¹⁹⁷ S. Lawson, *Tradition Versus Democracy in the South Pacific: Fiji, Tonga and Western Samoa* (1996), 156.

¹⁹⁸ Deng, *supra* note 42, 285-291.

¹⁹⁹ K. Brown, 'Customary Law in the Pacific: An Endangered Species', 3 *Journal of South Pacific Law* (1999), available at http://www.vanuatu.usp.ac.fj/journal_splaw/articles/Brown1.htm (last visited 15 June 2013).

²⁰⁰ Harper, *supra* note 35, 15.

²⁰¹ Kyed, *supra* note 67, 93.

²⁰² Toufayan, *supra* note 70, 396.

be remedied, if transition is ultimately successful, customary mechanisms will have to adapt by dividing jurisdiction with the State, and by being accountable to the State and to those who use it through some form of judicial review. The alternatives may ultimately be repression or obsolescence.

In any case, the role of traditional processes in the new state order is ripe for reconsideration. For example, in the aftermath of Burundi's National Reconciliation Policy, a commission on national unity recommended that *bashingantaha* be adapted to the needs of the modernizing State.²⁰³ Since then, greater government support and capacity building have been forthcoming.²⁰⁴ The Sierra Leone Truth and Reconciliation Commission advocated alterations in the relationship between chiefs and the State and was followed in recent years by draft legislation to regulate customary law in relation to gender, children and appointments of traditional authorities.²⁰⁵ The use of *gacaca* was revived and reconsidered by the Kigali government as a key part of establishing a new Rwandese identity. Whether change is compelled by socio-economic change, by refinement of the formal justice system or by transition, the challenge for the State and peace builders is to ensure that any monitoring, integration or alteration of indigenous law should proceed sensibly. The challenge is to achieve a pragmatic pluralism that facilitates day-to-day choices on the part of the population but which prevents abuse.²⁰⁶

II. External Factors

It is for these reasons that the general optimism in the literature, believing that transitional justice can instigate a normative shift while maintaining stability, applies with force in the context of indigenous justice.²⁰⁷ The manner in which transitional justice actors deploy to these contexts is apt to catalyze change in indigenous law. Firstly, most transitional justice actors in the field hail from INGOs or development agencies, who are the best equipped to foster imaginative change. As Golub argues, "most legal empowerment work is carried out by international and country-specific civil society groups because they tend to demonstrate more of the requisite initiative, dedication, and flexibility than

²⁰³ Naniwe-Kaburahe, *supra* note 31, 161.

²⁰⁴ *Ibid.*, 162, 168.

²⁰⁵ G. Corradi, 'Human Rights Promotion in Post Conflict Sierra Leone: Coming to Grips With Plurality in Customary Justice', 60 *Journal of Legal Pluralism and Unofficial Law* (2010), 73, 87-90.

²⁰⁶ Shaw & Waldorf, *supra* note 21, 22.

²⁰⁷ R. G. Teitel, *Transitional Justice* (2001), 6.

do government agencies”.²⁰⁸ Secondly, given the scale and diversity of the non-state sector, practitioners acknowledge that “focussing on a particular problem or service offers a good entry point to engage local communities, actors, as well as central state services”.²⁰⁹ As the examples of *gacaca*, *nabe biti*, and *mato oput* illustrate, transitional justice offers an incomparably high profile, but nonetheless particularized engagement in which to promote and exemplify reform. The operation of indigenous justice in the service of reconciliation and pacification can attract unprecedented amounts of funding from bilateral and multilateral donors that would otherwise not have gone to these mechanisms.²¹⁰ NGOs tend to prioritize human rights and gender equality – the strings attached to this funding generally stipulate training, human rights education, outreach and monitoring, all of which will benefit non-state justice systems in the long run.²¹¹

However, it would be unfair to suggest that transitional justice actors catalyze normative or institutional change in indigenous justice through imposition. Two noteworthy (but by no means universal) conclusions that peace builders have drawn from their dealings with long-established forms of non-state justice have been that (a) reforms resulting from internal critique are more effective than blatantly heavy-handed dictates, and (b) where this internal critique occurs, indigenous leaders tend to be responsive to changing normative attitudes, as failure to do so might undermine their level of respect in the community.²¹² References to indigenous mechanisms in transitional justice literature are replete with allusions to their inherent flexibility and predisposition to evolve in light of changing social circumstances, which in this respect above all others they surpass formal justice systems. Transitional justice, with its consistently reiterated commitment to consultation, has served as an excellent opportunity for (a) opening up discussion by those marginalized within traditional processes to challenge the domination and manipulation of indigenous norms by the powerful and to press for more inclusive comprehension of indigenous mores, and (b) “vernacularizing” human rights ideas into arrangements that are relevant

²⁰⁸ S. Golub, ‘The Past, Present and Possible Future of Legal Empowerment: One Practitioner’s Perspective’, in Botero *et al.*, *supra* note 40, 38, 38.

²⁰⁹ L. van de Goor & E. van Veen, ‘The Heart of Developmental Change: Rule of Law Engagements in Situations of Fragility’, in Botero *et al.*, *supra* note 40, 67, 69.

²¹⁰ Oomen, ‘Donor-Driven Justice and its Discontents: The Case of Rwanda’, *supra* note 158, 906.

²¹¹ Kerr & Mobekk, *supra* note 15, 160.

²¹² T. Mennen, ‘Putting Theory into Practice – Improving Customary Justice’, paper given at Customary Justice and Legal Pluralism in Post-Conflict and Fragile Societies Conference, 17-18 November 2009, Washington DC.

to the lived experience of communities and that can be appropriated by them to the extent that they are of utility in furthering individual or communal interests.²¹³

Education and awareness raising of these issues are often undertaken to encourage participants to apply basic human rights standards, training manuals are designed and participation of vulnerable groups encouraged. For example, transitional justice has been influential in empowering women as equal partners – women have headed localized truth-seeking projects in Sierra Leone,²¹⁴ and seen more involvement in Rwanda's *gacaca* than was traditionally allowed,²¹⁵ while in East Timor, stipulations that a minimum 30 per cent of all Regional Commissioners be women were observed in the CAVR Community Reconciliation Process. Once given this push, communities "willingly appointed female representatives".²¹⁶ Development agencies consistently warn that donor engagement is not appropriate where non-state justice systems violate basic human rights.²¹⁷ Where international actors support indigenous mechanisms to re-integrate soldiers or foster communal reconciliation, they can resist the employment of abusive or discriminatory forms of punishment.

However, the failure to integrate perspectives from rule of law reconstruction into support from NGOs, scholars, activists, and aid agencies for using indigenous mechanisms to engage with past human rights violations means that the beneficial innovations they bring to traditional processes for the purposes of reckoning with the past abuses may not be sustained.

The interaction of transitional justice activists with customary law emphasizes disengagement from the State, making it less likely that these innovations remain sustainable in the long term. Transitional justice actors are good at facilitating training and internalizing human rights and non-discrimination, but sustainable improvement will take a significantly longer time span than the period where the State is thronged with transitional justice and human rights NGOs and funding. Only the State can maintain these alterations beyond the foreshortened temporal horizons of transition and adjust as necessary the balance between the state and indigenous justice and security providers.

²¹³ Corradi, *supra* note 205, 94.

²¹⁴ Alie, *supra* note 187, 133.

²¹⁵ Ingelaere, 'Gacaca Courts', *supra* note 191, 52.

²¹⁶ Pigou, *supra* note 140, 83.

²¹⁷ DFID, *supra* note 38, 4.

F. Conclusion

There is great optimism in transitional justice literature that indigenous legal processes can capture the meaning of conflict in ways that more remote, state- or international-based processes cannot. However, if these mechanisms are (a) to make a long-term, sustainable impact beyond the transitional moment, or (b) effectuate change in the everyday lives of survivor populations, greater attention must be given to how their employment in the context of transitional justice might interact with the national rule of law strategy overall. In so doing, transitional justice will have to abandon some of the more romantic notions it has of indigenous justice – as something inherently (and primarily) restorative, as an antidote to the shortcomings of legal formalism or as a site of resistance to the State Leviathan. As Inksater argues, “generalizations that characterize indigenous justice systems as homogenous and isolated models are inaccurate and fail to recognize the distinct nature of the local context and the degree to which indigenous legal orders interact with state law”.²¹⁸ Current scholarship in transitional justice exaggerates the grounds for conflict with the State and unduly disregards the possibilities for harmonious interpenetration. In so doing, it has drawn on ideal applications of restorative justice in that Western milieu, which are of questionable relevance to dualist States. Transitional justice comes too close to the view of non-state legal systems found in earlier legal pluralism as parallel but entirely autonomous,²¹⁹ and occasionally wanders into the territory of “rhetorical stone-throwing” that once characterized the field.²²⁰

Enthusiasts for the employment of indigenous mechanisms in transitional justice can learn lessons from the processes of de-romanticization that legal pluralism went through and the experiences of peace building missions. If they do so, they can make the innovations in terms of inclusiveness, gender and fairness that transitional justice invariably promotes more sustainable in the transitional state by acknowledging the porosity of the boundaries between state and indigenous legal orders and embracing denser interactions between the two fields. The pure, autonomous identity of indigenous justice transitional justice scholarship romanticizes must give way to an approach that productively synthesizes fragmented elements from these seemingly opposed cultures, as

²¹⁸ K. Inksater, ‘Transformative Juricultural Pluralism: Indigenous Justice Systems in Latin America and International Human Rights’, 60 *Journal of Legal Pluralism and Unofficial Law* (2010), 105, 113.

²¹⁹ As described by Merry, *supra* note 10, 879.

²²⁰ Tamanaha, ‘The Folly’, *supra* note 58, 195.

opposed to allocating them to largely separate spheres of activity. This approach would attempt to ensure that the different legal orders that exist in any transitional or peace building ecology operate in a way that maximizes their ability to cross-fertilize, accommodate and supplement each other, as opposed to the dominant antagonistic presentation where one undermines and conflicts with the other.

Protection and Realization of Indigenous Peoples' Land Rights at the National and International Level

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Abstract

Today, it is generally recognized that the relationship to land forms the basis of an indigenous people's identity, and that indigenous peoples' cultures cannot be preserved without a certain degree of control over land and natural resources. In the course of colonization, however, indigenous peoples lost ownership and control over most of their ancestral lands, and from the end of the 19th century onwards the existence of inherent indigenous land rights, i.e. rights not derived from the colonial powers but rooted solely in the use and ownership of the land by indigenous peoples since time immemorial, had been completely denied. This began to change in the 1960s. Due to increased pressure by national courts and international institutions, state governments started to recognize the continued existence of inherent indigenous land rights and to develop different policies to protect them. This paper looks at how indigenous peoples' land rights are nowadays recognized and protected in the United States of America, Canada, Australia, and New Zealand, and whether the different national approaches are in accordance with international legal standards. It will be shown that none of the States subject to this study acts completely in accordance with its obligations under international law, but that nevertheless all States have some strong points regarding the realization and protection of indigenous land rights and can learn from each other's experiences.

A. Introduction

It is estimated that worldwide there are between 300-500 million people of indigenous origin, living in approximately 3,000-5,000 indigenous communities in more than 70 States.¹ Their traditional habitats range from Arctic

¹ M. D. Cole, *Das Selbstbestimmungsrecht indigener Völker: Eine völkerrechtliche Bestandsaufnahme am Beispiel der Native Americans in den USA* (2009), 194; T. Koivurova, 'From High Hopes to Disillusionment: Indigenous Peoples' Struggle to (Re)Gain Their Right to Self-Determination', 15 *International Journal on Minority and Group Rights* (2008) 1, 1, 21; European Parliament, *Resolution on Action Required Internationally to Provide Effective Protection for Indigenous Peoples*, 9 February 1994, OJ C61/69, A; European Commission, *Working Document on Support for Indigenous Peoples in the Development Co-operation of the Community and the Member States*, 11 May 1998, SEC(1998) 773, 1. However, the numbers vary significantly. For example, G. Alfredsson, 'Indigenous Populations, Protection', in R. Bernhardt (ed.), *Encyclopedia of Public International Law*, Vol. II, (1995), 946, 946 estimates the number of indigenous persons at 100-200 million, whereas B. Broms, 'The Rights of Indigenous Peoples: Recognition of Collective Rights', 3 *The Finnish Yearbook of*

permafrost zones to deserts and tropical rainforests. Since indigenous peoples have adapted to these diverse living conditions, their cultures, societies, ways of life, and forms of land use differ significantly. Yet, despite these differences, all indigenous peoples worldwide have one thing in common: they all share a deeply felt spiritual attachment to their ancestral territories, as well as the idea of collective stewardship over land and its resources. This special relationship lies at the core of an indigenous peoples' identity. Since indigenous peoples define themselves as peoples through their common genealogical descent from their ancestral lands and its continued collective use by the group, indigenous peoples' cultures cannot survive in the long term without access to, and a certain degree of control over, their traditionally used lands and resources.²

Yet in the course of colonization, indigenous peoples lost most of their ancestral lands – by conquest, cession, or occupation of their lands as *terrae nullius*. This loss of land has led to loss of identity, marginalization, and poverty. As a result, indigenous peoples all over the world have become disadvantaged by almost every standard compared to the dominant society, including income, education, housing, standard of health, and life expectancy,³ and thus are often referred to as “Fourth World”.⁴ Despite this desperate situation, the interests and demands of indigenous peoples have for a long time been completely disregarded on the national and international level. Instead, indigenous peoples were regarded as backward peoples who – for their own benefit – had to be assimilated into mainstream society to overcome their social disadvantages. This began to change in the 1960s. In the course of decolonization, the civil rights movement in the US and the increased importance of human rights, indigenous peoples began to organize themselves nationally and internationally and to draw the attention of the national public and the world community to their desperate situation.⁵ Because of the importance of land for an indigenous people's culture

International Law (1992), 298, 304 estimates their number at 250 million.

² See e.g. E. Dannenmaier, 'Beyond Indigenous Property Rights: Exploring the Emergence of a Distinctive Connection Doctrine', 86 *Washington University Law Review* (2008) 1, 53, 84-88 with references to statements of indigenous groups and advocates.

³ See e.g. UN Department of Economic and Social Affairs, *State of the World's Indigenous Peoples*, UN Doc ST/ESA/328 (2009).

⁴ The term “Fourth World” was coined by George Manuel in G. Manuel & M. Posluns, *The Fourth World: An Indian Reality* (1974) and has since been used to describe the situation of indigenous peoples. See also C. J. Iorns, 'Indigenous Peoples and Self Determination: Challenging State Sovereignty', 24 *Case Western Reserve Journal of International Law* (1992) 2, 199, 201-202.

⁵ See e.g. S. J. Anaya, *Indigenous Peoples in International Law*, 2nd ed. (2004), 56 [Anaya, *Indigenous Peoples in International Law*]; P. Thornberry, *Indigenous Peoples and*

and identity, the realization of the right to own, use, and live on their ancestral lands has been at the center of their struggle for recognition and enforcement of their rights.

This paper will look at the question of how indigenous land rights are realized in different national jurisdictions, and whether the level of protection and enforcement awarded to indigenous land rights is in accordance with minimum standards under international law. For the sake of clarity and brevity, the comparison of national legal frameworks will be limited to Australia, New Zealand, Canada, and the USA. The selection of these States as subjects of this study was, on the one hand, made for reasons of comparability: Australia, New Zealand, Canada, and the USA were all – at least predominantly – colonized by Great Britain. All of these States are typical settler States, and thus share the same historical path. On the other hand, the respective States have in the past led the way in the development of rights of indigenous peoples, and thus developments in these States can indicate future trends regarding rights of indigenous peoples worldwide.

The paper will be structured as follows: first, a historical overview of the indigenous peoples' loss of their ancestral lands during colonization will be given (B.). In a next step, the recognition, protection, and enforcement of indigenous peoples' land rights under the current national legal systems of the respective States will be surveyed and compared (C.). Subsequently, it will be analyzed whether the several national instruments for the protection and enforcement of indigenous land rights are in accordance with minimum standards under international law (D.). Ultimately, an appraisal will be given (E.).

B. The Loss of Indigenous Lands During Colonization

In the course of colonization, indigenous peoples lost ownership and control over most of their ancestral lands. Yet the ways in which indigenous peoples lost these lands differ significantly in the different States and regions. Three methods of land acquisition by the colonial powers are to be distinguished: conquest, cession/purchase, and occupation. In addition, some States implemented land reforms to render tribal ownership of land impossible.

As a general principle, the acquisition of title to land by mere occupation is only possible if the land had previously belonged to no one, i.e. if it constituted

Human Rights (2002), 21; D. Sanders, 'The Legacy of Deskaheh: Indigenous Peoples as International Actors', in C. Price Cohen (ed.), *The Human Rights of Indigenous Peoples* (1998), 73, 75-76.

terra nullius. In some regions, however, the colonial powers applied a legal fiction to extend the *terra nullius* doctrine to regions inhabited by indigenous peoples. Indigenous peoples were classified as “savages”, who were to be treated as legally non-existent. Consequently, indigenous peoples were entirely denied the legal capacity to claim rights over their traditional territories. The best-known example for indigenous territories being treated as *terrae nullius* is Australia. The Australian Aboriginal peoples were regarded as “so entirely destitute [...] even of the rudest forms of civil polity, that their claims, whether as sovereigns or proprietors of the soil, have been utterly disregarded”,⁶ and it was assumed that “[t]he right to the soil, and of all lands in the Colony, became vested immediately upon its settlement, in His Majesty, in the right of his crown, and as representative of the British Nation”.⁷

The *terra nullius* concept was also systematically pursued in the Canadian Provinces of British Columbia⁸ and Quebec,⁹ in the Canadian Maritime Provinces,¹⁰ and in the US State of California.¹¹ In addition, land rights of indigenous peoples were also disregarded in the northern regions, namely in the US State of Alaska,¹² and in Canada north of the 60th parallel¹³ due to indifference and neglect by the colonial powers, which initially did not envisage

⁶ British Parliamentary Papers, (1837) Vol. VII (425), 82. The text can also be found in M. F. Lindley, *The Acquisition and Government of Backward Territory in International Law: Being a Treatise on the Law and Practice Relating to Colonial Expansion* (1926), 41.

⁷ *R v. Steel*, Supreme Court of Van Diemen’s Land, (1834) 1 Legge 65, 68-69.

⁸ See S. Banner, *Possessing the Pacific: Land, Settlers, and Indigenous People From Australia to Alaska* (2007), 195-230 [Banner, *Possessing the Pacific*].

⁹ Algonquin Nation, ‘Presentation to the Members of the Committee to Examine Matters Relating to the Accession of Quebec to Sovereignty’ (4 February 1992), available at <http://cwis.org/fwdp/Americas/algonqin.txt> (last visited 15 June 2013), para. 2; R. H. Bartlett, *Indian Reserves and Aboriginal Lands in Canada: A Homeland* (1990), 14-15. This assumption was, however, flawed. See Algonquin Nation, *supra* note 9, para. 2; T. Morantz, ‘Aboriginal Land Claims in Quebec’, in K. Coates (ed.), *Aboriginal Land Claims in Canada: A Regional Perspective* (1992) [Coates, *Aboriginal Land Claims in Canada*], 101, 103.

¹⁰ See N. E. Ayers, ‘Aboriginal Rights in the Maritimes’, 2 *Canadian Native Law Reporter* (1984) 1, 1; R. H. Bartlett, *Indian Reserves in the Atlantic Provinces of Canada* (1986).

¹¹ Banner, *Possessing the Pacific*, *supra* note 8, 161-194.

¹² *Ibid.*, 287-314.

¹³ K. Coates, ‘Best Left As Indians: The Federal Government and the Indians of the Yukon, 1894-1950’, 4 *The Canadian Journal of Native Studies* (1984) 2, 179, 181; W. R. Morrison, ‘Aboriginal Land Claims in the Canadian North’, in Coates, *Aboriginal Land Claims in Canada*, *supra* note 9, 167, 168.

settlement of these hostile and barren regions, and thus did not find it necessary to deal with indigenous ownership rights.

In most parts of North America and in New Zealand, however, the colonial powers recognized the rights of indigenous peoples to their ancestral lands. With regard to North America, this is evidenced, *inter alia*, by the *Royal Proclamation* issued by the British Crown in 1763, which explicitly confirmed the Indians' right to their lands.¹⁴ Likewise, with regard to New Zealand, the *Treaty of Waitangi* of 1840, signed by the British Crown and several Maori chiefs and applicable to the whole of New Zealand, guaranteed to the Maori "the full exclusive and undisturbed possession of their Lands".¹⁵

Occasionally, it was argued that indigenous peoples had subsequently lost these rights as a result of conquest. For example, after the American War of Independence in 1783, several members of the US Congress were of the opinion that the Indians – most of whom had sided with the British – had altogether to be regarded as a defeated people and thus all their lands could be confiscated without compensation.¹⁶ Although such confiscations occurred to some extent,¹⁷ they remained an exception. The same was true with regard to New Zealand. For example, in 1863, the New Zealand Parliament enacted the *New Zealand Settlements Act*¹⁸ in response to the First Waikato War, allowing for the confiscation of Maori lands. Yet, although the New Zealand government subsequently confiscated more than 12,000 km², it later handed back 6,500 km² to the Maori owners and paid compensation for another 3,200 km².¹⁹ Since at the time of colonization, the principle of acquired rights or *droits acquis* – i.e. the principle that conquest leaves the property of individuals untouched – was

¹⁴ The text of the *Royal Proclamation* of 7 October 1763 can be found in B. Slattery, *The Land Rights of Indigenous Canadian Peoples as Affected by the Crown's Acquisition of Their Territories* (1979), 363-369.

¹⁵ *Treaty of Waitangi*, Art 2. The text of the *Treaty of Waitangi* can be found in Schedule 1 of the *Treaty of Waitangi Act 1975* (No. 114).

¹⁶ C. Goldberg, 'Federal Policy and Treaty Making: A Federal View', in D. L. Fixico (ed.), *Treaties With American Indians: An Encyclopedia of Rights, Conflicts, and Sovereignty*, Vol. I (2008) [Fixico, *Treaties with American Indians*], 13, 14.

¹⁷ S. Banner, *How the Indians Lost Their Land: Law and Power on the Frontier* (2005), 112-113, 121-124 & 127-129 [Banner, *How the Indians Lost Their Land*].

¹⁸ *An Act to Enable the Governor to Establish Settlements for Colonization in the Northern Island of New Zealand* (3 December 1863).

¹⁹ G. W. Rice, *The Oxford History of New Zealand*, 2nd ed. (1992), 63-67.

already widely recognized as a rule of international law,²⁰ the amount of land lost by indigenous peoples as a result of conquest is altogether negligible.

Instead, if indigenous peoples' rights to their ancestral lands were recognized by the colonial powers, land was generally acquired through cession treaties and agreements, not through conquest. Both in North America and New Zealand, the Crown reserved for itself the exclusive right to purchase land from indigenous peoples.²¹

Consequently, vast parts of Canada, including the Prairie Provinces and considerable parts of Ontario and the Northwest Territories, were acquired through treaties between the British or – since the founding of the Dominion of Canada in 1867 – the Canadian government respectively and several Indian tribes.²² The US government also maintained the British strategy of buying land from the Indian tribes after the country had gained its independence, and between 1789 and 1871, 229 treaties concerning cession of land were ratified by the US Congress.²³ Likewise, in New Zealand, the Crown had until the 1850s acquired virtually the entire South Islands and several thousand square

²⁰ E. d. Vattel, *The Law of Nations or the Principles of Natural Law Applied to the Conduct and to the Affairs of Nations and of Sovereigns*, Vol. III (1758) [1916], Book III, Ch. XIII, 177, para. 200. See also *Treaty of Paris*, 3 September 1783, Arts V & VI, 8 Stat. 80; *Wilcox v. Henry*, Supreme Court of Pennsylvania, (1782) 1 US (1 Dall.) 69, 71; *Johnson v. M'Intosh*, US Supreme Court, (1823) 21 US (8 Wheat) 543, 589; *United States v. Percheman*, US Supreme Court, (1832) 32 US (7 Pet.) 51.

²¹ *Royal Proclamation 1763*, *supra* note 14: "We do, with the Advice of our Privy Council strictly enjoin and require, that no private Person do presume to make any purchase from the said Indians of any Lands reserved to the said Indians, within those parts of our Colonies where We have thought proper to allow Settlement: but that, if at any Time any of the Said Indians should be inclined to dispose of the said Lands, the same shall be Purchased only for Us, in our Name, at some public Meeting or Assembly of the said Indians, to be held for that Purpose by the Governor or Commander in Chief of our Colony respectively within which they shall lie: and in case they shall lie within the limits of any Proprietary Government, they shall be purchased only for the Use and in the name of such Proprietaries, conformable to such Directions and Instructions as We or they shall think proper to give for that Purpose". *Treaty of Waitangi*, Art. 2, *supra* note 15: "[T]he Chiefs of the United Tribes and the individual Chiefs yield to Her Majesty the exclusive right of Preemption over such lands as the proprietors thereof may be disposed to alienate at such prices as may be agreed upon between the respective Proprietors and persons appointed by Her Majesty to treat with them in that behalf".

²² See map in R. A. Reiter, *The Law of Canadian Indian Treaties*, 2nd ed. (1996), 54.

²³ D. L. Fixico, 'Introduction', in Fixico, *Treaties with American Indians*, *supra* note 16, xxi, xxi.

kilometers of land on the North Island – in total approximately half of the country – through purchases from the Maori.²⁴

But although these transactions were based on treaties and agreements, the loss of land can by no means be qualified as voluntary. It can be assumed that many of the early land purchases were based on cultural misunderstandings regarding the meaning of these transactions. Since indigenous peoples had not traded in land prior to the arrival of Europeans, they would not have understood their consent as a permanent relinquishment of their rights to the land but rather as permission for the Europeans to henceforth use the land together with the tribe.²⁵ But also the treaties and agreements concluded later, at a time when most indigenous peoples would have realized the true meaning of land transactions, cannot be classified as voluntary surrenders of land. The government negotiators often resorted to fraud and other dishonest conduct to buy as much land as possible at the lowest possible price. For example, the negotiators took advantage of the fact that indigenous peoples were not familiar with British terms and units of measurement so that they often ended up selling more land than they wanted to. In addition, in the written documents, the government negotiators often unilaterally diverted from the previous oral agreements capitalizing on the fact that most indigenous negotiators were not able to read. Furthermore, indigenous negotiators were bribed or agreements were concluded with individual tribal members who had no authority to sell the land on behalf of the tribe.²⁶ Some indigenous peoples were also coerced to sell their lands by threat of the use of military force or by threat of withholding the delivery of essential food supplies, leaving many tribes only with the choice to either sign or to starve.²⁷

Yet despite the unequal power of the parties and the governments' resort to dishonest negotiation methods, some indigenous peoples were able to hold on to considerable amounts of their ancestral lands. Through efficient organization of their tribal structures, internal unity, and cooperation with other tribes, several

²⁴ Banner, *Possessing the Pacific*, *supra* note 8, 68.

²⁵ See Banner, *How the Indians Lost Their Land*, *supra* note 17, 57-59 with further references; Banner, *Possessing the Pacific*, *supra* note 8, 70-72 with further references; M. Craufurd-Lewis, 'Treaties with Aboriginal Minorities', 15 *Canadian Journal of Native Studies* (1995) 1, 1, 43; J. R. Miller, *Skyscrapers Hide the Heavens: A History of Indian-White Relations in Canada*, 3rd ed. (2000), 218-220; B. W. Morse, 'Canadian Indian Treaties', in Fixico, *Treaties with American Indians*, *supra* note 16, 209, 214; A. Ward, *National Overview*, Vol. I (1997), 58-59.

²⁶ Banner, *How the Indians Lost Their Land*, *supra* note 17, 62-74 with further references.

²⁷ G. Friesen, *The Canadian Prairies: A History* (1987), 150-151.

indigenous peoples – in particular in the western States of the USA and on the North Island of New Zealand – initially resisted attempts by the governments to acquire their lands. This put the governments under pressure. Since there was a steady influx of settlers to these regions and consequently a high demand for more and more land, the New Zealand and the US government decided to choose a new path to overcome this resistance: by way of comprehensive land reforms, the traditional tribal rights to the land were to be exchanged for individual fee simple titles.

These reforms ultimately caused indigenous peoples to lose most of their remaining land. In 1887, the US government enacted the *General Allotment Act* (Dawes Act),²⁸ which – contrary to previous treaty promises by the US government – allowed for the breaking up of all tribally held Indian reservations and their allotment to individual Indians. After a trust period of 25 years, these allotments were to be converted into fee simple titles and be freely alienable. As a result of the *Dawes Act*, Indians lost ownership over 364,000 km² – two thirds of their 1887 land base.²⁹ To the same end, the New Zealand government enacted the *Native Lands Act* in 1865.³⁰ Contrary to Article 2 of the *Treaty of Waitangi*, which guaranteed the Maori collective ownership of their lands, their tribally held titles were to be converted into individual and freely alienable ownership titles derived from the Crown. As a result of this land reform, the Maori lost almost two thirds of their remaining land base, in total almost 58,000 km².³¹

Hence, regardless of whether the indigenous peoples' rights to their traditional territories were initially recognized by the colonial powers or whether their lands were treated as *terrae nullius*, indigenous peoples could ultimately not prevent the loss of vast amounts of their ancestral lands in the course of colonization. Eventually, from the end of the 19th century onwards, the existence of inherent indigenous land rights rooted solely in traditional use and ownership was generally denied. Consequently, previous treaties concluded with indigenous peoples were regarded as abrogable or simple nullities.³²

²⁸ *Dawes General Allotment Act*, 8 February 1887, 24 Stat. 388; 25 USC 331, ch. 119.

²⁹ *Cobell v. Babbitt*, United States District Court for the District of Columbia, (1999) 91 F.Supp.2d 1, 8; N. J. Newton *et al.* (eds), *Cohen's Handbook of Federal Indian Law*, 3rd ed. (2005), 1042.

³⁰ *An Act to Amend and Consolidate the Laws Relating to Lands in the Colony in Which the Maori Proprietary Customs Still Exist, and to Provide for the Ascertainment of the Titles to Such Lands, and for Regulating the Descent Thereof, and for Other Purposes* (30 October 1865) (No. 71).

³¹ A. Ward, *National Overview*, Vol. II (1997), 248.

³² See *Wi Parata v. The Bishop of Wellington*, Supreme Court of New Zealand, (1877) 3 NZ

C. Today's Recognition and Implementation of Indigenous Land Rights in Comparison

Whereas up until the mid-20th century States completely ignored demands by indigenous peoples to have their inherent rights to their ancestral lands recognized and protected, this began to change after the Second World War. Under the impression of the unprecedented scale of atrocities committed against parts of the own population in National Socialist Germany, there was a general agreement among States that never again shall a State become an instrument to suppress and marginalize certain minorities. In the wake of the decolonization process, the US civil rights movements and the growing importance of human rights, governments and societies began to realize that in the past great injustices had been committed against indigenous peoples, and the keyword of “reconciliation” took center stage in the relationship between national governments and indigenous peoples. In the course of this development, States moved further away from the view that indigenous peoples were primitive and backward societies which for their own good had to be assimilated into mainstream society. Instead, it became increasingly accepted that indigenous cultures had an intrinsic value and were to be preserved for their own sake. States recognized that ownership and control over their traditional land and resources could not only help to solve the massive social and economic problems indigenous peoples are faced with, but also that a certain degree of self-administration and control over land and resources was essential to ensure the survival of indigenous peoples as peoples. Initially, however, States only recognized a moral, not a legal, obligation to realize and protect indigenous land rights. Consequently, governments were hesitant in addressing indigenous peoples' claims. This changed with the emergence of the modern aboriginal title doctrine.

The decision of the Supreme Court of Canada in *Calder v. Attorney-General of British Columbia* is generally regarded as the starting point of the modern aboriginal title doctrine. In its decision, the Canadian Supreme Court stated that at the time of colonization the indigenous peoples of British Columbia held aboriginal rights to their lands – i.e. rights based solely on the use and occupation of the land by indigenous peoples since time immemorial irrespective of the recognition of these rights by the Crown. It further declared

Jur. (NS) 72, 77-78; *St. Catherine's Milling and Lumber Co. v. The Queen*, Privy Council, (1888) 14 App. Cas. 46 (JCPC), 54.

that these rights were not automatically extinguished with the acquisition of British sovereignty.³³ This decision is regarded as a landmark decision since for the first time a supreme court implied that an aboriginal title could still exist over all lands not ceded. In 1986, the New Zealand High Court followed suit in its decision *Te Weehi v. Regional Fisheries Officer* by declaring that “the local laws and property rights of [indigenous] peoples in ceded or settled colonies were not set aside by the establishment of British sovereignty”.³⁴ In 1992, the High Court of Australia in its famous decision *Mabo v. Queensland (No. 2)* also accepted the existence of inherent indigenous land rights by declaring that the concept of *terra nullius* was “false in fact and unacceptable in [Australian] society”.³⁵ Instead, it assumed that aboriginal title to land has survived as a “burden on the radical title of the Crown”.³⁶

By way of this development the courts provided indigenous peoples with leverage against the governments. Governments were forced to take the land claims of indigenous peoples seriously and to enter into negotiations in order to settle all open land claims. Hence, the recognition of legally enforceable claims on behalf of indigenous peoples and the resulting pressure on governments to negotiate turned indigenous peoples from passive recipients of state benefits to actors with enforceable rights.³⁷

I. Inherent Land Rights

The aboriginal title doctrine was mainly shaped by the Supreme Court of Canada and the High Court of Australia with some decisions also issued by courts in New Zealand and the USA. Yet, although the developments in the several common law States have influenced one another, there is no uniform concept of aboriginal title. Instead, the legal nature and protection of aboriginal title rights, as well as the burden of proof to establish such rights differ significantly among these States.

³³ *Calder v. Attorney-General of British Columbia*, Supreme Court of Canada, [1973] SCR 313, 328, 375 & 390.

³⁴ *Te Weehi v. Regional Fisheries Officer*, High Court of New Zealand, [1986] 1 NZLR 682, 687. See also *Te Runanganui o Te Ika Whenua Inc Society v. Attorney-General*, New Zealand Court of Appeal, [1994] 2 NZLR 20 (CA), 23-24. See also the remarks by M. B. Schroder, ‘On the Crest of a Wave: Indigenous Title and Claims to the Water Resource’, 8 *New Zealand Journal of Environmental Law* (2004), 1, 16.

³⁵ *Mabo v. Queensland (No. 2)*, High Court of Australia, (1992) 175 CLR 1, para. 39.

³⁶ *Ibid.*, para. 62.

³⁷ P. G. McHugh, *Aboriginal Title: The Modern Jurisprudence of Tribal Land Rights* (2011), 5.

1. Legal Nature

In Canada, New Zealand, and the USA, an aboriginal title is regarded as an exclusive right to the land itself, i.e. the right to the land is not limited to traditional activities.³⁸ Yet, according to the Supreme Court of Canada, the use of land by aboriginal title holders “must not be irreconcilable with the nature of the attachment to the land which forms the basis of the particular group’s aboriginal title”.³⁹ Hence, the Supreme Court of Canada places restrictions on aboriginal title holders as to the range of permissible uses of the land, which do not apply to fee simple title holders. The US Supreme Court also classifies an aboriginal title as less comprehensive than a fee simple title by holding that an aboriginal title does not constitute “full proprietary ownership” or at least “right to unrestricted possession, occupation and use”,⁴⁰ but merely “permissive occupation”.⁴¹ However, as a right to the land itself, an aboriginal title in the Canadian, New Zealand, and US legal systems also includes a right to sub-surface resources.⁴²

In contrast, in Australia, an aboriginal – or native – title is merely seen as a bundle of rights which generally gives indigenous peoples only the right to pursue certain activities, which themselves constitute traditional aboriginal rights – e.g. the right to hunt, to fish, to gather, or to perform cultural activities

³⁸ With regard to Canada, see *Delgamuukw v. British Columbia*, Supreme Court of Canada, [1997] 3 SCR 1010, 1094-1096, paras 138 & 140 [Delgamuukw Case]; regarding the USA, see e.g. *United States v. Shoshone Tribe of Indians*, US Supreme Court, (1938) 304 US 111, 117-118 [Shoshone Tribe of Indians Case]; *United States v. Klamath and Moadoc Tribes*, US Supreme Court, (1938) 304 US 119. See also F. S. Cohen, ‘Original Indian Title’, 32 *Minnesota Law Review* (1947) 1, 28, 55; Newton *et al.*, *supra* note 29, 20-21. With respect to New Zealand, see R. H. Bartlett, *Native Title in Australia*, 2nd ed. (2004), 230-231 [Bartlett, Native Title in Australia]; Schroder, *supra* note 34, 21-22.

³⁹ *Delgamuukw Case*, *supra* note 38, 1080-1081, para. 111.

⁴⁰ *Tee-Hit-Ton Indians v. United States*, US Supreme Court, (1955) 348 US 272, 277 [Tee-Hit-Ton Indians Case].

⁴¹ *Ibid.*, 279.

⁴² With regard to Canada, see *Delgamuukw Case*, *supra* note 38, 1086-1087, para. 122; M. A. Stephenson, ‘Resource Development on Aboriginal Lands in Canada and Australia’, 9 *James Cook University Law Review* (2002/2003), 21, 37 & 41-42; Schroder, *supra* note 34, 19. Regarding the US, see S. D. Green, ‘Specific Relief for Ancient Deprivations of Property’, 36 *Akron Law Review* (2003) 2, 245; Newton *et al.*, *supra* note 29, 974, with reference to *Shoshone Tribe of Indians Case*, *supra* note 38, 117-118. With respect to New Zealand, see Bartlett, *Native Title in Australia*, *supra* note 38, 230-231; Schroder, *supra* note 34, 21-22.

– without conferring a right to the land itself.⁴³ Hence, although an aboriginal title has since the *Mabo* decision in 1992 been recognized in 141 cases over a total area of 20.5% of Australia, this has in most cases only led to the recognition of minimal rights.⁴⁴

2. Protection

Under the legal systems of all States subject to this study an aboriginal title is regarded as inalienable.⁴⁵ Yet, the overall level of protection afforded to original land rights differs significantly among the States. In Canada, aboriginal title rights are constitutionally protected and therefore can only be extinguished with the consent of the indigenous peoples concerned.⁴⁶ This constitutional protection is, however, not regarded as absolute. Whereas aboriginal titles may not be unilaterally extinguished, they may nevertheless be infringed upon by the federal or provincial government if the infringement is “in furtherance of a legislative objective that is compelling and substantial”⁴⁷ and “consistent with the special fiduciary relationship between the Crown and aboriginal peoples”.⁴⁸ Yet, even before the existence of an aboriginal title has been established, the government has a legal duty to consult with all potential aboriginal title holders and, if appropriate, accommodate their interests before projects potentially affecting these rights might commence.⁴⁹

⁴³ *Western Australia v. Ward*, High Court of Australia, (2002) 213 CLR 1, 94-95 [Western Australia Case].

⁴⁴ Australian Government - National Native Title Tribunal, ‘Information About Native Title: Facts and Figures’ (31 May 2012), available at <http://www.nntt.gov.au/Information-about-native-title/Pages/Factsandfigures.aspx> (last visited 15 June 2013); Australian Government - National Native Title Tribunal, ‘Determinations of Native Title’ (11 January 2013), available at http://www.nntt.gov.au/Mediation-and-agreement-making-services/Documents/Quarterly%20Maps/Determinations_map.pdf (last visited 15 June 2013).

⁴⁵ See *Delgamuukw Case*, *supra* note 38, 1081-1082, para. 113; *Mabo v. Queensland (No. 2)*, *supra* note 35, paras 53, 63 & 83; *Johnson v. M'Intosh*, *supra* note 20, 574; *Attorney-General v. Ngati Apa*, New Zealand Court of Appeal, [2003] 3 NZLR 643 (CA), paras 16 & 29 [Ngati Apa Case].

⁴⁶ *Constitution Act, 1982*, Art. 35 (1) (Schedule B to the *Canada Act 1982* (UK), 1982, ch. 11): “The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed”.

⁴⁷ See *Delgamuukw Case*, *supra* note 38, 1107-1108, para. 161.

⁴⁸ See *ibid.*, 1108-1109, para. 162.

⁴⁹ *Haida Nation v. British Columbia (Minister of Forests)*, Supreme Court of Canada, 2004 SCC 73, [2004] 3 SCR 511, 520, para. 10 [Haida Case]; see also *Taku River Tlingit First*

In the USA, on the other hand, an aboriginal title – or original Indian title – is not regarded as a *Fifth Amendment* right.⁵⁰ That means it is not protected at all against seizure and extinguishment by the federal government, and such acts are also not compensable.⁵¹ An aboriginal title is to a certain degree protected by the fact that only the federal government and not the individual States or private individuals can infringe or extinguish aboriginal title rights.⁵²

Under the Australian legal system, the federal government does not have exclusive competencies regarding indigenous peoples and their land.⁵³ However, since Section 109 *Commonwealth Constitution* stipulates that federal law takes precedence over state law, the federal *Racial Discrimination Act 1975* (Cth) (RDA), which prohibits discrimination based on racial and ethnic origin and lays down the right to equality before the law,⁵⁴ and the federal *Native Title Act 1993* (Cth) (NTA), which regulates that a native title can only be extinguished in accordance with the NTA,⁵⁵ prevent States to a certain degree from infringing or extinguishing aboriginal titles.⁵⁶ The federal government, on the other hand, can infringe or extinguish aboriginal title rights at any time since the RDA and NTA are not constitutionally

Nation v. British Columbia (Project Assessment Director), Supreme Court of Canada, 2004 SCC 74, [2004] 3 SCR 550, 562, para. 21 [Taku River Case].

⁵⁰ Under the *Fifth Amendment*, “[n]o person shall [...] be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation”.

⁵¹ *Tee-Hit-Ton Indians Case*, *supra* note 40, 285.

⁵² See e.g. *Worcester v. Georgia*, US Supreme Court, (1832) 31 US (6 Pet.) 515, 519; *United States v. Santa Fe Pacific Railroad*, US Supreme Court, (1941) 314 US 339, 347; *Oneida Indian Nation v. County of Oneida (Oneida I)*, US Supreme Court, (1974) 414 US 661, 667-668; *County of Oneida v. Oneida Indian Nation (Oneida II)*, US Supreme Court, (1985) 470 US 226, 240; see also Newton *et al.*, *supra* note 29, 971-972.

⁵³ *Commonwealth Constitution*, Section 51 (63 & 64 Victoria, c. 12 (UK)) in its current version says: “The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to: [...] (xxvi) the people of any race for whom it is deemed necessary to make special laws”. Until a constitutional amendment in 1967, the federal government had no competencies concerning indigenous peoples. See also Bartlett, *Native Title in Australia*, *supra* note 38, 276-277; Stephenson, *supra* note 42, 46-47.

⁵⁴ See *Racial Discrimination Act 1975* (Cth) (No. 52), Sections 9 & 10.

⁵⁵ See *Native Title Act 1993* (No. 110), Section 11 [NTA].

⁵⁶ See also Bartlett, *Native Title in Australia*, *supra* note 38, 274; Stephenson, *supra* note 42, 46.

entrenched, and it has done so on several occasions in the past.⁵⁷ Under the current legal system, indigenous peoples in Australia neither have a right to veto, nor a comprehensive right to be consulted prior to activities on their lands.⁵⁸ Native title holders are accorded a right to negotiate. Under this right, native title holders are to be notified of proposed projects on their lands, and the government as well as the operator must enter into good faith negotiations with the intention of reaching an agreement.⁵⁹ If no agreement is reached within a six-month period, each of the negotiation parties may apply to the National Native Title Tribunal, which determines whether the proposed project may be carried out.⁶⁰ This determination can, however, be overridden by the Commonwealth minister in the national interest or the interest of the respective State or Territory.⁶¹ Hence, ultimately, the right to negotiate is not very strong but instead largely accommodates the economic interests of the States and private enterprises.⁶² Furthermore, in its decision *Western Australia v. Ward*, the High Court held that a clear and plain intention was not necessary to extinguish aboriginal titles. Instead, every inconsistency between an aboriginal title and a non-indigenous land right is sufficient to extinguish a native title bit by bit.⁶³

A special situation exists in New Zealand. New Zealand is one of only three States worldwide without a written constitution or a constitutionally entrenched bill of rights. Since parliamentary acts can therefore not be declared *ultra vires* by courts, the New Zealand legislature has an exceptional

⁵⁷ For example, the NTA validated all past acts that were irreconcilable with the inherent indigenous land rights and as a result extinguished all native titles. Another example is the *Native Title Amendment Act 1998* (Cth) (No. 97) [NTAA], which was enacted in response to the decision in *Wik Peoples v. Queensland*, in which the High Court held that the granting of pastoral leases had not necessarily extinguished aboriginal title rights. The NTAA unilaterally extinguished all native titles to lands, to which contrary to the NTA new lease rights had been granted after 1993.

⁵⁸ See G. Nettheim, 'The Search for Certainty and the Native Title Amendment Act 1998 (Cth)', 22 *University of New South Wales Law Journal* (1999) 2, 564, 570-571; Stephenson, *supra* note 42, 56-59; G. Triggs, 'Australia's Indigenous Peoples and International Law: Validity of the Native Title Amendment Act 1998 (Cth)', 23 *Melbourne University Law Review* (1999) 2, 372, 405-409.

⁵⁹ NTA, Sections 29-31, *supra* note 55.

⁶⁰ *Ibid.*, Sections 35 & 38.

⁶¹ *Ibid.*, Section 42. Regarding the negotiation process, see also Stephenson, *supra* note 42, 57-59.

⁶² See McHugh, *supra* note 37, 166.

⁶³ *Western Australia Case*, *supra* note 43, 89.

power unique for a liberal democracy, which can be classified as parliamentary supremacy.⁶⁴ This became evident in the foreshore and seabed controversy. In reaction to the decision by the New Zealand Court of Appeal in *Attorney-General v. Ngati Apa*, in which the Court held that an aboriginal – or Maori customary – title could potentially still apply to the foreshore and seabed, the New Zealand parliament enacted the *Foreshore and Seabed Act 2004*. This act regulated that henceforth “the full legal and beneficial ownership of the public foreshore and seabed is vested in the Crown, so that the public foreshore and seabed is held by the Crown as its absolute property”.⁶⁵ Consequently, all potential inherent rights of the Maori to the foreshore and seabed were without prior consultation unilaterally extinguished whereas non-indigenous private rights to these regions remained untouched.⁶⁶ The act was repealed after much political controversy in April 2011 with the enactment of the *Marine and Coastal Area (Takutai Moana) Act 2011*, which reversed the vesting of title to the foreshore and seabed in the Crown.⁶⁷ Yet, the foreshore and seabed controversy shows that aboriginal titles in New Zealand can be extinguished unilaterally and without compensation at any time.

3. Burden of Proof and Limitations

Another issue of relevance is the burden of proof on indigenous peoples asserting an aboriginal title and the overall possibility to claim an aboriginal title in the respective State. Under the aboriginal title doctrine, only *existing* rights are protected. The doctrine is not a means of reparation. Consequently, large parts of Canada, the USA, and New Zealand are *a priori* not subject to a potential aboriginal title. As regards Canada, aboriginal titles cannot be claimed to the Prairie Provinces and considerable parts of Ontario since these regions were ceded to the Crown in the 19th and 20th centuries.⁶⁸ In the USA, the continued

⁶⁴ See G. W. G. Leane, ‘Fighting Them on the Beaches: The Struggle for Native Title Recognition in New Zealand’, 8 *Newcastle Law Review* (2004) 1, 65, 79-82; G. W. G. Leane, ‘Indigenous Rights Wronged: Extinguishing Native Title in New Zealand’, 29 *Dalhousie Law Journal* (2006) 1, 41, 61-64 & 74-77; C. N. Siewers Jr., ‘Balancing a Colonial Past With a Multicultural Future: Maori Customary Title in the Foreshore and Seabed After Ngati Apa’, 30 *North Carolina Journal of International Law and Commercial Regulation* (2004) 1, 253, 256-257.

⁶⁵ *Foreshore and Seabed Act 2004* (No. 93), Section 13 (1).

⁶⁶ *Ibid.*, Sections 5 & 18.

⁶⁷ *Marine and Coastal Area (Takutai Moana) Act 2011* (No. 3), Section 11.

⁶⁸ Regarding the areas in the Northwest Territories claimed by the Dene and Métis, which are covered by numbered *Treaty No. 8* (21 June 1899) and *Treaty No. 11* (27 June 1921)

existence of aboriginal titles is even less likely. Not only has the US government concluded numerous cession treaties with Indian tribes all over the USA but in addition, comprehensive land reforms were carried out to convert traditional tribal rights into individual fee simple titles. The land reforms in New Zealand during the 19th and 20th century were carried out to the same end. In the course of the New Zealand land reforms, practically all lands in New Zealand were reviewed by the Maori Land Court and subsequently the aboriginal titles were converted into freehold titles.⁶⁹ As a result, in New Zealand, aboriginal title rights are only discussed with regard to bodies of water and submerged lands.⁷⁰ In Australia, on the other hand, where according to the *terra nullius* doctrine indigenous land rights have for a very long time been completely ignored and therefore neither cession treaties were concluded nor land reforms carried out, the area, in which aboriginal titles could potentially still exist, covers practically the entire Australian landmass.

As regards the burden of proof on indigenous peoples to establish an aboriginal title, there are also major differences among the different States subject to this study. Concerning the burden of proof in Canada, the Supreme Court of Canada has stated in *Delgamuukw* that an indigenous group claiming an aboriginal title has to prove that (1) it has occupied the land prior to sovereignty, (2) there is continuity between present and pre-sovereignty occupation, and (3) at sovereignty occupation was exclusive.⁷¹ The Supreme Court elaborated on these criteria in greater detail in its decision *R. v. Marshall; R. v. Bernard* and placed the burden of proof so high that hardly any indigenous group can meet the test. The Supreme Court held that the required criteria of occupation would only be fulfilled if the respective activity on the land had been “sufficiently

(printed in Reiter, *supra* note 22, 42-59 & 68-71) the Canadian federal government has acknowledged the potential existence of aboriginal title rights based on the fact that these treaties have never been implemented; see also T. Isaac, *Aboriginal Law: Commentary, Cases and Materials* (2004), 94.

⁶⁹ R. Boast, ‘Maori Proprietary Claims to the Foreshore and Seabed After Ngati Apa’, 21 *New Zealand Universities Law Review* (2004) 1, 1, 3; Land Information New Zealand, ‘What Is Maori Land’, available at <http://www.linz.govt.nz/survey-titles/maori-records/what-is-maori-land> (last visited 15 June 2013). See also *Ngati Apa Case*, *supra* note 45, para. 4.

⁷⁰ J. F. Pruner, ‘Aboriginal Title and Extinguishment Not So ‘Clear and Plain’: A Comparison of the Current Maori and Haida Experiences’, 14 *Pacific Rim Law and Policy Journal* (2005) 1, 253, 279.

⁷¹ *Delgamuukw Case*, *supra* note 38, 1097-1107, paras 143-159.

regular and exclusive”.⁷² Seasonal hunting, fishing, or gathering activities in a particular area were not regarded as sufficient to establish such a regular and exclusive occupation and therefore can never give rise to an aboriginal title. Instead, such activities can only establish non-territorial aboriginal rights to carry out these specific activities, not, however, a right to the land itself.⁷³ Since almost all indigenous groups in North America were nomadic or semi-nomadic, this amounts *de facto* to a denial of aboriginal title rights in Canada. Instead, through the back door a bundle of rights approach like in Australia is introduced.⁷⁴ Consequently, so far no indigenous group has managed to have an aboriginal title recognized by the courts. Courts have only hinted that such a right may exist under certain circumstances without having recognized its existence in any particular case. The burden for proving non-territorial aboriginal rights is also very high. Indigenous peoples are not only required to prove that an activity has been carried out or that a resource has been used since time immemorial, but also that a particular practice or custom is “integral to the distinctive culture”⁷⁵ and “has continuity with the practices, customs and traditions of pre-contact times”.⁷⁶ These requirements as regards aboriginal rights *de facto* amount to a frozen rights approach, forcing indigenous peoples to either live in the past to maintain their aboriginal rights or to adapt to modern times and lose these rights.⁷⁷

The burden of proof is much lower in the USA. In *Mitchel v. United States*, the US Supreme Court held that

⁷² *R. v. Marshall; R. v. Bernard* (2005), Supreme Court of Canada, 2005 SCC 43, [2005] 2 SCR 220, 247, para. 58 [Marshall Case].

⁷³ *Ibid.*, 247, 251-252, 523, paras 58, 70 & 77.

⁷⁴ See also the critical Dissenting Opinion of Judge LeBel, in *Delgamuukw Case*, *supra* note 38, 265, 271-279, paras 110, 126-140. See also T. Isaac, *Aboriginal Title* (2006), 17-19.

⁷⁵ *R. v. Van der Peet*, Supreme Court of Canada, [1996] 2 SCR 507, 549, para. 46 [Van der Peet Case].

⁷⁶ *Ibid.*, 556, para. 63.

⁷⁷ K. McNeil, ‘Aboriginal Rights in Canada: From Title to Land to Territorial Sovereignty’, 5 *Tulsa Journal of Comparative and International Law* (1998) 2, 253, 265. See also R. L. Barsh & J. Youngblood Henderson, ‘The Supreme Court’s Van der Peet Trilogy: Naive Imperialism and Ropes of Sand’, 42 *McGill Law Journal* (1997) 4, 993; J. Borrows, ‘The Trickster: Integral to a Distinctive Culture’, 8 *Constitutional Forum* (1997) 2, 27, 28-29; L. I. Rotman, ‘Hunting for Answers in a Strange Kettle of Fish: Unilateralism, Paternalism and Fiduciary Rhetoric in Badger and Van der Peet’, 8 *Constitutional Forum* (1997) 2, 40, 43-45.

“Indian possession or occupation was considered with reference to their habits and modes of life; their hunting grounds were as much in their actual possession as the cleared fields of the whites, and their rights to its exclusive enjoyment in their own way and for their own purposes were as much respected until they abandoned them, made a cession to the government or an authorized sale to individuals”.⁷⁸

Hence, indigenous peoples can also claim aboriginal titles to lands which they have traditionally used for seasonal hunting, fishing, and gathering activities. The task of proving traditional possession is further facilitated by the fact that the indigenous peoples do not have to prove possession since the establishment of sovereignty by a European colonial power but only “continuous use and occupancy ‘for a long time’ prior to the loss of the property”.⁷⁹

In Australia, the burden of proof is considerably higher than in the USA. In *Members of the Yorta Yorta Aboriginal Community v. Victoria*, the High Court of Australia held that continued use and occupation of the land is not sufficient to establish an aboriginal title. Instead, in addition, the indigenous group has to prove that “the normative system under which the rights and interests are possessed (the traditional laws and customs) is a system that has had a continuous existence and vitality since sovereignty”.⁸⁰ Hence, in order to prove their aboriginal titles, indigenous peoples not only have to specify the individual laws and customs under which they hold rights to the land but also the uninterrupted adherence to these rules and customs since the acquisition of sovereignty by the British Crown. There is no presumption of a continued connection to the land based on its permanent occupation and use.⁸¹ The burden of proof is hard to meet for most indigenous groups, in particular since the High Court deemed the lower court’s approach permissible according to which historical written colonial documents are given preference over oral histories and traditions of indigenous peoples.⁸²

⁷⁸ *Mitchel v. United States*, US Supreme Court, (1835) 34 US (9 Pet.) 711, 746.

⁷⁹ *Newton et al.*, *supra* note 29, 970 with reference to *Sac & Fox Tribe of Indians of Oklahoma v. United States*, United States Court of Claims, (1967) 383 F.2d 991, para. 45.

⁸⁰ *Members of the Yorta Yorta Aboriginal Community v. Victoria*, High Court of Australia, (2002) 194 ALR 538, para. 47 [Yorta Yorta Aboriginal Community Case].

⁸¹ R. H. Bartlett, ‘An Obsession with Traditional Laws and Customs Creates Difficulty Establishing Native Title Claims in the South: Yorta Yorta’, 31 *University of Western Australia Law Review* (2003) 1, 35, 44.

⁸² *Ibid.* with reference to *Yorta Yorta Aboriginal Community Case*, *supra* note 80, paras 163 & 190.

The relevant New Zealand act, the *Tē Ture Whenua Maori Act 1993/Maori Land Act 1993* (TTWMA) also contains a provision according to which Maori customary land is only land held in accordance with *tikanga Maori*,⁸³ i.e. “Maori customary values and practices”.⁸⁴ Unlike in Australia, however, values and practices are not frozen at the time of acquisition of sovereignty by the Crown. Instead, Maori customary values and practices refer to the values and practices that are relevant at the time the land claim is being made.⁸⁵ This significantly lowers the burden of proof. Yet, like in Canada, the ownership structures are frozen at the time of acquisition of sovereignty by the Crown. Hence, the Maori also have to prove that their ancestors had already used the land at the time of colonization.⁸⁶

4. Conclusion

All in all, the aboriginal title doctrine has not lived up to the expectations the indigenous peoples originally had for it. The bold and innovative approaches initially applied by the courts were not only not repeated in later judgments but, moreover, mitigated or even completely abandoned in later decisions. In addition, unwelcome judgments were often scrapped by legislation and innovative judicial approaches were thus destroyed. As a result, the aboriginal title doctrine has, since its modern recognition in 1973, continuously been undermined and diminished, and aboriginal title rights have increasingly been subordinated to land rights derived from the government. Since aboriginal title therefore only confers a “defective, vulnerable and inferior legal status for indigenous land and resource ownership”,⁸⁷ indigenous peoples have more and more resorted to applying to the governments for derivative, state-defined land rights – and thus a secure legal position – as a means to implement and enforce their rights to their ancestral lands.

⁸³ *Tē Ture Whenua Maori Act 1993* (No. 4), Section 129 (2) (a) [TTWMA].

⁸⁴ *Ibid.*, Section 4.

⁸⁵ J. I. Reynolds, ‘Recent Developments in Aboriginal Law in the United States, Australia and New Zealand: Lessons for Canada? Part II’, 62 *The Advocate* (2004), 177, 184.

⁸⁶ *Oakura* (June 1866), Compensation Court, printed in: *Important Judgments: Delivered in the Compensation Court and Native Land Court: 1866-1879* (1879), 9, 10.

⁸⁷ Special Rapporteur of the Sub-Commission on the Promotion and Protection of Human Rights, *Human Rights on Indigenous Peoples: Indigenous People and Their Relationship to Land: Second Progress Report on the Working Paper*, UN Doc E/CN.4/Sub.2/1999/18, 3 June 1999, 13, para. 38.

II. Derivative Land Rights

Although derivative ownership and use rights are created, defined, and conferred by the State, such rights must not be regarded as a gift from the States to indigenous peoples. Instead, in most areas, to which States confer land rights to indigenous peoples, the latter hold a potential aboriginal title or – in case the aboriginal title has unambiguously been extinguished through a previous legislative or executive act – they often have a claim for reparation for illegal, unfair, and discriminatory land seizures. This must be borne in mind when talking about derivative land rights.

Derivative land rights of indigenous peoples have to be subdivided into two main categories: rights to the land itself, and rights to use and co-manage the land and its natural resources.

1. Rights to the Land Itself

Needless to say, nowadays indigenous peoples – like all other citizens – may acquire fee simple title to land by purchase from the government or third parties. In addition, all States covered in this study provide for special legal regimes under which land rights can be transferred to indigenous groups. These particular forms of indigenous land rights, which deviate from land titles held by non-indigenous owners, are justified with the special historical relationship between the government and indigenous peoples and the need for reconciliation for historical injustices.

On the one hand, indigenous peoples focus on the protection and preservation of those state-defined land rights already guaranteed to them by the governments in historical treaties or previous legislation or executive acts. On the other hand, they aim at the better protection of their aboriginal title rights by obtaining additional state-defined rights to the respective area. Furthermore, the transfer of state-defined rights can also serve as a means of reparation for the illegal and unfair taking of their lands during colonization.

The amount of derivative land rights conferred to indigenous peoples differs significantly among the several States subject to this study. The indigenous peoples of the USA, who make up 1.4% of the population, hold derivative land rights to approximately 4% of the total US landmass or around 400,000 km², of which 184,000 km² lie in Alaska.⁸⁸ In Canada, where indigenous peoples account

⁸⁸ J. Mitchell, *Forest Service National Resource Guide to American Indian and Alaska Native Relations* (1997), available at <http://www.fs.fed.us/people/tribal/> (last visited 15 June 2013), Appendix D; J. Utter, *Americans Indians: Answer to Today's Question* (2001), 217.

for 3.8% of the total population, indigenous groups hold around 626,000 km² or 6.3% of the total landmass, yet most of it lies north of the 60th parallel. In the southern Provinces, which are home to approximately 95% of all indigenous people within Canada, only 37,000 km² are held by indigenous groups.⁸⁹ In Australia, indigenous groups, accounting for 2.5% of the total population, hold land rights to 16% of the country, i.e. 1.2 million km². Yet, almost half of all land held by indigenous groups lies in the Northern Territory and a further 47% in Western Australia and South Australia.⁹⁰ In New South Wales, Victoria, Queensland, and Tasmania – home to approximately two thirds of all indigenous Australians – indigenous groups hold hardly any land.⁹¹ The total amount of land held by Maori groups, who constitute 14.6% of the total New Zealand population, is hard to specify. According to official data, Maori hold derivative rights to 15,000 km² or 5.6% of New Zealand with approximately 14,500 km² being situated on the North Island and 500 km² on the South Island.⁹² This number, however, only comprises lands held in form of Maori Freehold Title.⁹³

⁸⁹ Indian and Northern Affairs Canada, 'General Briefing Note on Canada's Self-Government and Land Claims Policies and the Status of Negotiations' (January 2012), available at http://www.aadnc-aandc.gc.ca/DAM/DAM-INTER-HQ/STAGING/texte-text/al_ldc_ccl_gbnjan2012_1324327698586_eng.pdf (last visited 15 June 2013).

⁹⁰ H. McRae *et al.*, *Indigenous Legal Issues: Commentary and Materials*, 4th ed. (2009), 208-209; D. P. Pollack, 'Indigenous Land in Australia: A Quantitative Assessment of Indigenous Landholdings in 2000' (2001), available at http://caepr.anu.edu.au/sites/default/files/Publications/DP/2001_DP221.pdf (last visited 15 June 2013), 29-30.

⁹¹ Australian Bureau of Statistics, '3238.0 - Experimental Estimates and Projections, Aboriginal and Torres Strait Islander Australians, 1991 to 2009' (27 September 2004), available at <http://www.abs.gov.au/AUSSTATS/abs@.nsf/Lookup/3238.0Main+Features11991%20to%202009> (last visited 15 June 2013); McRae *et al.*, *supra* note 90, 209.

⁹² Controller and Auditor-General, 'Māori Land Administration: Client Service Performance of the Maori Land Court Unit and the Maori Trustee' (2004), available at <http://www.oag.govt.nz/2004/maori-land-court/docs/maori-land-court.pdf> (last visited 15 June 2013), 8. See also the overview in G. Harmsworth, 'Māori Perspectives on Kyoto Policy: Interim Results: Reducing Greenhouse Gas Emissions from the Terrestrial Biosphere (C09X0212)' (February 2003), available at http://www.landcareresearch.co.nz/__data/assets/pdf_file/0004/43834/maori_perspectives_kyoto_interim.pdf (last visited 15 June 2013), 27. These official numbers are, however, disputed. Instead, some estimate the total area of land held by Maori in form of Maori Freehold Title at only 8,200 km² or 3% of the total New Zealand landmass. See *ibid.*, 9.

⁹³ According to TTWMA, *supra* note 83, Section 129 (2) (b), Maori Freehold Land is land whose "beneficial ownership [...] has been determined by the Maori Land Court by freehold order". Maori Freehold Land can be held by Maori tribes or by Maori individuals. Yet, since most of it was created in the course of the land reforms of the 19th and early 20th century with the intention to individualize land rights, the majority of Maori Freehold

In addition, Maori tribes collectively hold several thousand square kilometers in other forms, yet there are no official records regarding the exact number.

When looking at the total amount of land held by or for indigenous peoples, it has to be kept in mind that the actual amount does not say anything about the legal nature, content, scope, and degree of protection of the rights. Comprehensive and exclusive rights over a small area of land may be worth more than weak and non-exclusive rights over vast territories. Therefore, in the following, the different national strategies regarding the conveyance and protection of derivative indigenous land rights will be presented and analyzed. In this context, two forms of derivative collective land rights will be looked at: the reservation or tribal trust land system, and the concept of conveying collective fee simple title to indigenous groups.⁹⁴

a. Reservations and the Tribal Trust Land System

Reservations are areas which have been demarcated by the respective government for the use and occupation of a certain indigenous group. The legal title to a reservation is vested in the government, which holds the land in trust for the indigenous group – the beneficial owner. Historically the establishment of reservations and the practice of “rounding up” indigenous peoples were intended to prevent violent and costly conflicts through the separation of indigenous peoples from the encroaching Europeans, and – at the same time – open the indigenous peoples’ traditional territories to settlement. Thus reservations were only created in regions intended for settlement. Consequently, during the colonization period, the reservation system was extensively applied in the southern Canadian Provinces, the contiguous States of the USA, and in Australia. In contrast, in the northern regions of North America, where due to the hostile climate no considerable degree of settlement was expected, hardly any reservations were established. Neither were reservations in a considerable number established in New Zealand, although it had always been intended for settlement.

Land is held by individuals.

⁹⁴ There are other forms of derivative land rights, e.g. individual trust lands (allotments or Maori freehold lands) as remnants of the 19th and 20th century land reforms, permanent leasehold lands, or so-called Deeds-of-Grant-in-Trust, a community-level land trust established in Queensland to administer former reserves. Yet, these forms of derivative land rights only play a minor role and are therefore, for reasons of brevity, not expanded on in this paper.

Since reservations were in the past often used to control and oppress indigenous peoples, and due to their paternalistic nature, their *raison d'être* is challenged. Accordingly, within Canada no further reservations are being established, and the Australian States have even converted most of their existing reservations into collective fee simple title.⁹⁵ Only the USA still sticks to the reservation system for future conveyances of land. When talking about the reservation system in the USA, one has to bear in mind, however, that since enactment of the *Dawes Act* a distinction needs to be made between reservations and tribal trust lands. Whereas initially the term "reservation" was synonymous with "tribal trust land", the breaking up of reservations in the course of the allotment policy of the 19th and early 20th centuries has led to the fragmentation of reservations, and some reservations are nowadays predominantly owned by non-Indian individuals, whereas others are still exclusively or predominantly held as trust land on behalf of the tribes.⁹⁶ In total, there are about 180,000 km² of tribal trust lands; this is about 2.3% of the total US landmass.⁹⁷

The tribal trust land system in the USA is maintained with the express support of the indigenous peoples. This is due to the fact that the rights accorded to indigenous peoples with regard to their tribal trust lands are more

⁹⁵ The only State within Australia in which the reservation system is still prevalent is Western Australia, where reservations still cover an area of over 202,350 km². The only other State with reservations is Queensland. Yet, in Queensland, reservations cover an area of only 177.8 km² and therefore less than 0.1% of all reservations within Australia. See McRae *et al.*, *supra* note 90, 209. See also Queensland Government - Queensland Studies Authority, 'The History of Aboriginal Land Rights in Australia (1800s-1980s)' (December 2007), available at http://www.qsa.qld.edu.au/downloads/approach/indigenous_res006_0712.pdf (last visited 15 June 2013), 4 & 8; E. A. Young, 'Aboriginal Land Rights in Australia: Expectations, Achievements and Implications', 12 *Applied Geography* (1992) 2, 146, 152.

⁹⁶ Cole, *supra* note 1, 420. Since not all reservations were allotted but often only those lands wanted by settlers or the government for agricultural purposes or resource extraction, some reservations are still exclusively or predominantly owned by Indian tribes. See D. R. Nash & C. E. Burke, 'The Changing Landscape of Indian Estate Planning and Probate: The American Indian Probate Reform Act', 5 *Seattle Journal for Social Justice* (2006) 1, 121, 125. For example, about 95% of the largest Indian reservation, the Navajo Reservation covering more than 60,000 km² in the States Arizona, Utah, and New Mexico, are still collectively held as Indian trust land. In total, about 45% of all Indian reservations are still exclusively held for the tribes. See J. Utter, *supra* note 88, 207-208.

⁹⁷ An additional 184,000 km² of land is held in the form of Alaska Native Corporation Lands. This form of land rights will not be examined in greater detail in this paper since it is based on an experimental model, which has not been repeated in any of the contiguous States.

comprehensive than in Canada and Australia and, in fact, in some respect more comprehensive than rights accorded by fee simple title.

Like in Canada⁹⁸ and Australia,⁹⁹ indigenous peoples in the USA may not alienate or mortgage land held in trust without the government's consent.¹⁰⁰ This limitation restricts their economic freedom and makes it harder for them to receive loans for the development of their lands. Yet, aside from these restrictions, indigenous peoples in the USA hold quasi-property rights to their reservations protected under the *Fifth Amendment*.¹⁰¹ These rights include the right to sub-surface resources.¹⁰² The federal government has exclusive jurisdiction with regard to lands held in trust for Indians¹⁰³ and is under the obligation to protect Indian trust land against all interferences by States, local authorities, or other third parties.¹⁰⁴ Consequently, unauthorized hunting, trapping, and fishing,¹⁰⁵ the grazing of livestock without the tribe's consent,¹⁰⁶ and settling on Indian trust land¹⁰⁷ are prohibited by federal laws. In addition, Indian trust land is not subject to state codes or state or local taxation.¹⁰⁸ Furthermore, only on trust land there is a presumption of inherent governmental powers of the tribes, including civil and criminal jurisdiction and the power to tax.¹⁰⁹ In addition, in the USA, gaming is also only possible on tribal trust land, not on tribally held fee simple land.¹¹⁰ Since income from gaming is nowadays for many Indian tribes a very important economic factor providing Indian tribes with the opportunity to generate money to provide social services to their members and to buy back

⁹⁸ *Indian Act*, Section 90 (2) (RSC, 1985, ch. I-6).

⁹⁹ *Aboriginal Affairs Planning Authority Act 1972* (WA) (No. 24), Section 20 (3) (c).

¹⁰⁰ 25 USC 177; 25 CFR 152.22 (b) as well as 25 USC 348 & 415 (a). See also Newton *et al.*, *supra* note 29, 998-1003.

¹⁰¹ See *United States v. Sioux Nation*, US Supreme Court, (1980) 448 U.S. 371, 408; Newton *et al.*, *supra* note 29, 1026-1030 with further references.

¹⁰² Newton *et al.*, *supra* note 29, 1086-1088 with further references. See also J. Mitchell, *supra* note 88, Appendix D; Utter, *supra* note 88, 218-221.

¹⁰³ *Indian Act*, *supra* note 98, Section 2, Ch. I-5. See also *United States v. Kagama*, US Supreme Court, (1886) 118 U.S. 375; *Donnelly v. United States*, US Supreme Court, (1913) 228 U.S. 243.

¹⁰⁴ Newton *et al.*, *supra* note 29, 1015-1016.

¹⁰⁵ 18 USC 1165. See also Newton *et al.*, *supra* note 29, 1153-1154.

¹⁰⁶ 25 USC 179.

¹⁰⁷ 25 USC 180.

¹⁰⁸ 25 USC 465.

¹⁰⁹ Newton *et al.*, *supra* note 29, 214-219.

¹¹⁰ See *Indian Gaming Regulatory Act 1988* (25 USC 2701).

their ancestral lands, and thus to increase their land base, indigenous peoples have a substantial interest to have their lands held in trust.¹¹¹

Many of these incentives do not apply with respect to reservations in Canada or Australia. On reservations in Canada and Australia, indigenous peoples neither enjoy tribal self-government nor is gaming permissible.

Like in the USA, the indigenous peoples in Canada hold quasi-property rights to their reservations, and their reservations are exempted from property and estate taxes.¹¹² Furthermore, since the federal government has exclusive jurisdiction with regard to lands held in trust for Indians, the indigenous peoples' rights to reservations may not be infringed by provincial or territorial governments.¹¹³ Reservations may also not be unilaterally diminished or taken away by the federal government since they are constitutionally protected under Section 35 *Constitution Act, 1982*. Unlike in the USA, the rights to the land do not, however, extend to sub-surface resources, which are generally owned and administered by the respective Province.¹¹⁴

Even more restricted are the rights of indigenous peoples on reservation lands in Australia. Unlike in the USA and Canada, indigenous peoples in Western Australia – the only Australian State which still sticks to the reservation system – do not have quasi-property rights to reservation lands. Instead, reservations can at any time unilaterally be diminished, altered, or taken away by proclamation of the governor.¹¹⁵ Furthermore, indigenous peoples cannot prevent non-indigenous peoples from accessing and using their lands. Not only do the rights of indigenous peoples to their reservations not include rights to sub-surface resources,¹¹⁶ but unlike in the USA and Canada the aboriginal peoples also do not have the right to veto resource exploration and exploitation on their reservations.¹¹⁷

¹¹¹ See e.g. K. K. Washburn, 'Federal Law, State Policy, and Indian Gaming', 4 *Nevada Law Journal* (2004) 2, 285.

¹¹² *Indian Act*, Section 87, *supra* note 98.

¹¹³ *Constitution Act, 1867*, Section 91 (24) (30 & 31 Victoria, ch. 3 (UK)).

¹¹⁴ See *ibid.*, Section 109. Regarding Manitoba, Alberta, Saskatchewan, and British Columbia see the *Constitution Act, 1930* (20-21 Geo. V, ch. 26 (UK)). Regarding Newfoundland, see the *Newfoundland Act* (12-13 Geo. V, ch. 22 (UK)). Regarding Prince Edward Island, see the Schedule to the *Prince Edward Island Terms of Union* (1873).

¹¹⁵ *Aboriginal Affairs Planning Authority Act 1972* (WA), Section 25. But see also *Land Administration Act 1997* (WA) (No. 30), Sections 42-44.

¹¹⁶ *Land Administration Act 1997*, Section 24, *supra* note 115.

¹¹⁷ *Mining Act 1978* (WA) (No. 107), Section 24 (1) (f) & (7) (a). See M. Tehan, 'Practising Land Rights: The Pitjantjatjara in the Northern Territory, South Australia and Western Australia', 65 *The Australian Quarterly* (1993) 4, 34, 38 & 41-43.

For these reasons, indigenous peoples in Australia and Canada are less favorable towards the reservation system than indigenous peoples in the USA. In addition, it needs to be kept in mind that in the course of the *Dawes Act* the indigenous peoples in the USA have experienced a massive loss of land as a result of the conversion of reservations into fee simple land. Therefore, they still associate fee simple title with loss of land, and consequently reject it as a means of realizing indigenous land rights.

b. Collective Fee Simple Title

Whereas in the USA indigenous peoples' land rights are still virtually synonymous with the tribal trust land system, indigenous peoples in Canada, Australia, and New Zealand nowadays hold most of their lands in the form of collective fee simple title.

The conveyance of collective fee simple title in Canada is based on the Comprehensive Land Claims (CLC) Policy. The CLC Policy was introduced in 1973 in response to the *Calder* decision. The CLC Policy addresses the assumption that aboriginal titles may have survived in all areas not subject to historical land cession treaties. Based on negotiations, all claims by indigenous groups shall be comprehensively and finally settled by extinguishing or rendering permanently unenforceable all potential but vague aboriginal titles and rights to an indigenous group's entire traditional territory in return for the conveyance of precise and secure collective fee simple title to a certain part of the traditionally used land. Accordingly, all agreements concluded in the course of the CLC Policy contain a clause which shall make it impossible for indigenous groups to claim aboriginal title or rights in the future.¹¹⁸ Under the CLC Policy, 24 agreements have been concluded so far between the federal government and indigenous groups, and about 613,000 km² of land – that is 6.1% of the total

¹¹⁸ See C. Alcantara, 'Old Wine in New Bottles?: Instrumental Policy Learning and the Evolution of the Certainty Provision in Comprehensive Land Claims Agreements', 35 *Canadian Public Policy* (2009) 3, 325, 335-336 with further references; J. E. Dalton, 'Aboriginal Title and Self-Government in Canada: What Is the True Scope of Comprehensive Land Claims Agreements?', 22 *Windsor Review of Legal and Social Issues* (2006), 29, 52-53, 70; P. Rynard, "'Welcome In, But Check Your Rights at the Door': The James Bay and Nisga'a Agreements in Canada', 33 *Canadian Journal of Political Science* (2000) 2, 211, 218. See also CESCR, *Consideration of Reports Submitted by States Parties Under Articles 16 and 17 of the Covenant, Concluding Observations of the Committee on Economic, Social and Cultural Rights: Canada*, UN Doc E/C.12/CAN/CO/5, 22 May 2006, 4, para. 16.

area of Canada – has been transferred to indigenous groups in the form of fee simple title, with most of the land conveyed lying north of the 60th parallel.¹¹⁹

In New Zealand, the exchange relationship is not at the center of the land policy. An exchange of “aboriginal title for fee simple title” is practically impossible since almost all original indigenous land rights in New Zealand were extinguished in the course of the land reforms of the 19th and 20th centuries. Instead, in New Zealand the focus is on the question whether in the course of previous land transactions the principles of the *Treaty of Waitangi* have been violated, which in its English version guarantees to the Maori “the full exclusive and undisturbed possession of their Lands and Estates Forests Fisheries and other properties which they may collectively or individually possess so long as it is their wish and desire to retain the same in their possession”.¹²⁰ Two procedures are open to Maori claimants: proceedings before the Waitangi Tribunal – a specialist body established by the *Treaty of Waitangi Act 1975* as a combination of an arbitral tribunal and an independent commission of inquiry – or direct negotiations with the government.¹²¹ As redress for illegal takings of land, the *Treaty of Waitangi Act 1975* provides, on the one hand, for the return of the respective land to the Maori as immediate remedy (cultural redress) or, on the

¹¹⁹ *James Bay and Northern Quebec Agreement 1975* (Quebec); *Northeastern Quebec Agreement 1978* (Quebec); *Inuvialuit Final Agreement 1984* (Northwest Territories) [Inuvialuit Final Agreement]; *Gwich'in Comprehensive Land Claim Agreement 1992* (Yukon, Northwest Territories) [Gwich'in Agreement]; eleven *Yukon First Nations Final Agreements* under the *Council for Yukon Indians Umbrella Final Agreement 1993* (Yukon) [Council for Yukon Indians Umbrella Final Agreement]; *Sahtu Dene and Métis Comprehensive Land Claim Agreement 1993* (Northwest Territories) [Sahtu Dene and Métis Agreement]; *Nunavut Land Claims Agreement 1993* (Nunavut) [Nunavut Land Claims Agreement]; *Nisga'a Final Agreement 1998* (British Columbia) [Nisga'a Final Agreement]; *Tlicho Land Claims and Self-Government Agreement 2003* (Northwest Territories) [Tlicho Land Claims and Self-Government Agreement]; *Labrador Inuit Land Claims Agreement 2005* (Newfoundland and Labrador) [Labrador Inuit Land Claims Agreement]; *Nunavik Inuit Land Claims Agreement 2006* (Quebec, Nunavut, Newfoundland and Labrador) [Nunavik Inuit Land Claims Agreement]; *Tsawwassen First Nation Final Agreement 2007* (British Columbia) [Tsawwassen First Nation Final Agreement]; *Maa-Nulth First Nations Final Agreement 2009* (British Columbia) [Maa-nulth First Nation Final Agreement]; and *Eeyou Marine Region Land Claims Agreement 2010* (Nunavut). For an overview of the CLC Agreements, see e.g. Indian and Northern Affairs Canada, *supra* note 89.

¹²⁰ *Treaty of Waitangi*, Art. 2, *supra* note 15.

¹²¹ See Office of Treaty Settlements, ‘Healing the Past, Building a Future: A Guide to Treaty of Waitangi Claims and Negotiations with the Crown’ (2010), available at <http://nz01.terabyte.co.nz/ots/fb.asp?url=LiveArticle.asp?ArtID=1715811693> (last visited 15 June 2013), 38.

other hand, for damages in money or in form of alternative land (financial redress).¹²² As financial redress, only those tracts of land can be conveyed to indigenous peoples, which have been placed in the regional land bank system of the Office of Treaty Settlements for this purpose at the request of claimant groups after the lands have been declared surplus land. Furthermore, the land must be situated in the area of interest of the respective indigenous group. Land as financial redress is only transferred at fair market value, i.e. the value of the land conveyed is set off against the total amount of the financial redress awarded to the indigenous claimant group.¹²³ As cultural redress, land is handed back to its previous indigenous owners without such an offset if the land is of particular cultural or spiritual importance to the indigenous group.

Unlike in Canada and New Zealand, there is no uniform national procedure in Australia for the conveyance of fee simple title. Since the federation only has concurrent legislative powers with regard to indigenous peoples and their land, every Australian State and Territory – with the exception of Western Australia which still clings to the reservation system – has its own procedures to convey fee simple title to indigenous peoples. Yet collective fee simple title is unevenly spread across Australia. About 74% (579,000 km²) are situated in the Northern Territory, 24% (189,000 km²) in South Australia, and 2% (14,600 km²) in Queensland.¹²⁴ In New South Wales, Victoria, Tasmania, the Australian Capital Territory, the Jervis Bay Territory, and Western Australia, where 55% of the indigenous population of Australia lives, indigenous peoples hold hardly any title to land.¹²⁵ For a long time, the main purpose of the conveyance of collective freehold title to indigenous groups has been the dissolution of the reservation system and therefore the mere conversion of existing reservations into fee simple lands. In particular in the Northern Territory further purposes were pursued, like creating a land base sufficient to allow economic development or conveying land to which the group has close traditional ties in order to ensure its cultural survival. The settlement of indigenous land claims, which is at the center of the Canadian land policy, was for a very long time not a relevant factor in Australia since, until 1992, the official governmental position was that such rights had never existed in Australia.

¹²² *Treaty of Waitangi Act 1975*, Section 6 (3), *supra* note 15.

¹²³ Office of Treaty Settlements, *supra* note 121, 90.

¹²⁴ Australian Government - Geoscience Australia, 'Land Tenure' (1993), available at <http://www.ga.gov.au/education/geoscience-basics/land-tenure.html> (last visited 15 June 2013).

¹²⁵ McRae *et al.*, *supra* note 90, 209.

But not only do the motives for conveying collective fee simple title to indigenous peoples differ across the States subject to this study. There are also considerable differences regarding content, scope, and protection of these rights.

As a general rule, a fee simple title holder is free to alienate, lease, or mortgage his or her title. With regard to collective fee simple titles of indigenous peoples, this right is sometimes limited. Whereas such restrictions limit indigenous peoples in their ability to raise money in order to develop the land, they make sure that there will be no future landless generations. As regards the legal situation in Canada, several CLC agreements contain provisions restricting the alienability of fee simple title. The furthest reaching restrictions were imposed on indigenous groups in the Gwich'in, the Sahtu Dene, and Métis CLC agreements which stipulate that collective fee simple title can only be transferred to organizations controlled by the respective indigenous group or to the federal or the territorial government – as regards the latter two, however, only in exchange for other lands.¹²⁶ Mortgaging the land is also prohibited.¹²⁷ Several other CLC agreements also restrict the alienability of collective fee simple land.¹²⁸ All CLC agreements concluded within British Columbia, however, stipulate that the indigenous groups can without prior approval by the government, alienate or mortgage their lands to any third person.¹²⁹

In Australia, as a general rule, the collective fee simple title transferred to indigenous groups is inalienable and cannot be mortgaged.¹³⁰ Collective fee

¹²⁶ *Gwich'in Agreement*, Section 18.1.5, *supra* note 119; *Sahtu Dene and Métis Agreement*, Section 19.1.5, *supra* note 119.

¹²⁷ *Gwich'in Agreement*, Section 18.1.8, *supra* note 119; *Sahtu Dene and Métis Agreement*, Section 19.1.8, *supra* note 119.

¹²⁸ For example, according to *Nunavut Land Claims Agreement*, Section 19.7.1, *supra* note 119, fee simple lands can only be transferred to indigenous organizations or the federal government, according to *Labrador Inuit Land Claims Agreement*, Section 4.4.5, *supra* note 119, it can only be conveyed to the federal and provincial government (yet it can generally be mortgaged. See *ibid.*, Section 4.8.1 (d); and according to *Inuvialuit Final Agreement*, Section 7.44, *supra* note 119, the land can only be conveyed to corporations controlled by the indigenous group, the federal government or individual members of the respective group.

¹²⁹ See *Nisga'a Final Agreement*, Sections 3.4 (a) & 3.8, *supra* note 119; *Tsawwassen First Nation Final Agreement*, Sections 4.3 (a) & 6.1 (b) (ii), *supra* note 119. The *Maa-nulth First Nation Final Agreement* also provides for the option to transfer fee simple title to third persons without the government's consent, but it makes such a transfer dependent on the prior registration of the parcel if the parcel is to be transferred to a non-indigenous person. See *Maa-nulth First Nation Final Agreement*, Sections 2.3.2, 2.3.5 & 3.3.1, *supra* note 119. As regards mortgages, see *ibid.*, Section 2.3.13 (a) (ii).

¹³⁰ *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) (No. 91), Section 19

simple land can, however, in principle be leased to third persons, yet the term of lease may not exceed a certain amount of years without the government's prior approval.¹³¹

In New Zealand, indigenous fee simple land generally constitutes ordinary fee simple land, hence the Maori can use their land as economic good without restrictions, i.e. they may sell or lease their land to anyone and mortgage it, unless the land was transferred to them as cultural redress under certain obligations and restrictions.

In none of the States subject to this study does the conveyance of title to land automatically convey title to sub-surface resources. According to the Canadian CLC Policy, indigenous peoples only hold sub-surface rights to lands transferred to them if the conferral of such rights was expressly included in the respective agreement. Currently, they hold sub-surface rights to approximately one fifth of the total land area conveyed to them in the course of the CLC Policy. In Australia, most of the States and Territories do not confer rights to sub-surface resources when transferring land to indigenous peoples in form of collective fee simple title.¹³² Since in particular the Northern Territory and South Australia – where approximately 98% of the total amount of collective fee simple land is situated – do not confer sub-surface rights when conveying land

[Aboriginal Land Rights (Northern Territory) Act]; *Anangu Pitjantjatjara Yankunytjatjara Land Rights Act 1981* (SA) (No. 20), Section 17 [Anangu Pitjantjatjara Yankunytjatjara Land Rights Act]; *Maralinga Tjarutja Land Rights Act 1984* (SA) (No. 3), Section 15 [Maralinga Tjarutja Land Rights Act]; *Aboriginal Land Act 1991* (Qld) (No. 32), Sections 40C & 77C [Aboriginal Land Act 1991]; *Torres Strait Islander Act 1991*, Sections 37C & 73-75 (Qld) (No. 33) [Torres Strait Islander Act]. See also *Aboriginal Lands Act 1995* (Tas) (No. 98), Section 30 [Aboriginal Lands Act 1995]; *Aboriginal Land (Lake Condah and Framlingham Forest) Act 1987* (Cth) (No. 34), Sections 13 & 21 [Aboriginal Land (Lake Condah and Framlingham Forest)]; *Aboriginal Land Grants (Jervis Bay Territory) Act 1986* (Cth) (No. 164), Section 38 (1) [Aboriginal Land Grants (Jervis Bay Territory) Act 1986].

¹³¹ *Aboriginal Land Rights (Northern Territory) Act*, Section 19, *supra* note 130; *Anangu Pitjantjatjara Yankunytjatjara Land Rights Act*, Section 6 (2) (b) (iii), *supra* note 130; *Maralinga Tjarutja Land Rights Act*, Section 5 (2) (b) (iii), *supra* note 130; *Aboriginal Land Act 1991* (Qld), Sections 39-40B & 76-77B; *Torres Strait Islander Act*, *supra* note 130, Sections 36-37B & 73; *Aboriginal Lands Act 1995*, Section 28A, *supra* note 130; *Aboriginal Land Act 1970* (Vic), Section 11 (4); *Aboriginal Land (Lake Condah and Framlingham Forest) Act*, Section 13 & 21, *supra* note 130; *Aboriginal Land Grants (Jervis Bay Territory) Act 1986*, Section 38, *supra* note 130.

¹³² See *Aboriginal Land Act 1991*, Sections 42 & 80, *supra* note 130; *Torres Strait Islander Act 1991*, Sections 39 & 77, *supra* note 130; *Aboriginal Land (Lake Condah and Framlingham Forest) Act*, Sections 6 (1) & 7 (1), *supra* note 130; *Aboriginal Land Grants (Jervis Bay Territory) Act 1986*, Sections 39 & 77, *supra* note 130, Section 14.

to indigenous peoples,¹³³ the indigenous peoples of Australia hold *de facto* no sub-surface rights to their collective fee simple lands. Equally, in New Zealand, indigenous peoples generally hold no sub-surface rights to lands conveyed to them. Instead, the *Crown Minerals Act 1991* stipulates that as a general rule all sub-surface resources of particular national importance – including all petroleum, gold, silver, and uranium – are owned by the Crown, even if they are situated on privately held land.¹³⁴ Yet the transfer of title to land has to include title to sub-surface resources if these resources were known and used by the Maori at the time of the conclusion of the *Treaty of Waitangi*. This has been expressly laid down as regards jade (*pounamu*), which has been used by Maori since time immemorial and which therefore always has to be included in the transfer of title to land.¹³⁵

There are also significant national differences regarding the question in how far indigenous peoples can prevent individuals or the government from entering and using their collective fee simple lands. Whereas title to land generally includes the right to use the land exclusively and to prevent others from entering or using it, indigenous peoples are often restricted in their right to exclude others. In Canada, many CLC agreements contain clauses according to which individuals have the right to enter the land for recreational and transit purposes.¹³⁶ However, indigenous peoples can veto mineral prospecting and extraction on their lands. In Australia, with its concurrent jurisdiction between the federation and the States, there are huge regional differences as regards the rights of indigenous peoples to exclude others from entering their lands. Whereas in the Northern Territory indigenous peoples have far-reaching rights to prevent others from entering and using their lands,¹³⁷ other state laws even allow for resource exploration and extraction on collective fee simple land

¹³³ *Aboriginal Land Rights (Northern Territory) Act*, Section 12 (2), *supra* note 130; *Aboriginal Lands Trust Act 1966* (SA) (No. 87), Section 16 (2) [*Aboriginal Lands Trust Act 1966*]; *Anangu Pitjantjatjara Yankunytjatjara Land Rights Act 1981* (SA), Part 3, Division 3, *supra* note 130; *Maralinga Tjarutja Land Rights Act*, Part 3, Division 4, *supra* note 130.

¹³⁴ *Crown Minerals Act 1991* (No. 70), Section 10.

¹³⁵ *Ibid.*, Section 11 (2).

¹³⁶ See e.g. *Nisga'a Final Agreement*, Section 6.2, *supra* note 119; *Maa-nulth First Nation Final Agreement*, Section 5.2.7, *supra* note 119; *Inuvialuit Final Agreement*, Section 7.14, *supra* note 118; *Gwich'in Agreement*, Sections 20.2.1 & 20.2.3, *supra* note 119; *Nunavut Land Claims Agreement*, Sections 21.3.1 & 21.3.9, *supra* note 119; *Labrador Inuit Land Claims Agreement*, Section 4.15.13, *supra* note 119; *Nunavik Inuit Land Claims Agreement*, Section 12.2.6, *supra* note 119; *Council for Yukon Indian Umbrella Final Agreement*, Sections 5.15.3 & 6.3.0, *supra* note 119.

¹³⁷ *Aboriginal Land Act 1978* (NT) (No. 106), Sections 4-5.

without the indigenous group's prior consent.¹³⁸ As regards New Zealand, where land is conveyed to indigenous peoples either as financial or as cultural redress, a distinction has to be made: land given as financial redress for past wrongs is generally transferred as fully-fledged fee simple title, thus containing the comprehensive right to exclude others.¹³⁹ In contrast, land conferred as cultural redress often constitutes land to which there is a public interest of access, use, and preservation. Hence, these lands are generally conveyed under the condition that others may still access and use the land for recreational purposes and that certain measures to preserve the environment, landscape, or sites of historical value can be taken by the government.¹⁴⁰

The amount of protection accorded to indigenous peoples against the involuntary loss of their collective fee simple land also differs among the several States. In general, land held by indigenous peoples in form of collective fee simple title can be condemned by the respective government under the same condition as any other privately held land. In addition – unlike reservations which are tax-exempted – fee simple land is generally liable to tax, and hence can be seized in case these taxes cannot be paid. In order to prevent involuntary loss of land as a result of unpaid taxes, several Australian States have expressly exempted land conveyed to indigenous groups from tax liability,¹⁴¹ and some – but not all – of the Canadian CLC agreements contain provisions stipulating that seizure of land for unpaid taxes is not possible.¹⁴²

¹³⁸ *Aboriginal Land Rights Act 1983* (NSW) (No. 42), Section 45 (11)-(13) [*Aboriginal Land Rights Act 1983*]; *Aboriginal Lands Trust Act 1966*, Section 16 (9), *supra* note 133.

¹³⁹ Office of Treaty Settlements, *supra* note 121, 126.

¹⁴⁰ *Reserves Act 1977* (No. 66), Section 77; *Conservation Act 1987* (No. 65), Section 27.

¹⁴¹ See e.g. *Aboriginal Land Rights Act 1983*, Section 43, *supra* note 138; *Anangu Pitjantjatjara Yankunytjatjara Land Rights Act*, Section 40, *supra* note 130, *Maralinga Tjarutja Land Rights Act 1984*, Section 38, *supra* note 130. In the Northern Territory, where most indigenous fee simple land is situated, no land taxes are imposed on land owners. See also B. Dawson, 'Final Report to Commonwealth Grants Commission: Material Differences in Land Tax Between States and Territories in Relation to Value of a Landowner's Taxable Holdings of Land' (October 2009), available at http://www.cgc.gov.au/attachments/article/27/Material_differences_in_land_tax.pdf (last visited 15 June 2013), 1 & 22.

¹⁴² See e.g. *Nunavut Land Claims Agreement*, Section 22.2.5, *supra* note 119; *Tlicho Agreement*, Section 18.1.12, *supra* note 119; *Council for Yukon Indians Umbrella Final Agreement*, Section 21.3.1, *supra* note 119. In contrast, see *Nisga'a Final Agreement*, Section 3.8, *supra* note 119; *Tsawwassen First Nation Final Agreement*, Sections 4.7-4.8, *supra* note 119; *Labrador Inuit Land Claims Agreement*, Section 4.4.11, *supra* note 119.

2. Land Use and Management Rights

Although derivative rights to the land itself give indigenous peoples the opportunity to regain and to reconnect with some of their ancestral lands, the lands conveyed are generally considerably smaller than their traditional territories. In addition, governments often convey only land in areas which are of no interest to non-indigenous people due to their remoteness and extreme climate conditions. For these reasons, indigenous peoples have increasingly turned their attention to land use and co-management rights in order to realize their rights to their ancestral lands. The major advantage of this approach is that such use and management rights can also be transferred in areas where third parties hold rights to the land since the main focus is on shared use and reconciliation of interests.

Such use and management rights can either be derived from historical treaties if these treaties contain clauses according to which the indigenous peoples cede their lands to the colonial powers but in return are guaranteed the continued and perpetual existence of their rights to hunt, fish, or use other resources on their traditional territories. Such treaties were concluded in the USA and Canada. Whereas in the USA – according to the plenary powers doctrine – Congress can abrogate such treaty rights at any time without the tribes' consent,¹⁴³ existing treaty rights are constitutionally protected under Section 35 (1) *Constitution Act, 1982* in Canada.¹⁴⁴ As regards New Zealand, indigenous peoples' use rights are protected in one universal historical document, the *Treaty of Waitangi*. The *Treaty of Waitangi* is not considered to be legally binding; however, if a piece of legislation refers to the Treaty, adherence to its principles takes precedence over a literal reading of the text.¹⁴⁵

Complementary to historical treaty rights, the Canadian, New Zealand, and Australian governments have also concluded several modern co-management and co-use agreements with indigenous groups regarding hunting and fishing, sub-surface resources, and sacred sites. As regards Canada, such co-use and co-management rights are usually included in the CLC agreements. Use and management rights are often granted with regard to lands, which form part of the traditional territory of the respective group but are not transferred to the group in form of collective fee simple title. Hence, in the CLC process, these

¹⁴³ *Lone Wolf v. Hitchcock*, US Supreme Court, (1903) 187 US 553, 566.

¹⁴⁴ *Simon v. The Queen*, Supreme Court of Canada, [1985] 2 SCR 387, paras 24 & 33.

¹⁴⁵ *New Zealand Maori Council v. Attorney-General*, New Zealand Court of Appeal, [1987] 1 NZLR 641, 664.

rights are generally regarded as secondary rights. In contrast, under the New Zealand land policy, modern co-use and co-management rights are regarded as an equally or even more effective way to implement indigenous land rights, and whereas little land is conveyed in form of fee simple title, extensive use and management rights over vast parts of New Zealand have been conferred to indigenous groups. There are several co-management agreements regarding mountains sacred in Maori culture,¹⁴⁶ rivers,¹⁴⁷ and lakes.¹⁴⁸ Particular notice needs to be taken of the Sealord Deal granting Maori commercial fishing rights worth around NZD 150 million.¹⁴⁹

In Australia, co-use and co-management rights of indigenous peoples are generally realized through *Indigenous Land Use Agreements* (ILUAs), which were introduced in reaction to the 1992 *Mabo* decision. ILUAs are voluntary out-of-court settlements of native title disputes, which become binding upon their registration with the National Native Title Tribunal. So far, over 500 ILUAs have been concluded.¹⁵⁰ They deal with a vast range of matters including resource development, access to native title land, management of wildlife and natural resources, land and water management, or management of national parks.¹⁵¹ Several of the ILUAs concluded between indigenous groups and the Crown concern co-use and co-management of land and natural resources. In addition to the ILUA system, more than 20 so-called *Joint Management Agreements* have been concluded between the Crown and indigenous groups, the most well-known being the *Uluru-Kata Tjuta National Park Agreement* and the *Kakadu*

¹⁴⁶ J. Ruru, 'Indigenous Peoples' Ownership and Management of Mountains: The Aotearoa/New Zealand Experience', 3 *Indigenous Law Journal* (2004), 111.

¹⁴⁷ See in particular *Deed in Relation to Co-Governance and Co-Management Arrangements for the Waikato River* (31 May 2010).

¹⁴⁸ See in particular *Te Arawa Lake Settlement*. A summary of the *Deed of Settlement* is available at <http://nz01.terabyte.co.nz/ots/DocumentLibrary/TeArawaLakesSettlementSummary.pdf> (last visited 15 June 2013).

¹⁴⁹ H. K. Guth, 'Dividing the Catch: Natural Resource Reparations to Indigenous Peoples: Examining the Maori Fisheries Settlement', 24 *University of Hawai'i Law Review* (2001) 1, 179, 182.

¹⁵⁰ See Australian Human Rights Commission, '500th Indigenous Land Use Agreement a Good Sign for Principled Agreement-Making' (1 April 2011), available at http://www.hreoc.gov.au/about/media/media_releases/2011/26_11.html (last visited 15 June 2013).

¹⁵¹ D. Craig, 'Native Title and Environmental Planning: Indigenous Land Use Agreements', 17 *Environmental and Planning Law Journal* (2000) 5, 440, 445; J. Gilbert, *Indigenous Peoples' Land Rights Under International Law: From Victims to Actors* (2006), 286.

National Park Agreement.¹⁵² Under the *Joint Management Agreement* system, title to land is granted to its traditional owners, who in turn lease back that land to the Australian government for its management as a national park.¹⁵³ Yet, since such joint management takes place on collectively held fee simple land, it does not constitute an additional means to realize indigenous land rights. Instead, it restricts indigenous fee simple title as regards significant sites, which otherwise would not have been conveyed to indigenous groups, similar to the conveyance of land as cultural redress in New Zealand.

In the contiguous States of the USA, as a general rule, co-use and co-management rights outside of Indian trust lands are not transferred to indigenous peoples.¹⁵⁴

3. Conclusion

Through the conveyance of property and quasi-property rights to indigenous peoples, the transfer of use and management rights and the affirmation and enforcement of historical treaty rights, indigenous peoples could secure and – to a certain degree – regain ownership and control over vast tracts of their historical land base. The key aspects of the different national land policies, however, differ significantly. Whereas the US government has – at least in the contiguous States – not transferred modern land rights to indigenous peoples to any substantial extent but instead relies on the reservation or tribal trust land system to protect historical land rights, modern land rights in form of collective fee simple title and use and co-management rights are at the center of the Canadian, New Zealand, and Australian land policy. The governments' motives for the conveyance of land rights to indigenous peoples vary. They range from providing legal certainty through the exchange of potential aboriginal rights for secure derivative land rights to restitution for past injustices and the creation of a sufficient land base to ensure economic development and cultural survival of indigenous peoples.

¹⁵² See Agreements/Treaties and Negotiated Settlements Project, 'Joint Management Agreement' (2011), available at <http://www.atns.net.au/subcategory.asp?subcategoryid=150> (last visited 15 June 2013).

¹⁵³ Australian Government - Department of Agriculture Fisheries and Forestry, 'Indigenous Australians: Natural Resource Management' (2007), available at http://www.daff.gov.au/_data/assets/pdf_file/0009/29097/indigenous.pdf (last visited 15 June 2013).

¹⁵⁴ Co-management regimes exist, however, in Alaska (see *Alaska National Interest Lands Conservation Act* (16 USC 3101); *Migratory Bird Treaty Act* (16 USC 703); *Marine Mammal Protection Act* (16 USC 1361)) and Hawaii (Kaho'olawe Island Reserve).

One problem in this context is, however, the unequal bargaining position of indigenous peoples. Due to their better financial resources, higher level of expertise, and application of their legal framework, governments are in a much more powerful position than indigenous peoples. Through the recognition of the aboriginal title doctrine, governments were initially put under pressure to negotiate with indigenous peoples and to ensure that their interests are taken into account. Yet, as a result of the more recent judgments of Canadian and Australian courts regarding aboriginal title rights and the enactment of restrictive laws in Australia and New Zealand, the domestic pressure on governments to realize and protect indigenous peoples' land rights has declined significantly in recent years.¹⁵⁵

D. Compatibility of the Several National Regimes With Obligations Under International Law

The handling of indigenous land rights is, however, no longer a purely national matter. Since the 1980s, several international organizations, bodies, and courts have committed themselves to protect and promote indigenous land rights. Through the drafting of agreements, the adoption of declarations, and the issuance of judgments, they have tried to encourage governments to guarantee a minimum level of rights to indigenous peoples as regards their traditional lands. Whether the States subject to this study act in accordance with minimum standards under international law shall be explored in this chapter.

In this context, it needs to be mentioned that the protection and promotion of indigenous peoples' rights are always embedded in a human rights framework. Yet there are two paths to protect and promote indigenous peoples' rights. On the one hand, indigenous peoples aim at the creation of special forums and bodies which exclusively deal with the situation of indigenous peoples and represent their interests at the international level, as well as at the elaboration and adoption of progressive provisions and instruments which only focus on indigenous peoples' rights. As a special international institution for the protection of indigenous peoples' rights, the Expert Mechanism on the Rights of Indigenous Peoples (and the Working Group on Indigenous Populations as its predecessor), the Permanent Forum on Indigenous Issues, and the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of

¹⁵⁵ A. Erueti, 'The Demarcation of Indigenous Peoples' Traditional Lands: Comparing Domestic Principles of Demarcation with Emerging Principles of International Law', 23 *Arizona Journal of International and Comparative Law* (2006) 3, 543, 579-581.

Indigenous Peoples need to be mentioned. All of these institutions have been established since the early 1980s within the United Nations framework and have been active on the question of indigenous peoples' land rights. With regard to special instruments for the protection of indigenous rights, first mention has to go to the International Labour Organization *Convention Concerning Indigenous and Tribal Peoples in Independent Countries* (ILO Convention No. 169)¹⁵⁶ of 1989. This Convention remains – besides the outdated assimilationist ILO *Convention Concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries* (ILO Convention No. 107)¹⁵⁷ – as of today the only binding international instrument exclusively dealing with the rights of indigenous peoples.¹⁵⁸ Although the *ILO Convention No. 169* has so far only been ratified by 22 States,¹⁵⁹ its relevance goes far beyond the limited number of ratifications. National and international organizations and courts consult the convention on a regular basis when rights of indigenous peoples are concerned – even if the State in question has not ratified it – and therefore at least the central provisions of the *ILO Convention No. 169* are nowadays to be regarded as customary international law.¹⁶⁰ Another special instrument for the protection of indigenous peoples that needs to be mentioned is the *United Nations Declaration on the Rights of Indigenous Peoples* (UNDRIP), which was adopted by the General Assembly in 2007.¹⁶¹ While a General Assembly resolution is not *per se* binding,¹⁶² the UNDRIP is one of the most-

¹⁵⁶ ILO, *Convention Concerning Indigenous and Tribal Peoples in Independent Countries*, 27 June 1989, 28 ILM 1382 [ILO Convention No. 169].

¹⁵⁷ ILO, *Convention Concerning the Protection and Integration of Indigenous and Other Tribal and Semi-tribal Populations in Independent Countries*, 26 June 1957, 328 UNTS 247 [ILO Convention No. 107].

¹⁵⁸ Although *ILO Convention No. 107* remains binding on those 17 States which have ratified it, it was declared closed for ratification after the adoption of *ILO Convention No 169*. In case a State has ratified both Conventions, *ILO Convention No. 107* is completely replaced.

¹⁵⁹ See ILO, 'Ratifications of C169 - Indigenous and Tribal Peoples Convention, 1989 (No. 169)', available at http://www.ilo.org/dyn/normlex/en/?p=1000:11300:0::NO:11300:P11300_INSTRUMENT_ID:312314 last visited 15 June 2013).

¹⁶⁰ S. J. Anaya, 'International Human Rights and Indigenous Peoples: The Move Toward the Multicultural State', 21 *Arizona Journal of International and Comparative Law* (2004) 1, 13, 40; Anaya, *Indigenous Peoples in International Law*, *supra* note 5, 61.

¹⁶¹ *United Nations Declaration on the Rights of Indigenous Peoples*, 13 September 2007, GA Res. 61/295 annex, UN Doc A/RES/61/295, 1 [UNDRIP].

¹⁶² See Arts 10 & 11 *Charter of the United Nations*.

discussed texts in the history of the United Nations¹⁶³ and has been supported by a broad majority of States.¹⁶⁴ Therefore, many of the aspects laid down in the Declaration have to be considered to constitute customary international law.¹⁶⁵

On the other hand, as another approach to realize their land rights, indigenous peoples invoke general human rights norms and instruments and demand their adaptation to the special situation of indigenous peoples. In particular, the *International Covenant on Civil and Political Rights* (ICCPR),¹⁶⁶ the *International Covenant on Economic, Social and Cultural Rights* (ICESCR),¹⁶⁷ and the *International Convention on the Elimination of all Forms of Racial Discrimination* (ICERD)¹⁶⁸ at the international level, and the *Charter of the Organization of American States*¹⁶⁹ in conjunction with the *American Declaration of the Rights and Duties of Man*,¹⁷⁰ the *American Convention on Human Rights*,¹⁷¹ and the *African Charter on Human and Peoples' Rights*¹⁷² at the regional level are employed to this end. Indigenous peoples rely on the progressive interpretation of these norms by international courts and human rights treaty bodies to further their cause.

Ultimately, these two approaches supplement one another. Courts and committees often refer to special instruments for the protection of indigenous

¹⁶³ M. Barelli, 'The Role of Soft Law in the International Legal System: The Case of the United Nations Declaration on the Rights of Indigenous Peoples', 58 *International and Comparative Law Quarterly* (2009) 4, 957, 969-970.

¹⁶⁴ In the General Assembly 143 States voted in favor of UNDRIP with four States (Australia, Canada, New Zealand, and the USA) voting against and 11 abstaining. 34 States did not participate in the vote. All four States opposing the UNDRIP have since then changed their vote in favor of the Declaration. See UN News Centre, 'United States' Backing for Indigenous Rights Treaty Hailed at UN' (17 December 2010), available at <http://www.un.org/apps/news/story.asp?NewsID=37102> (last visited 15 June 2013).

¹⁶⁵ Barelli, *supra* note 163, 966-967; C. Charters, 'The Road to the Adoption of the Declaration on the Rights of Indigenous Peoples', 4 *New Zealand Yearbook of International Law* (2007), 121, 123.

¹⁶⁶ *International Covenant on Civil and Political Rights*, 16 December 1966, 999 UNTS 171 [ICCPR].

¹⁶⁷ *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, 993 UNTS 3 [ICESCR].

¹⁶⁸ *International Convention on the Elimination of all Forms of Racial Discrimination*, 7 March 1966, 660 UNTS 195.

¹⁶⁹ *Charter of the Organization of American States*, 30 April 1948, 119 UNTS 3.

¹⁷⁰ *American Declaration of the Rights and Duties of Man*, OAS Res. XXX, 2 May 1948, OEA/ser.L/V/II.23, doc. 21, rev. 6 (1979) [American Declaration].

¹⁷¹ *American Convention on Human Rights*, 22 November 1969, 1144 UNTS 123 [ACHR].

¹⁷² *African Charter on Human and Peoples' Rights*, 27 June 1981, 1520 UNTS 217.

peoples' rights to interpret general human rights obligations and, in turn, international organizations look at the international jurisprudence when developing new progressive instruments for the protection and promotion of indigenous peoples' rights.

I. Duty to Recognize and Protect Inherent Indigenous Land Rights

That indigenous peoples have inherent rights to their ancestral lands based on their occupation and use since time immemorial and their continued special relationship to the land is no longer disputed. Art. 13 *ILO Convention No. 169* calls upon States to “respect the special importance for the cultures and spiritual values of the peoples concerned of their relationship with the lands [...] which they occupy or otherwise use”,¹⁷³ and Art. 14 (1) *ILO Convention No. 169* lays down the duty to recognize “[t]he rights of ownership and possession of the peoples concerned over the lands which they traditionally occupy”.¹⁷⁴ That such recognition is of a purely declaratory nature was confirmed by the ILO Committee of Experts in its *Observations on Peru* in which it held that “under the Convention traditional occupation conferred a right to the land, whether or not such a right was recognized [by the State]”.¹⁷⁵ The wording of the UNDRIP is even clearer. In its Preamble, it recognizes “the urgent need to respect and promote the *inherent rights* of indigenous peoples which derive from their political, economic and social structures and from their cultures, spiritual traditions, histories and philosophies, especially their rights to their lands, territories and resources”.¹⁷⁶ Furthermore, it points out that control over the developments of their lands and its natural resources enables indigenous peoples not only to preserve and strengthen their cultures and traditions but also to promote their development in accordance with their needs.¹⁷⁷ Consequently,

¹⁷³ *ILO Convention No. 169*, Art. 13, *supra* note 156, 1387.

¹⁷⁴ *Ibid.*, Art. 14 (1), 1387.

¹⁷⁵ ILO Committee of Experts, ‘Observations on Peru: Indigenous and Tribal Peoples Convention, 1989 (No. 169)’ (2002), available at http://www.ilo.org/dyn/normlex/en/f?p=1000:13100:0::NO:13100:P13100_COMMENT_ID:2214952 (last visited 15 June 2013), para. 7. See also B. Feiring & Programme to Promote ILO Convention No. 169 - International Labour Standards Department, ‘Indigenous & Tribal Peoples’ Rights in Practice: A Guide to ILO Convention No. 169’ (2009), available at http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---normes/documents/publication/wcms_106474.pdf (last visited 15 June 2013), 94.

¹⁷⁶ UNDRIP, Preamble (para. 7), *supra* note 161, 2 (emphasis added).

¹⁷⁷ *Ibid.*, Preamble (para. 10), 2.

Art. 25 UNDRIP stipulates the indigenous peoples' right "to maintain and strengthen their distinctive spiritual relationship with their traditionally owned or otherwise occupied and used lands",¹⁷⁸ and Art. 26 UNDRIP recognizes in a declaratory manner that indigenous peoples "have the right" to their ancestral lands.¹⁷⁹

Within the framework of the universal and regional protection of human rights, the idea of a deeply felt cultural and spiritual relationship of indigenous peoples to their ancestral lands has also been taken up by several courts and committees, and States have been requested to recognize and protect the inherent rights of indigenous peoples to these lands. For example, the Human Rights Committee (HRC) in its *General Comment No. 23* has alluded to this special relationship by stating that "culture manifests itself in many forms, including a particular way of life associated with the use of land resources, especially in the case of indigenous peoples".¹⁸⁰ The HRC has repeatedly held that indigenous peoples have inherent rights to their lands based on this special relationship. For example, in its *Concluding Observations on Canada*, it refers to indigenous peoples' rights to their lands as "inherent aboriginal rights",¹⁸¹ and in several *Concluding Observations* the HRC has implicitly classified indigenous peoples' land rights as inherent by subsuming them under Art. 1 (2) ICCPR, i.e. the right of peoples to freely dispose of their natural wealth and resources¹⁸² – a right which is always inherent.¹⁸³ Likewise, the Committee on the Elimination of Racial Discrimination (CERD) "calls upon States parties to recognize and protect the rights of indigenous peoples to own, develop, control and use their

¹⁷⁸ *Ibid.*, Art. 25, 7.

¹⁷⁹ *Ibid.*, Art. 26, 8.

¹⁸⁰ Human Rights Committee [HRC], *General Comment No. 23*, UN Doc CCPR/C/21/Rev.1/Add.5, 26 April 1994, 4, para. 7 [HRC, General Comment No. 23].

¹⁸¹ HRC, *Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant: Concluding Observations of the Human Rights Committee: Canada*, UN Doc CCPR/C/79/Add.105, 7 April 1999, 2, para. 8 [HRC, *Concluding Observations on Canada*].

¹⁸² See e.g. *ibid.*; HRC, *Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant: Chile: Addendum: Information Provided by the Government of Chile on the Implementation of the Concluding Observations of the Human Rights Committee (CCPR/C/CHL/CO/5)*, UN Doc CCPR/C/CHL/CO/5/Add.1, 22 January 2009, 5-6, para. 19; HRC, *Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant: Concluding Observations of the Human Rights Committee: Sweden*, UN Doc CCPR/C/SWE/CO/6, 7 May 2009, 7, para. 21.

¹⁸³ See e.g. ICCPR, Art. 47, *supra* note 166, 185 and ICESCR, Art. 25, *supra* note 167, 11: "Nothing in the present Covenant shall be interpreted as impairing the inherent right of all peoples to enjoy and utilize fully and freely their natural wealth and resources".

communal lands, territories and resources¹⁸⁴ and has in several Concluding Observations and decisions requested States to respect and protect the rights of indigenous peoples to their traditional lands.¹⁸⁵ On a regional level, the Inter-American Court of Human Rights (IACtHR),¹⁸⁶ the Inter-American Commission on Human Rights (IACHR)¹⁸⁷ and the African Commission on Human and Peoples' Rights (ACHPR)¹⁸⁸ have also recognized the close ties of

¹⁸⁴ Committee on the Elimination of Racial Discrimination (CERD), *General Recommendation XXIII*, UN Doc HRI/GEN/1/Rev.9 (Vol. II), 27 May 2008, 285, 286, para. 5 [CERD, General Recommendation XXIII].

¹⁸⁵ CERD, *Consideration of Reports Submitted by States Parties Under Article 9 of the Convention: Concluding Observations the Committee on the Elimination of Racial Discrimination: Argentina*, UN Doc CERD/C/65/CO/1, 10 December 2004, 4, para. 16 [CERD, Concluding Observations on Argentina]; CERD, *Consideration of Reports Submitted by States Parties Under Article 9 of the Convention: Concluding Observations the Committee on the Elimination of Racial Discrimination: Australia*, UN Doc CERD/C/AUS/CO/14, 14 April 2005, 4, para. 17 [CERD, Concluding Observations on Australia (2005)]; CERD, *Early Warning and Urgent Action Procedure: Decision 1 (68): United States of America*, UN Doc CERD/C/USA/DEC/1, 11 April 2006, 3, para. 8 [CERD, Decision 1 (68)].

¹⁸⁶ *Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, Judgment of 31 August 2001, IACtHR Series C, No. 79, 74, para. 149 [Awas Tingni Case]; *Moiwana Community v. Suriname*, Judgment of 15 June 2005, IACtHR Series C, No. 124, 54-55, paras 130-135 [Moiwana Case]; *Indigenous Community Yakye Axa v. Paraguay*, Judgment of 17 June 2005, IACtHR Series C, No. 125, 74-77, 79, paras 124, 131, 135-137, 140 & 154; *Sawhoyamaxa Indigenous Community v. Paraguay*, Judgment of 29 March 2006, Series C, No. 146, 71-72, paras 118-121, 128 & 131 [Sawhoyamaxa Case]; *Saramaka People v. Suriname*, Judgment of 28 November 2007, IACtHR Series C, No. 172, 24 & 28, paras 82 & 95-96 [Saramaka Case].

¹⁸⁷ *Mary and Carrie Dann v. United States*, IACHR Case 11.140, 27 December 2002, Report No. 75/02, para. 128 [Dann Case]; *Maya Indigenous Communities of the Toledo District v. Belize*, IACHR Case 12.053, 12 October 2004, Report No. 40/04, para. 114 [Maya Indigenous Communities Case]. See also IACHR, *Report on the Situation of Human Rights in Ecuador*, OEA/Ser.L/V/II.96, doc. 10, rev. 1, 24 April 1997, 115: "For many indigenous cultures, continued utilization of traditional collective systems for the control and use of territory are essential to their survival, as well as to their individual and collective well-being. Control over the land refers both to its capacity for providing the resources which sustain life, and to 'the geographical space necessary for the cultural and social reproduction of the group'" (footnotes omitted).

¹⁸⁸ African Commission on Human and Peoples' Rights (ACHPR), 'Advisory Opinion on the United Nations Declaration on the Rights of Indigenous Peoples' (2007), available at http://www.achpr.org/files/special-mechanisms/indigenous-populations/un_advisory_opinion_idp_eng.pdf (last visited 15 June 2013), 4, para. 12; *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on Behalf of Endorois Welfare Council v. Kenya*, ACHPR Communication No. 276/2003, 4 February 2010, 36-37, 60 & 64-66, paras 154, 156, 227 & 244-251 [Endorois Case] with further references.

indigenous peoples with their ancestral lands as the basis of their culture and identity, and based on this assumption they have repeatedly stressed the inherent nature of indigenous land rights.¹⁸⁹

Although the existence of inherit indigenous land rights is undisputed under international law, their legal nature, protection, and requirements regarding the burden of proof are less evident.

1. Legal Nature

When reading Art. 14 (1) *ILO Convention No. 169*, it is striking that a distinction is being made between “lands which [indigenous peoples] traditionally occupy” and “lands not exclusively occupied by them, but to which they have traditionally had access for their subsistence and traditional activities”.¹⁹⁰ Whereas Art. 14 (1) *ILO Convention No. 169* accords “rights of ownership and possession”¹⁹¹ to indigenous peoples regarding the former, it only recognizes use rights as regards to the latter. The UNDRIP does not draw such a clear distinction between rights to traditionally occupied lands and rights to traditionally used lands. Instead, it stipulates more generally that “[i]ndigenous peoples have the right to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use”.¹⁹² Yet it cannot be the intention of this provision to accord full ownership rights to indigenous peoples to all lands which they have somehow used in the past irrespective of the nature, exclusivity, and intensity of their traditional land use. Instead, the enumeration of several rights that might accrue to indigenous peoples implies that a gradation of rights to the land depending on its traditional use must be possible. However, at the same time, the *ILO Convention No. 169* and the UNDRIP make clear that in case of an exclusive occupation indigenous peoples’ rights to the land amount to full ownership

¹⁸⁹ *Awas Tingni Case*, *supra* note 186, 74 & 75, paras 149 & 151; *Moiwana Case*, *supra* note 186, 54-55, paras 130-135; *Sawhoyamaxa Case*, *supra* note 186, 73, para. 128; *Saramaka Case*, *supra* note 186, 27 & 28, paras 93 & 96; *Maya Indigenous Communities Case*, *supra* note 187, paras 115, 117 & 127; IACHR, *Third Report on the Human Rights Situation in Colombia*, OAS Doc OEA/Ser.L/V/II.102 doc. 9, rev. 1, 26 February 1999, Ch. X, para. 19 [IACHR, Human Rights Situation in Colombia]; IACHR, *Access to Justice and Social Inclusion: The Road Towards Strengthening Democracy in Bolivia*, OAS Doc OEA/Ser.L/V/II doc. 34, 28 June 2007, 62, para. 231; *Endorois Case*, *supra* note 188, paras 190 & 196-209.

¹⁹⁰ *ILO Convention No. 169*, Art. 14 (1), *supra* note 156, 1387.

¹⁹¹ *Ibid.*

¹⁹² UNDRIP, Art. 26 (2), *supra* note 161, 8.

rights. Regarding these inherent ownership rights, indigenous peoples must – on the basis of the fundamental principle of non-discrimination¹⁹³ – not be placed in a worse condition than holders of derivative, state-defined ownership rights. This has also been emphasized by the IACtHR, which held that “traditional possession of their lands by indigenous people has equivalent effects to those of a state-granted full property title”,¹⁹⁴ and by the IACHR, which stated that “respect for and protection of the private property of indigenous peoples on their territories is equivalent in importance to non-indigenous property, and [...] mandated by the fundamental principle of non-discrimination”.¹⁹⁵

Therefore, the Australian approach, under which indigenous land rights are never regarded as a right to the land itself but only as a bundle of rights is not in accordance with international law. However, the Canadian and US practice is also not entirely in conformity with the States' international legal obligations, since they accord a lesser status to indigenous land ownership than to fee simple title. For example, the statement by the Supreme Court of Canada in *Delgamuukw* according to which aboriginal titles – unlike fee simple titles – are subject to immanent limitations of use,¹⁹⁶ are irreconcilable with the principle of non-discrimination. Likewise, the US Supreme Court's classification of aboriginal title rights neither as full ownership nor as unrestricted possession, occupation, and use rights but merely as “permissive occupation”¹⁹⁷ is not in accordance with the obligation to treat indigenous and non-indigenous ownership rights equally. With regard to New Zealand, the nature and extent of an aboriginal title and hence New Zealand's compliance with international obligations is hard to ascertain. Since almost all original land rights were extinguished during the land reforms in the 19th and early 20th centuries, the New Zealand courts have never explored this question in detail.

Under international law, the inherent ownership rights of indigenous peoples do not necessarily have to comprise sub-surface rights. Art. 15 (2) *ILO Convention No. 169* expressly states that States may retain the ownership of mineral or sub-surface resources. The UNDRIP does not contain such a provision. Yet the preliminary works on the Declaration suggest that this omission cannot be regarded as a departure from the principle that States may

¹⁹³ See *ILO Convention No. 169*, Art. 3, *supra* note 156, 1385; UNDRIP, Preamble (paras 5 & 18), *supra* note 161, 2 & 3. See also *ibid.*, Arts 2 & 46 (3), 3 & 11.

¹⁹⁴ *Sawhoyamaxa Case*, *supra* note 186, 73, para. 128.

¹⁹⁵ *Maya Indigenous Communities Case*, *supra* note 187, para. 119.

¹⁹⁶ *Delgamuukw Case*, *supra* note 38, 1080-1081, para. 111.

¹⁹⁷ *Tee-Hit-Ton Indians Case*, *supra* note 40, 277-279.

retain sub-surface rights. Whereas indigenous peoples tried to have a provision included stipulating their right to sub-surface resources,¹⁹⁸ States strictly opposed the inclusion of such a provision throughout the negotiations.¹⁹⁹ Several Special Rapporteurs have also recognized the right of States to retain rights to sub-surface resources. For example, according to José R. Martínez Cobo, the sub-surface resources under indigenous lands are to be regarded as the exclusive property of the respective indigenous communities only “[w]here possible within the prevailing legal system”,²⁰⁰ and Erica-Irene Daes observes that “[t]here appears to be widespread understanding that natural resources located *on* indigenous lands [...] belong to the indigenous peoples that own the land or territory” but “[t]here is not such agreement concerning subsurface resources”.²⁰¹

The right of States to reserve certain resources for themselves is also recognized under the universal and regional human rights framework. For example, the CERD distinguishes between property and ownership rights of indigenous peoples to their ancestral lands and rights to participate in the exploitation, management, and conservation of the resources located on this

¹⁹⁸ See Chairman-Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities, *Study of the Problem of Discrimination Against Indigenous Populations: Report of the Working Group on Indigenous Populations on its Third Session*, UN Doc E/CN.4/Sub.2/1984/20, 8 August 1984, para. 114.

¹⁹⁹ See Human Rights Commission, *Indigenous Issues: Report of the Working Group Established in Accordance With Commission on Human Rights Resolution 1995/32*, UN Doc E/CN.4/2000/84, 6 December 1999, 16-17, paras 92-93; Human Rights Commission, *Indigenous Issues: Report of the Working Group Established in Accordance With Commission on Human Rights Resolution 1995/32*, UN Doc E/CN.4/2001/85, 6 February 2001, 18-19, paras 107-110. See also S. Errico, ‘The Controversial Issue of Natural Resources: Balancing States’ Sovereignty with Indigenous Peoples’ Rights’, in S. Allen & A. Xanthaki (eds), *Reflections on the UN Declaration on the Rights of Indigenous Peoples* (2011), 329, 339-340.

²⁰⁰ Special Rapporteur of the Sub-Commission on the Prevention of Discrimination and Protection of Minorities, *Study of the Problem of Discrimination Against Indigenous Populations*, UN Doc E/CN.4/Sub.2/1986/7/Add.4, March 1987, para. 543 [Special Rapporteur of the Sub-Commission on the Prevention of Discrimination and Protection of Minorities, *Discrimination Against Indigenous Populations*].

²⁰¹ Special Rapporteur of the Sub-Commission on the Promotion and Protection of Human Rights, *Prevention of Discrimination and Protection of Indigenous Peoples: Indigenous Peoples’ Permanent Sovereignty Over Natural Resources: Final Report*, UN Doc E/CN.4/Sub.2/2004/30, 13 July 2004, 13-14, paras 42-43 (emphasis in the original).

land.²⁰² Likewise, the IACHR, the IACtHR, and the ACHPR recognize the States' rights to retain the sub-surface resources located on indigenous lands.²⁰³

Hence Australia's approach to generally not accord ownership rights to sub-surface resources to indigenous peoples is not *per se* irreconcilable with its obligations under international law. Yet, under the principle of non-discrimination, indigenous peoples must not be denied sub-surface resource rights if such rights are accorded to non-indigenous owners under the respective national framework.²⁰⁴ Furthermore, even if non-indigenous owners cannot claim sub-surface resource rights, indigenous peoples must be able to claim at least rights to those resources, which they have traditionally used and which are therefore of a particular importance to their culture, economy, or way of life.²⁰⁵ The recognition of the Maori's right to jade (*pounamu*) is a positive example for this approach.

Despite the obligation to treat indigenous and non-indigenous land rights equally, one particular unequal treatment is generally not regarded as inconsistent with international law: the classification of aboriginal titles as inalienable, although it places a restriction on indigenous peoples, which does not apply to fee simple title holders and restricts their economic freedom. The inalienability, although not expressly called for in international instruments, is generally regarded as a reasonable means to prevent future landless generations. To a certain degree, this is reflected in the UNDRIP, which in its Art. 26 (3) obliges States to recognize indigenous land rights "with due respect to the customs, traditions and land tenure systems of the indigenous peoples concerned".²⁰⁶ Since indigenous peoples had not traded in land before the arrival of the colonial powers, this might imply an obligation, or at least a permission, to prevent

²⁰² CERD, *Prevention of Racial Discrimination, Including Early Warning Measures and Urgent Action Procedures: Decision 1 (67): Suriname*, UN Doc CERD/C/DEC/SUR/2, 18 August 2005, 2, para. 4.

²⁰³ *Saramaka Case*, *supra* note 186, 36, para. 122; IACHR, *Indigenous and Tribal Peoples' Rights Over Their Ancestral Lands and Natural Resources: Norms and Jurisprudence of the Inter-American Human Rights System*, OEA/Ser.L/V/II. Doc. 56/09, 30 December 2009, 74, para. 180 [IACHR, Norms and Jurisprudence of the Inter-American Human Rights System]; *Endorois Case*, *supra* note 188, 70-71, paras 266-267.

²⁰⁴ Anaya, *Indigenous Peoples in International Law*, *supra* note 5, 143; G. Ulfstein, 'Indigenous Peoples' Right to Land', 8 *Max Planck Yearbook of United Nations Law* (2004), 1, 28.

²⁰⁵ S. J. Anaya, 'Indigenous Peoples' Participatory Rights in Relation to Decisions About Natural Resources Extraction: The More Fundamental Issue of What Rights Indigenous Peoples Have in Lands and Resources', 22 *Arizona Journal of International and Comparative Law* (2005) 1, 7, 16.

²⁰⁶ UNDRIP, Art. 26 (3), *supra* note 161, 8.

alienation – especially since Art. 25 UNDRIP emphasizes the indigenous peoples’ “responsibilities to future generations” in regard to their lands.²⁰⁷ The IACHR takes a clear stand against the alienability of indigenous lands. It characterizes the “recognition by [a] state of the permanent and inalienable title of indigenous peoples” as a general international legal principle,²⁰⁸ and emphasizes in a report concerning indigenous peoples’ rights over their ancestral lands and resources that “[e]ffective security and legal stability of lands are affected whenever the law fails to guarantee the inalienability of communal lands and instead allows communities to freely dispose of them, to establish liens, mortgages or other encumbrances, or to lease them”.²⁰⁹

2. Protection

With regard to the protection of indigenous land rights, international law distinguishes between protection against unilateral extinguishment of inherent indigenous land rights and protection against their infringement.

a. Extinguishment

As a general rule, compulsory acquisition of indigenous lands and relocation of indigenous peoples is contrary to international law. Art. 16 *ILO Convention No. 169* stipulates that relocations may only take place under exceptional circumstances and even then only with the indigenous peoples’ free and informed consent. In case such a relocation takes place, the State is under an obligation to enable the indigenous peoples to return to their lands as soon as possible or – if such a return is not possible – to provide them with lands of equal quality or, if expressly requested by the indigenous group, compensate them in money or in kind. A unilateral taking of land is not envisaged. The UNDRIP also prohibits States from relocating indigenous peoples without their free, prior, and informed consent and an agreement on just and fair compensation. Where it is possible, indigenous peoples must be given the option to return.²¹⁰ In addition, States are called upon to provide effective mechanisms to prevent any action aiming at or resulting in indigenous peoples’ dispossession of their

²⁰⁷ *Ibid.*, Art. 25, 7.

²⁰⁸ *Dann Case*, *supra* note 187, para. 130.

²⁰⁹ IACHR, *Norms and Jurisprudence of the Inter-American Human Rights System*, *supra* note 203, 37, para. 89.

²¹⁰ UNDRIP, Art. 10, *supra* note 161, 5.

lands or resources.²¹¹ Likewise, in its *General Recommendation XXIII*, the CERD instructs States not to take away indigenous lands without the indigenous peoples' free and informed consent.²¹² The IACHR and the ACHPR also prohibit States from arbitrarily acquiring indigenous lands. In the *Dann Case*, the IACHR stated that an aboriginal title may only be extinguished or changed "by mutual consent between the state and respective indigenous peoples when they have full knowledge and appreciation of the nature or attributes of such property"²¹³ and only against fair compensation.²¹⁴ The IACHR further clarifies that the State's aim to encourage agricultural developments cannot justify the extinguishment of indigenous land rights.²¹⁵ In its *Endorois* decision, the ACHPR made a similar statement. According to the ACHPR, the eviction of an indigenous community cannot be justified "with reference to 'the general interest of the community' or a 'public need'".²¹⁶

Since compulsory acquisitions of indigenous lands are generally prohibited, indigenous land rights enjoy *de facto* a higher level of protection than non-indigenous land rights. This can be justified with the special cultural importance of land for indigenous peoples and their origin in a time before the formation of the State.

In view of the foregoing, the USA, Australia, and New Zealand do not act in accordance with their international legal obligations. As regards the USA, the still valid precedent of the US Supreme Court in *Tee-Hit-Ton Indians v. United States*, according to which an aboriginal title can be unilaterally extinguished without compensation,²¹⁷ has repeatedly been criticized by international institutions.²¹⁸ But also Australia has repeatedly been internationally criticized for its extinguishments of aboriginal titles. In particular, the fact that the Australian

²¹¹ *Ibid.*, Art. 8 (2) (b), 4.

²¹² CERD, *General Recommendation XXIII*, *supra* note 184, 286, para. 5.

²¹³ *Dann Case*, *supra* note 1867 para. 130.

²¹⁴ *Ibid.*, paras 130-131 & 143-145. See also IACHR, *Norms and Jurisprudence of the Inter-American Human Rights System*, *supra* note 203, 37-38, para. 90.

²¹⁵ *Dann Case*, *supra* note 187, para. 145.

²¹⁶ *Endorois Case*, *supra* note 188, 57, para. 215.

²¹⁷ *Tee-Hit-Ton Indians Case*, *supra* note 40, 285.

²¹⁸ Special Rapporteur of the Sub-Commission on the Promotion and Protection of Human Rights, *Prevention of Discrimination and Protection of Indigenous Peoples and Minorities: Indigenous Peoples and Their Relationship: Final Working Paper*, UN Doc E/CN.4/Sub.2/2001/21, 11 June 2001, paras 44-45 [Special Rapporteur of the Sub-Commission on the Promotion and Protection of Human Rights, Final Working Paper]. See also *Dann Case*, *supra* note 187, paras 140-145; CERD, *Decision 1 (68)*, *supra* note 185, 2-3, paras 6-10.

government has in the past suspended the RDA several times in order to be able to unilaterally extinguish indigenous land rights in a discriminatory manner has been criticized by the HRC,²¹⁹ the CERD,²²⁰ and the Special Rapporteur of the Sub-Commission on the Promotion and Protection of Human Rights, Erica-Irene A. Daes.²²¹ The protection New Zealand accords to indigenous peoples is also regarded as insufficient. In theory, the parliamentary supremacy and the lack of a constitutionally entrenched bill of rights affect all New Zealanders equally. In practice, however, it is foremost the traditional land rights of the Maori that are affected, with the best-known example being the *Foreshore and Seabed Act 2004*. The actions taken by the government, i.e. the unilateral extinguishment of all potential aboriginal rights instead of negotiating with the Maori, have been condemned by several international institutions, *inter alia*, the CERD²²² and the Special Rapporteurs on the Situation of Human Rights and Fundamental Freedoms of Indigenous Peoples Rodolfo Stavenhagen²²³ and S. James Anaya.²²⁴ Although the New Zealand government reacted to this criticism by repealing the *Foreshore and Seabed Act*, Maori land rights remain vulnerable to extinguishment. So far, the New Zealand government has not

²¹⁹ HRC, *Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant: Concluding Observations of the Human Rights Committee: Concluding Observations on Australia*, UN Doc A/55/40 Vol. I (2000), 71, para. 498, 508-511.

²²⁰ CERD, *Concluding Observations on Australia (2005)*, *supra* note 185, 4, para. 16.

²²¹ Special Rapporteur of the Sub-Commission on the Promotion and Protection of Human Rights, *Final Working Paper*, *supra* note 218, 16, para. 47.

²²² CERD, *Decision 1 (66): Foreshore and Seabed Act 2004*, UN Doc CERD/C/66/NZL/Dec.1, 11 March 2005, 1-2, paras 4-7. See also CERD, *Consideration of Reports Submitted by States Parties Under Article 9 of the Convention: Concluding Observations of the Committee on the Elimination on Racial Discrimination: New Zealand*, UN Doc CERD/C/NZ/CO/17, 15 August 2007, 4, para. 19 [CERD, Concluding Observations on New Zealand].

²²³ Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous Peoples, *Indigenous Issues: Human Rights and Indigenous Issues: Addendum: Mission to New Zealand*, UN Doc E/CN.4/2006/78/Add.3, 13 March 2006, 21, para. 92 [Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous Peoples, Mission to New Zealand].

²²⁴ Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous Peoples, *The Situation of Maori People in New Zealand (Addendum)*, UN Doc A/HRC/18/35/Add.4, 31 May 2011, 16, para. 56 [Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous Peoples, The Situation of Maori People in New Zealand].

reacted to requests to introduce a constitutionally entrenched bill of rights²²⁵ or a constitutional or at least statutory entrenchment of the *Treaty of Waitangi* within the national legal system.²²⁶ Canada, on the other hand, is expressly praised for its constitutional protection of the continuous existence of aboriginal titles and rights under Section 35 *Constitution Act, 1982* under which the extinguishment of inherent indigenous rights is only possible with the express consent of the indigenous group concerned.²²⁷

b. Infringement

Property and other similar rights are never absolute but can under certain circumstances be infringed by the State in the public interest. There is general agreement, however, that indigenous land rights must not be placed in a worse position than non-indigenous land rights. Therefore, indigenous land rights may only be infringed under the same conditions that apply to non-indigenous land rights,²²⁸ i.e. the intended restrictions must have been previously established by law, be necessary and proportional, and have the aim of achieving a legitimate objective in a democratic society.²²⁹ Yet the prohibition of less favorable treatment alone is not enough to adequately protect the interest of indigenous peoples. Instead, it is nowadays generally recognized that States are under the obligation to adopt positive measures to effectively protect inherent indigenous land

²²⁵ Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous Peoples, *Mission to New Zealand*, *supra* note 223, 21, para. 91; CERD, *Concluding Observations on New Zealand*, *supra* note 222, 2, para. 12.

²²⁶ HRC, *Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant: Concluding Observations of the Human Rights Committee: New Zealand*, UN Doc CCPR/C/NZL/CO/5, 7 April 2010, 5, para. 20; CERD, *Concluding Observations on New Zealand*, *supra* note 222, 3, para. 13; Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous Peoples, *The Situation of Maori People in New Zealand*, *supra* note 224, 21, para. 77.

²²⁷ Special Rapporteur of the Sub-Commission on the Promotion and Protection of Human Rights, *Final Working Paper*, *supra* note 218, 32-33, para. 105.

²²⁸ See *ILO Convention No. 169*, Art. 3 (1), *supra* note 156, 1385; UNDRIP, Art. 1, *supra* note 161, 3; CERD, *Decision 1 (68)*, *supra* note 185, 2-3, para. 7; Special Rapporteur of the Sub-Commission on the Promotion and Protection of Human Rights, *Final Working Paper*, *supra* note 218, 41, para. 144 (c); *Maya Indigenous Communities Case*, *supra* note 187, para. 119; *Sawhoyamaxa Case*, *supra* note 186, 71-72, para. 120.

²²⁹ See e.g. *Saramaka Case*, *supra* note 186, 37-38, para. 127 with further references.

rights.²³⁰ This does not constitute discrimination against the non-indigenous population because

“[i]t is a well established principle of international law that unequal treatment towards persons in unequal situations does not necessarily amount to impermissible discrimination. [...] In the context of members of indigenous and tribal peoples, [...] special measures are necessary in order to ensure their survival in accordance with their traditions and customs”.²³¹

The granting of participatory rights regarding all decisions which potentially affect aboriginal titles and rights is generally regarded as an adequate special measure to protect indigenous peoples' land rights against infringements threatening their cultural or physical survival. Yet these participatory rights do not generally amount to a right to veto in favor of the indigenous communities concerned. Instead, the principle to effectively involve indigenous peoples in all decisions affecting them requires States in most cases merely to consult indigenous peoples “in good faith, through culturally appropriate procedures and with the objective of reaching an agreement”²³² but not to abandon a project if no consensus can be reached. Only if a proposed governmental measure would have a substantial impact on the land and lives of indigenous peoples – which is in particular the case with regard to large-scale resource exploitation projects on indigenous lands – the obligation to consult will be transformed into an obligation to obtain the free, prior, and informed consent of the indigenous group concerned, i.e. a full right of veto in favor of indigenous peoples.²³³

²³⁰ See e.g. HRC, *General Comment No. 23*, *supra* note 180, 4, para. 7; IACHR, *Third Report on the Human Rights Situation in Paraguay*, OAS Doc OEA/Ser.L/V/II.110 doc. 52, 9 March 2001, Ch. IX, para. 13; *Dann Case*, *supra* note 187, paras 126-127; *Saramaka Case*, *supra* note 186, 25-26, para. 85; *Endorois Case*, *supra* note 188, 48 & 51, paras 187 & 196.

²³¹ *Saramaka Case*, *supra* note 186, 31, para. 103.

²³² *Ibid.*, 40, para. 133.

²³³ See e.g. HRC, *Ángela Poma Poma v. Peru*, Communication No. 511/1992, UN Doc CCPR/C/95/D/1457/2006, 24 April 2009, 11, para. 7.6 [*Ángela Poma Poma v. Peru*]; CERD, *Consideration of Reports Submitted By States Parties Under Article 9 of the Convention: Concluding Observations of the Committee on the Elimination of Racial Discrimination: Ecuador*, UN Doc CERD/C/62/CO/2, 2 June 2003, 3-4, para. 16; *Saramaka Case*, *supra* note 185, 40, para. 134; *Endorois Case*, *supra* note 188, 77, para. 291; Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous Peoples, *Summary of Cases Transmitted to Governments and Replies Received (Addendum)*, UN Doc A/HRC/9/9/Add.1, Annex 1, 15 August 2008, 92, 100, paras 39-40 (translation

The US and New Zealand approach according to which indigenous land rights might be infringed at any time without prior consultation of the indigenous groups concerned are not in accordance with international law.²³⁴ The right to negotiate entrenched in the Australian NTA is in its current form also not in conformity with international law. Since States and enterprises may call upon the National Native Title Tribunal to decide if negotiations fail, and the Australian government may even override these decisions in the national interest or the interest of a State or Territory, there is little incentive to reach an amicable agreement with the indigenous groups concerned.²³⁵ The Canadian approach, on the other hand, is generally assessed as positive. Although inherent

by L. Rodríguez-Piñero, 'The Inter-American System and the UN Declaration on the Rights of Indigenous Peoples: Mutual Reinforcement', in Allen & Xanthaki, *supra* note 199, 457, 473-474 (footnotes omitted)); Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous Peoples, *Promotion and Protection of all Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development: Report to the Human Rights Council*, UN Doc A/HRC/12/34, 15 July 2009, 16-17, paras 47-49; Expert Mechanism on the Rights of Indigenous Peoples, *Progress Report on the Study on Indigenous Peoples and the Right to Participate in Decision-Making*, UN Doc A/HRC/EMRIP/2010/2, 17 May 2010, 9, para. 34. See also International Law Association, 'Final Report Sofia (2012): Rights of Indigenous Peoples' (September 2012), available at <http://www.ila-hq.org/en/committees/index.cfm/cid/1024> (last visited 15 June 2013), 6-7; T. Ward, 'The Right to Free, Prior, and Informed Consent: Indigenous Peoples' Participation Rights Within International Law', 10 *Northwestern Journal of International Human Rights* (2011) 2, 54; J. Gilbert & C. Doyle, 'A New Dawn over the Land: Shedding Light on Collective Ownership and Consent', in Allen & Xanthaki, *supra* note 199, 289, 304-328; Rodríguez-Piñero, *supra* note 233, 470-475.

²³⁴ With regard to the US, see CERD, 'Early Warning Urgent Action Letters to the United States' (9 March 2012), available at <http://www2.ohchr.org/english/bodies/cerd/docs/CERDUnitedStates.pdf> (last visited 15 June 2013); CERD, *Decision 1 (68)*, *supra* note 185, 3, paras 7 (d) & 10 (b); CERD, *Consideration of Reports Submitted by States Parties Under Article 9 of the Convention: Concluding Observations of the Committee on the Elimination of Racial Discrimination: United States of America*, UN Doc CERD/C/USA/CO/6, 8 May 2008, 10, para. 29; *Dann Case*, *supra* note 187, para. 140; Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous Peoples, *The Situation of Maori People in New Zealand*, *supra* note 224, 15-16, para. 52; Special Rapporteur of the Sub-Commission on the Promotion and Protection of Human Rights, *Final Working Paper*, *supra* note 218, 17, para. 48.

²³⁵ See CERD, *Decision (2) 54 on Australia*, UN Doc A/54/18, 29 September 1999, 6, 7, para. 7; Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous Peoples: *Situation of Indigenous Peoples in Australia (Addendum)*, UN Doc A/HRC/15/37/Add.4, 1 June 2010, 8-9, paras 26-30 [Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous Peoples Situation of Indigenous Peoples in Australia].

indigenous land rights can still be unilaterally infringed for a wide range of legislative purposes despite their constitutional protection, the requirements for such infringements are in accordance with international law. In particular, the Canadian Supreme Court's assumption that indigenous participatory rights may in some cases amount to a right to veto,²³⁶ and that participatory rights also exist before the existence of an aboriginal title has been established,²³⁷ is to be praised.

3. Burden of Proof

With regard to the burden of proof, two questions are relevant: how to distinguish between inherent ownership rights and mere use rights, and what requirements apply regarding the proof of a continuous occupation or use of the land.

a. Occupation

As mentioned above, indigenous peoples have ownership rights only to those lands, which they have traditionally and exclusively occupied. To all lands, which they have used otherwise, they only have continuous use rights. The distinction between rights to traditionally occupied lands and rights to lands traditionally used otherwise must, however, not be understood as denying nomadic peoples aboriginal titles *per se*. Since the majority of indigenous peoples traditionally used their lands in a nomadic or semi-nomadic way, such an interpretation would amount to a denial of the existence of inherent indigenous ownership rights. Instead, it is recognized that in principle nomadic peoples can also fulfill the requirements of occupation.

According to the narrow, Eurocentric interpretation, an occupation requires settlement, possession, use, and effective control over a tract of land – requirements which most nomadic peoples do not fulfill.²³⁸ However, the *ILO*

²³⁶ *Delgamuukw Case*, *supra* note 38, 1112-1113, para. 168.

²³⁷ *Haida Case*, *supra* note 49, para. 10; *Taku River Case*, *supra* note 49, 652, para. 21.

²³⁸ The Oxford English Dictionary defines “occupy” as “[t]o hold possession of; to have in one’s possession or power; to hold (a position, office, or privilege)” or “[t]o live in and use (a place) as its tenant or regular inhabitant; to inhabit; to stay or lodge in” (‘Oxford English Dictionary Online’ (2012), available at <http://www.oed.com/> (last visited 15 June 2013)) and Black’s Law Dictionary defines “occupancy” as “[t]he act, state, or condition of holding, possessing, or residing in or on something; actual possession, residence, or tenancy, esp. of a dwelling or land [and it] denotes whatever acts are done on the land to manifest a claim of exclusive control and to indicate to the public that the actor has appropriated the land” (B. A. Garner (ed.), *Black’s Law Dictionary*, 9th ed. (2009), 1184).

Convention No. 169 stipulates that “[i]n applying the provisions [...] governments shall respect the special importance for the cultures and spiritual values of the peoples concerned of their relationship with the lands or territories”,²³⁹ their “social, cultural, religious and spiritual values and practices”,²⁴⁰ and their “customs or customary laws”.²⁴¹ Likewise, the UNDRIP stresses that the recognition of indigenous peoples’ rights to their lands “shall be conducted with due respect to the customs, traditions and land tenure systems of the indigenous peoples concerned”.²⁴² Therefore, possession and control are not to be defined solely according to the European concept but indigenous views are also to be taken into account. The IACtHR²⁴³ and ACHPR²⁴⁴ have also stressed that nomadic peoples can hold inherent ownership rights to their traditional lands. Whether a nomadic people can claim ownership rights or merely use rights depends on the nature, exclusivity, and intensity of their traditional use of the land. In case a nomadic people wanders a region randomly in search of food, water, or other resources without any special relationship to a particular area, or in case it shares a tract of land with other indigenous groups, this does not amount to occupation.²⁴⁵ Yet if a nomadic people permanently and exclusively ranges a definite area of land, thereby visiting religious sites, using natural resources in accordance with their culture and way of life, and returning annually to good campgrounds they can claim ownership rights to the land.²⁴⁶ The requirements in terms of exclusivity must not be applied too strictly. If a nomadic group from time to time tolerates the use of the land by other groups or there have been

The term “possession” is defined as “[v]isible power or control over something (defined by the intention to use or to hold it against others) as distinct from lawful ownership; *spec.* exclusive control of land” (‘Oxford English Dictionary Online’, *supra* note 238) or “[t]he fact of having or holding property in one’s power; the exercise of dominion over property” (Garner, *supra* note 237, 1281). See also Ulfstein, *supra* note 204, 18.

²³⁹ *ILO Convention No. 169*, Art. 13, *supra* note 156, 1387.

²⁴⁰ *Ibid.*, Art. 5, 1385.

²⁴¹ *Ibid.*, Art. 8 (1), 1386.

²⁴² UNDRIP, Art. 26 (3), *supra* note 161, 8.

²⁴³ See statement by Galio Claudio Enrique Gurdían Gurdían, in *Awas Tingni Case*, *supra* note 186, 29-31, para. 83 (f) and expert opinion by Rodolfo Stavenhagen Gruenbaum in *Awas Tingni Case*, *supra* note 186, 23-26, para. 83 (d); *Sawhoyamaxa Case*, *supra* note 186, 74, para. 131. See also IACHR, *Norms and Jurisprudence of the Inter-American Human Rights System*, *supra* note 203, para. 55 (footnote 135).

²⁴⁴ *Endorois Case*, *supra* note 188, 48, para. 187. Regarding the land use of the Endorois see *ibid.*, 13, para. 73.

²⁴⁵ K. McNeil, *Common Law Aboriginal Title* (1989), 202.

²⁴⁶ *Ibid.*, 203-204.

occasional trespasses by other groups, it will still have exclusive control over the land provided it intends to exclusively control the land and can generally enforce such an exclusive control.²⁴⁷

The Australian approach under which indigenous peoples are only accorded a bundle of rights but not rights to the land itself is therefore not in accordance with international law. Neither the Torres Strait Islanders, who often lived in permanent settlements and practiced agriculture, nor the Aboriginal peoples who had paths they regularly followed and areas they exclusively used, wandered the land aimlessly. Therefore, they cannot generally be denied ownership rights. The decision by the Canadian Supreme Court in *R. v. Marshall; R. v. Bernard*, in which it held that exclusive seasonal hunting, fishing, or gathering activities in a particular area were not sufficient to establish occupation,²⁴⁸ is also to be criticized. Instead of respecting and taking due account of indigenous customs, traditions, and ownership structures, the Court exclusively applied European standards, which indigenous peoples generally cannot fulfill.

b. Continuity

Since the source of indigenous land rights is the traditional occupation and use of the land since time immemorial, the question arises if indigenous land rights continue to exist in case the manner of use has changed over the years.

The HRC noted in this connection that “article 27 does not only protect traditional means of livelihood of minorities, but allows also for adaptation of those means to the modern way of life and ensuing technology”,²⁴⁹ and the IACHR stressed that “the history of indigenous peoples and their cultural adaptations along time are not obstacles for preserving their fundamental relationship with their territory, and the rights that stem from it”.²⁵⁰ The statements in the preamble of the UNDRIP according to which indigenous peoples have a “right to development in accordance with their own needs and

²⁴⁷ *Ibid.*, 204 with further references; Ulfstein, *supra* note 204, 19. See also *Richtersveld Community v. Alexkor Ltd.*, Supreme Court of Appeal of South Africa, (2003) 6 South African Law Reports 104, para. 24.

²⁴⁸ *Marshall Case*, *supra* note 73, 247, 251-252 & 523, paras 58, 70 & 77.

²⁴⁹ HRC, *Apirana Mahuika et al. v. New Zealand*, Communication No. 547/1993, UN Doc CCPR/C/70/D/547/1993, 14-15, para. 9.4 [Mahuika Case].

²⁵⁰ IACHR, *Norms and Jurisprudence of the Inter-American Human Rights System*, *supra* note 203, 27-28, para. 70. See also *ibid.*, 11 & 12, paras 35 & 36.

interests”²⁵¹ and “control by indigenous peoples over developments affecting them and their lands, territories and resources will enable them to maintain and strengthen their institutions, cultures and traditions, and to promote their development in accordance with their aspirations and needs”²⁵² can also only be interpreted as a right of indigenous peoples to develop culturally without losing their inherent rights to the land.²⁵³ Hence, as long as there is a historical, continuous presence of an indigenous people within a certain area and an on-going tie to the pre-colonial society, the inherent indigenous land rights continue to exist, even if the manner of land use has changed.²⁵⁴ Therefore, in order to prove their inherent land rights, indigenous peoples only have to prove that their ancestors have occupied or otherwise used the land.

The burden of proof under the Australian NTA is not in accordance with these stipulations. Under the NTA, indigenous groups are required not only to prove the individual laws and customs under which they hold rights to the lands but also their uninterrupted adherence. There is no assumption of a continued relationship to the land based on its on-going use and settlement.²⁵⁵ This has been criticized by the CERD,²⁵⁶ the Committee on Economic, Social and Cultural Rights (CESCR),²⁵⁷ and the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous Peoples, S. James Anaya^{258, 259}. The approach by the Canadian Supreme Court, which requires indigenous peoples claiming aboriginal rights to prove that a practice is integral

²⁵¹ UNDRIP, Preamble (para. 6), *supra* note 161, 2.

²⁵² *Ibid.*, Preamble (para. 9), 2.

²⁵³ See also *ILO Convention No. 169*, Preamble (para. 5) & Art. 7 (1), *supra* note 156, 1384 & 1386.

²⁵⁴ IACHR, *Norms and Jurisprudence of the Inter-American Human Rights System*, *supra* note 203, 11-12, para. 35.

²⁵⁵ *Yorta Yorta Aboriginal Community Case*, *supra* note 80, paras 44 & 46-47.

²⁵⁶ CERD, *Concluding Observations on Australia (2005)*, *supra* note 185, 4, para. 17; CERD, *Consideration of Reports Submitted by States Parties Under Article 9 of the Convention: Concluding Observations of the Committee on the Elimination of Racial Discrimination: Australia*, UN Doc CERD/C/AUS/CO/15-17, 13 September 2010, 5, para. 18.

²⁵⁷ CESCR, *Consideration of Reports Submitted by States Parties Under Articles 16 and 17 of the Covenant: Concluding Observations of the Committee on Economic, Social and Cultural Rights: Australia*, UN Doc E/C.12/AUS/CO/4, 12 June 2009, 9, para. 32.

²⁵⁸ Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous Peoples, *Situation of Indigenous Peoples in Australia*, *supra* note 235, 8, para. 26.

²⁵⁹ In March 2011, the Green Party introduced the *Native Title Amendment (Reform) Bill 2011* to lower the burden of proof. Whether this will lead to a revision of the NTA remains to be seen; see also McHugh, *supra* note 37, 132-133.

to their culture and has had an uninterrupted continuity since pre-contact times,²⁶⁰ is also not in accordance with international law.

II. Duty to Demarcate Indigenous Lands and Convey Secure Legal Status

Several obligations for States arise from the international recognition of the existence of inherent indigenous land rights. The most important ones are the duty to identify and demarcate indigenous lands and – in a next step – the duty to effectively protect indigenous land rights by granting indigenous peoples a secure legal status to their lands through the conveyance of rights recognized under the national legal system.

1. Duty to Demarcate

Demarcation means “the formal process of identifying the actual locations and boundaries of indigenous lands or territories and physically marking those boundaries on the ground”.²⁶¹ Without demarcation, State representatives or third parties are not able to ascertain as to which lands indigenous peoples hold rights. Since “[p]urely abstract or legal recognition of indigenous lands, territories or resources can be practically meaningless unless the physical identity of the property is determined and marked”,²⁶² the duty to demarcate is widely recognized under international law. The *ILO Convention No. 169* calls upon States to “take steps as necessary to identify” indigenous lands,²⁶³ the HRC demanded in its *Concluding Observations on Brazil* that “in light of article 27 of the Covenant, all necessary measures should be taken to ensure that the process of demarcation of indigenous lands be speedily and justly settled”,²⁶⁴ and the CESCR expressed its concern that Russia still has not enacted any legislation to facilitate the demarcation of indigenous lands.²⁶⁵ Likewise, the IACHR and

²⁶⁰ *Van der Peet Case*, *supra* note 76, 549 para. 46.

²⁶¹ Special Rapporteur of the Sub-Commission on the Promotion and Protection of Human Rights, *Final Working Paper*, *supra* note 218, 17, para. 50.

²⁶² *Ibid.*

²⁶³ *ILO Convention No. 169*, Art. 14 (2), *supra* note 156, 1387.

²⁶⁴ HRC, *Consideration of Reports Submitted by States Parties Under Article of the Covenant: Concluding Observations of the Human Rights Committee: Brazil*, UN Doc CCPR/C/79/Add.66, 24 July 1996, 5, para. 32.

²⁶⁵ CESCR, *Consideration of Reports Submitted by States Parties Under Articles 16 and 17 of the Covenant: Concluding Observations of the Committee on Economic, Social and Cultural Rights: Russian Federation*, UN Doc E/C.12/1/Add.94, 12 December 2003, 2, para. 11.

the IACtHR have repeatedly stressed the importance of demarcation. In several reports²⁶⁶ and decisions,²⁶⁷ the IACHR has referred to the duty to demarcate indigenous lands, and the IACtHR held in its *Awás Tingni* decision that the failure to demarcate indigenous lands “has created a climate of constant uncertainty among the members of the Awás Tingni Community, insofar as they do not know for certain how far their communal property extends geographically and, therefore, they do not know until where they can freely use and enjoy their respective property”.²⁶⁸ It therefore requested Nicaragua to adopt all necessary legislative, administrative, and other measures to demarcate the lands of the Awás Tingni, and until then to abstain from acts that might affect the potential land rights of the indigenous community.²⁶⁹ The UNDRIP does not contain any express obligations to demarcate indigenous lands. Such an obligation is, however, implied in Art. 26 (3) UNDRIP, which obliges States to recognize and protect indigenous lands since the protection of indigenous lands is not possible without prior demarcation.²⁷⁰

2. Duty to Convey Secure Legal Status

From the obligation to take all necessary measures to legally recognize and protect indigenous lands follows that demarcation as a merely factual act does not suffice to adequately protect indigenous ownership and use rights. Instead,

See also CESCR, *Consideration of Reports Submitted by States Parties Under Articles 16 and 17 of the Covenant: Concluding Observations of the Committee on Economic, Social and Cultural Rights: Brasil*, UN Doc E/C.12/BRA/CO/2, 12 June 2009, 3-4, para. 9 [CESCR, Concluding Observations on Brazil].

²⁶⁶ IACHR, *Human Rights Situation in Colombia*, Ch. X, Recommendation 2: “The State should take appropriate measures to ensure that the process of legal demarcation, recognition and granting title to land and use of natural resources to indigenous communities is not hindered or delayed by bureaucratic difficulties”. IACHR, *Second Report on the Human Rights Situation in Peru*, OAS Doc OEA/Ser.L/V/II.106 doc. 59, 2 June 2000, Ch. X, para. 16: “The recovery, recognition, demarcation, and registration of the lands represents essential rights for cultural survival and for maintaining the community’s integrity”.

²⁶⁷ *Yanomami Indigenous Peoples v. Brazil*, IACHR Case 7615, Resolution No. 12/85, OEA/Ser.L/V/II.66/ doc. 10, rev. 1, 24; *Maya Indigenous Communities Case*, *supra* note 187, paras 132, 152, 193 & 197 (2).

²⁶⁸ *Awás Tingni Case*, *supra* note 186, 76, para. 153.

²⁶⁹ *Ibid.*, 76 & 81, paras 153 & 164. See also *Moiwana Case*, *supra* note 186, 81, para. 209; *Yakye Axa Case*, *supra* note 186, 77, 98 & 102, paras 143, 215 & 233; *Sawhoyamaxa Case*, *supra* note 186, 77 & 104, paras 143 & 239; *Saramaka Case*, *supra* note 186, 34 & 56, paras 115 & 194 (a).

²⁷⁰ UNDRIP, Art. 26 (3), *supra* note 161, 8.

the demarcation is only a prerequisite for the assignment of a secure legal status to the land, which is recognized under the national legal system. Only through such a secure legal status indigenous lands rights can be effectively protected against interferences by the State or third parties. Therefore, the *ILO Convention No. 169*,²⁷¹ the UNDRIP,²⁷² several Special Rapporteurs²⁷³ and UN treaty bodies,²⁷⁴ as well as the IACHR, the IACtHR, and the ACHPR²⁷⁵ unanimously request States to convey nationally recognized land rights to indigenous peoples' lands following the demarcation of their lands. These derivative land rights must adequately reflect the nature and content of the inherent indigenous land rights. Hence, a distinction has to be made between rights to traditionally occupied lands and to lands traditionally used otherwise.

a. Traditionally Occupied Lands

Since the conveyed land rights shall adequately reflect the inherent indigenous land rights, the transfer of mere access rights or the acquiescence of *de facto* ownership to traditionally occupied lands are not sufficient means to recognize and effectively protect inherent indigenous ownership rights. Instead,

²⁷¹ *ILO Convention No. 169*, Art. 14 (2), *supra* note 156, 1387.

²⁷² UNDRIP, Arts 26 (3) & 27, *supra* note 161, 8.

²⁷³ Special Rapporteur of the Sub-Commission on the Prevention of Discrimination and Protection of Minorities, *Discrimination Against Indigenous Populations*, *supra* note 197, para. 514; Special Rapporteur of the Sub-Commission on the Promotion and Protection of Human Rights, *Final Working Paper*, *supra* note 218, 13-14, para. 38; Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous Peoples, *Situation of Indigenous Peoples in the Russian Federation (Addendum)*, UN Doc A/HRC/15/37/Add.5, 23 June 2010, 10-11, para. 35 [Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous Peoples, *Situation of Indigenous Peoples in the Russian Federation*].

²⁷⁴ See HRC, *General Comment No. 23*, *supra* note 180, 4, para. 7; *Mahuika Case*, *supra* note 248, 9 & 15, paras 7.1 & 9.5; *Ángela Poma Poma v. Peru*, *supra* note 233, 10, para. 7.2; CERD, *Concluding Observations on Argentina*, *supra* note 185, 4, para. 16; CESCR, *General Comment No. 21*, UN Doc E/C.12/GC/21, 21 December 2009, 2, para. 7; CESCR, *Concluding Observations on Brazil*, *supra* note 265, 3-4, para. 9; CESCR, *Consideration of Reports Submitted by States Parties Under Articles 16 and 17 of the Covenant: Concluding Observations of the Committee on Economic, Social and Cultural Rights: Russian Federation*, E/C.12/RUS/CO/5, 1 June 2011, 3, para. 7.

²⁷⁵ See *Moiwana Case*, *supra* note 186, 54-55, para. 133; *Yakye Axa Case*, *supra* note 186, 77 & 79, paras 143 & 155; *Sawhoyamaya Case*, *supra* note 186, 73, para. 128; *Saramaka Case*, *supra* note 186, 34, para. 115; *Dann Case*, *supra* note 187, para. 130; *Maya Indigenous Communities Case*, *supra* note 187, para. 115; *Endorois Case*, *supra* note 188, 48, 54 & 55, paras 187, 205 & 209.

indigenous peoples must be given legally secure rights which have to exceed mere use rights.

The question arises, however, whether indigenous peoples are entitled to the transfer of title to the land or whether the formal title can remain with the State as long as the indigenous groups are given far-reaching substantive rights to the land, which are more or less equivalent to the rights typically enjoyed by an owner.

The *ILO Convention No. 169* is rather vague concerning this matter. According to Art. 14 (2) *ILO Convention No. 169*, States shall take the necessary measures “to guarantee effective protection of [indigenous peoples’] rights of ownership and possession”.²⁷⁶ From this wording, it is unclear what exactly is required by States. The ILO Committee of Experts clarifies that it “does not consider that the Convention requires title to be recognized in all cases in which indigenous and tribal peoples have rights to lands traditionally occupied by them, although the recognition of ownership rights by these peoples over the lands they occupy would always be consistent with the Convention”.²⁷⁷ Hence, according to the ILO Committee of Experts, the legal title to the land can remain with the State. If the title remains with the State, this does not mean, however, that the State is free to exercise its ownership powers. Instead, the obligation to recognize the indigenous peoples’ ownership rights restricts the formal legal title of the State.²⁷⁸ The *Guide to ILO Convention No. 169* (2009) confirms this interpretation of Art. 14 (2) *ILO Convention No. 169* by stating “[t]hese procedures [to protect indigenous peoples’ rights to ownership and possession] can take a variety of forms; in some cases they will including demarcation and titling while in other they may imply the recognition of self-governance arrangements or co-management regimes”.²⁷⁹ Likewise, the UNDRIP does not require States to confer formal title to indigenous peoples. Art. 26 (3) merely requires States to give “legal recognition and protection” to indigenous lands without stipulating how this obligation is to be implemented.²⁸⁰

The IACHR also does not require States to convey legal title to indigenous peoples. In its decision in *Maya v. Belize*, it criticizes Belize for not having “titled

²⁷⁶ *ILO Convention No. 169*, Art. 14 (2), *supra* note 156, 1387.

²⁷⁷ ILO Committee of Experts, ‘Individual Direct Request concerning Convention No. 169, Indigenous and Tribal Peoples, 1989 Norway (Ratification: 1990)’, available at http://www.ilo.org/dyn/normlex/en/f?p=1000:13100:0::NO::P13100_COMMENT_ID:2148151 (last visited 15 June 2013), para. 17.

²⁷⁸ Ulfstein, *supra* note 204, 20-21.

²⁷⁹ Feiring & Programme to Promote ILO Convention No. 169, *supra* note 175, 95.

²⁸⁰ UNDRIP, Art. 26 (3), *supra* note 161, 8.

or otherwise established the legal mechanisms necessary to clarify and protect the territory on which their right exists”,²⁸¹ and in its report on *Indigenous and Tribal Peoples’ Rights Over Their Ancestral Lands and Natural Resources*, it states that indigenous peoples have the right to be granted “a formal title to property or another similar form of State recognition”.²⁸²

The conveyance of formal title in all cases in which an indigenous people claims ownership to land is also not required from a teleological point of view. The conveyance of legal title is not an end in itself but merely one of several means to ensure an indigenous people’s control and permanent use of its ancestral lands. This ultimate objective may be equally well or even better achieved by other means than the conveyance of a formal title to the land. Insisting on the conveyance of formal title might even be contrary to indigenous peoples’ interests in case they have identified other approaches as more appropriate to ensure effective control over their lands. Consequently, the Special Rapporteur of the Sub-Commission on the Promotion and Protection of Human Rights, Erica-Irene A. Daes, regards the policy of holding land in trust for indigenous peoples as problematic only if it contravenes the will of the indigenous peoples concerned.²⁸³ Likewise, Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous Peoples, S. James Anaya, argues that

“rights to use the land and its renewable and common resources, while title ownership remains with the State [...] could be sufficient to comply with relevant international standards, if they are well established, implemented, judicially protected, and working in concert with other entitlements such as those of consultation and consent, compensation, environmental protection and development”.²⁸⁴

²⁸¹ *Maya Indigenous Communities Case*, *supra* note 187, para. 133 (emphasis added). See also *ibid.*, paras 135, 152 & 194.

²⁸² IACHR, *Norms and Jurisprudence of the Inter-American Human Rights System*, *supra* note 203, 34-35, para. 83 (emphasis added). See also *ibid.*, 33-34, para. 82 (note 223): “Indigenous and tribal peoples, therefore, have the right to enjoy formal title, or other instruments that recognize their property over the lands where they live and develop their cultural and subsistence activities”.

²⁸³ Special Rapporteur of the Sub-Commission on the Promotion and Protection of Human Rights, *Final Working Paper*, *supra* note 218, 42, para. 149 (d).

²⁸⁴ Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous Peoples, *Situation of Indigenous Peoples in the Russian Federation*, *supra* note 273, 10, para. 31.

Since the majority of Indian tribes in the US rejects the conveyance of legal title and often even tries to have the fee simple titles acquired on the market to be transformed into trust land, the US government's focus on the tribal trust land system raises no objections. On the other hand, the reservation system as applied in Western Australia is not in accordance with international law as it transfers merely use rights but no right of continuance to indigenous peoples. Since the conveyance of formal title is generally in accordance with international obligations, the transfer of collective fee simple title under the Canadian CLC Policy and Australian state or territory legislation cannot be criticized *per se*. Yet, since the derivative land rights shall adequately reflect nature and content of the inherent indigenous land rights, the fact that some CLC agreements and some Australian land laws allow for the alienation of the conveyed lands is to be viewed critically. Another problem is that the fee simple titles conveyed to indigenous peoples in Canada and Australia do not include a broad right to exclude others. Instead, indigenous peoples are obliged to tolerate the use of their land by state representatives and third parties to a higher degree than other fee simple title holders. With regard to Australia, the fact that several land laws allow for the exploitation of natural resources without prior extensive consultations and adequate financial participation of the indigenous owners is also a matter of concern. With regard to Canada it is problematic that under some CLC agreements the collective fee simple land is subject to real estate tax and can even be seized to recover unpaid taxes. The tax liability and possibility to seize do not place indigenous peoples in a less favorable position than other fee simple title holders. However, the Canadian government does not take into account that in certain cases the special situation of indigenous peoples requires positive discrimination. The fee simple title shall only protect the inherent indigenous rights by mitigating the risk of loss of their land but not place additional duties on indigenous peoples. The tax liability, however, impairs the status of indigenous peoples to their lands since they do not have to pay taxes for their inherent land rights. With regard to Canada, the fact that aboriginal titles and rights are permanently extinguished or made unenforceable in return for the conveyance of fee simple title to certain parts of the indigenous peoples' traditional lands is also internationally criticized and

rejected as assimilationist.²⁸⁵ However, a positive feature of the Canadian legal system is that not only the inherent land rights but also the rights given to indigenous peoples under the CLC agreements are constitutionally protected.²⁸⁶ Hence overall, the derivative land rights of indigenous peoples enjoy a higher degree of protection than other fee simple titles.

Besides the conveyance of formal title, Canada and Australia pursue another approach to protect the inherent ownership rights of indigenous peoples to their ancestral lands: the installation of co-management regimes. The installation of co-management regimes without concurrent conveyance of title to the land is only adequate if indigenous peoples are given effective and perpetual control in form of real co-decision and co-governance competences. A purely advisory co-management or minor participatory rights as well as terminable co-management agreements are not sufficient. It is also not sufficient if recommendations by co-management bodies, in which the majority of members are indigenous peoples' representatives, are not legally binding but only generally followed in practice since mere *de facto* rights never suffice.

b. Lands Traditionally Used Otherwise

Due to the multitude of different forms of traditional land uses it is difficult to determine in the abstract how the inherent use rights of indigenous peoples are to be realized and protected within the national legal systems. It is, however, established that – since inherent use rights are less far-reaching than inherent ownership rights – the rights transferred to indigenous peoples under the national legal systems can altogether be less comprehensive than in the case of a traditional occupation of the land.

Australia and Canada have both transferred use rights based on agreements and legislation relevant to indigenous peoples. The transfer of such legally secure use rights is essential for the survival of indigenous cultures since many indigenous peoples feel committed to honor a resource through its constant use. Whether the transfer of mere use rights suffices to protect the inherent indigenous use rights must, however, be doubted. Indigenous peoples have never viewed themselves as mere users of the land but also as its guardians, who

²⁸⁵ Special Rapporteur of the Sub-Commission on the Promotion and Protection of Human Rights, *Final Working Paper*, *supra* note 218, 30 & 31, paras 99 & 102; CESCR, *Consideration of Reports Submitted by States Parties Under Articles 16 and 17 of the Covenant: Concluding Observations of the Committee on Economic, Social and Cultural Rights: Canada*, UN Doc E/C.12/1/Add.31, 10 December 1998, 4, para. 18.

²⁸⁶ *Constitution Act, 1982*, Section 35 (1) & (3).

are responsible for the balance of nature. This idea, which is deeply entrenched in indigenous culture and spirituality, can only be accommodated if indigenous peoples are given not only use rights but also participatory rights regarding the management of their traditionally used lands and resources. There is no general answer to the question how far-reaching these participatory rights have to be; this has to be assessed on a case by case basis. Due to the less intensive connection to the land, the content and extent of these participatory rights can, however, be less far-reaching than the participatory rights which are transferred based on traditional occupation.

Noteworthy is the Canadian approach. In the CLC agreements, the Canadian government always transfers participatory rights together with use rights. Furthermore, indigenous peoples are often given a financial share in the exploitation of their traditionally used resources in recognition of their special relationship. The Australian ILUAs, on the other hand, transfer in many cases only use rights to indigenous peoples. By no means in accordance with international obligations is the US policy according to which indigenous peoples are generally not given any preferential use or management rights outside of their reservations unless such rights were guaranteed to them in a historical treaty.

III. Duty to Redress Past Grievances

In addition to the obligation to demarcate and convey secure legal status to lands still occupied and used by indigenous peoples, the recognition of inherent land rights has also led to an obligation of States to provide reparation to indigenous peoples for unfair and illegal takings of land in the past. The existence of such an obligation has been widely recognized in international legal instruments and by international and regional courts and human rights bodies. Because of the fundamental importance of land as the basis of an indigenous people's economic livelihood and source of its spiritual and cultural identity, the obligation to redress past grievance is primarily an obligation to hand back the lands traditionally owned or otherwise occupied and used to indigenous peoples and only secondarily a duty to provide financial compensation in the form of alternative land or cash.²⁸⁷ The return of the land has to be carried out by transferring secure legal status to the land within the national legal framework. The rights transferred as a means of redress have to be of the same nature and

²⁸⁷ See *ILO Convention No. 169*, Art. 16 (3) & (4), *supra* note 156, 1388; UNDRIP, Art. 28, *supra* note 161, 8; CERD, *General Recommendation XXIII*, *supra* note 184, 286, para. 5; *Sawhoyamaxa Case*, *supra* note 186, 73, para. 128; IACHR, *Norms and Jurisprudence of the Inter-American Human Rights System*, *supra* note 203, 53, 124.

extent as the rights transferred to secure the continuous original indigenous land rights.

Under Art. 28 UNDRIP, the right to redress is not time-limited. According to the wording of Art. 16 (3) and (4) *ILO Convention No. 169*, the right to redress seems to be restricted to takings of lands after the entry into force of the Convention. Yet the ILO Governing Body has declared that the Convention also applies if “the effects of the decisions that were taken at that time continue to affect the current situation of the indigenous peoples in question”.²⁸⁸ Likewise, the HRC has declared that historical inequities, which threaten the way of life and culture of an indigenous people, constitute a violation of Art. 27 ICCPR as long as they continue.²⁸⁹ Even more far-reaching the IACtHR has held that, “[a]s long as [the unique spiritual relationship with their traditional lands] exists, the right to claim lands is enforceable.”²⁹⁰ Similar statements were issued by the IACHR²⁹¹ and the ACHPR.²⁹² The right to restitution is, however, always subject to feasibility.²⁹³ If a large number of private landowners had to be expropriated in order to return land to indigenous peoples, restitution would be disproportionate and therefore legally not possible.

New Zealand’s approach is most consistent with these international obligations. During the land reforms of the 19th and early 20th centuries, almost all inherent indigenous land rights were extinguished. Nevertheless, as redress for the illegal, unfair, and discriminatory taking of indigenous lands, co-management regimes have been installed in large numbers all over New Zealand – not only to land but also to maritime resources, rivers, and lakes. In many cases,

²⁸⁸ ILO Committee of Experts, ‘Report of the Committee Set up to Examine the Representation Alleging Non-Observance by Mexico of the Indigenous and Tribal Peoples Convention, 1989 (No. 169)’, available at http://www.ilo.org/dyn/normlex/en/f?p=1000:50012:0::NO:50012:P50012_COMPLAINT_PROCEDURE_ID,P50012_LANG_CODE:2507203,en:NO (last visited 15 June 2013), para 36. See also ILO Committee of Experts, ‘Report of the Committee Set up to Examine the Representation Alleging Non-Observance by Denmark of the Indigenous and Tribal Peoples Convention, 1989 (No. 169)’, available at http://www.ilo.org/dyn/normlex/en/f?p=1000:50012:0::NO:50012:P50012_COMPLAINT_PROCEDURE_ID,P50012_LANG_CODE:2507219,en:NO (last visited 15 June 2013), para. 29.

²⁸⁹ HRC, *Lubicon Lake Band v. Canada*, Communication No. 167/1984, UN Doc CCPR/C/38/D/167/1984, para. 33.

²⁹⁰ *Sawhoyamaxa Case*, *supra* note 186, 74, para. 131.

²⁹¹ *Dann Case*, *supra* note 187, para. 167.

²⁹² *Endorois Case*, *supra* note 188, 55, paras 209 & 210.

²⁹³ See *ILO Convention No. 169*, Art. 16 (3), *supra* note 156, 1388; UNDRIP, Art. 28 (1), *supra* note 161, 8.

these co-management rights amount to co-governance. In Australia, it is also possible, to some degree, to claim restitution and financial compensation for the illegal extinguishment of native titles in the past. Yet such claims are restricted to the time after the adoption of the RDA in 1975, which is a cause of concern from an international law point of view. In Canada, there is no procedure to claim restitution or compensation for past illegal, unfair, and discriminatory takings of indigenous lands. The CLC Policy as the only procedure to claim the transfer of secure legal status to land is *a priori* not applicable to areas which are subject to historical land cession treaties. Likewise, under the US legal system there is currently no procedure under which indigenous peoples can claim redress for past grievances.²⁹⁴

E. Appraisal

It is a fact that nowadays vast areas of traditional indigenous lands are owned by non-indigenous people, who have been using and living on these lands for generations and thus are also worthy of protection in their continued use. Therefore, not all lands traditionally used and occupied by indigenous groups can be transferred to indigenous peoples. Nevertheless, the national governments have to try to reconcile the interests of the non-indigenous majority with those of the indigenous minority in order to redress past injustices without creating new ones. In order to achieve this goal, States can learn from each other's experiences. All States subject to this study possess several weaknesses but also some strong points regarding the realization and protection of indigenous land rights.

The example of New Zealand shows that co-management is in many cases the most appropriate way of realizing and protecting indigenous land rights. Not only does co-management come closer to the indigenous peoples' idea of humans as guardians and part of the land than the conveyance of fee simple title, which mirrors the European concept of humans as rulers over the Earth, but the transfer of co-management is also more widely applicable and easier to convey to the public than the conveyance of fee simple title. Whereas co-management is based on the balancing of different interests, the focus of fee simple title is to enforce one's own interests against all others. Therefore, co-management is also possible as regards national parks, other important cultural, historical or

²⁹⁴ In 1946 the US Congress established the Indian Claims Commission (ICC) to hear claims of Indian tribes against the US. It was in operation until 1978. The ICC could, however, only award financial compensation to indigenous peoples but not return lands to Indian tribes.

recreational sites and even areas to which third parties hold rights, whereas the conveyance of title or similar ownership rights to those areas would lead to nationwide protests of the non-indigenous population. The co-management rights transferred by the New Zealand government are quite strong and often amount to co-governance. Furthermore, New Zealand could serve as a model for other States since it not only transfers rights to areas to which indigenous peoples still hold inherent indigenous land rights. Since the New Zealand government sees the transfer of derivative land rights as a means of reparation for illegal, unjust, and discriminatory taking of indigenous lands, it also transfers rights to lands, to which the Maori's aboriginal titles have been extinguished in the past – unlike the USA and Canada, which do not transfer derivative rights to indigenous peoples in regions which are covered by historical treaties. Canada, however, could serve as a model for other States in-so-far as it is the only State which constitutionally protects inherent and derivative indigenous land rights, whereas in the other States subject to this study indigenous land rights can be unilaterally infringed or extinguished by the State. The USA, on the other hand, is to be commended for providing more extensive protection to tribal trust lands than to ordinary fee simple lands and for guaranteeing far-reaching self-government rights to Indian tribes on their reservations. With regard to Australia, only the Northern Territory and South Australian approaches are noteworthy. In these federal units indigenous peoples are given far-reaching co-management rights as regards national parks and hold a disproportionate amount of land in relation to their percentage of the overall population. In all other Australian States and Territories, indigenous peoples hold hardly any recognized rights to the land. In particular, the weak status of an aboriginal title is to be criticized since indigenous peoples are not provided with a meaningful leverage against the respective State governments. The Australian federal government – which unlike the US, the Canadian, and the unitary New Zealand government does not have exclusive competencies concerning indigenous peoples and their lands – should intervene and force the States to adequately recognize and protect indigenous land rights.

It remains to be hoped that States cease hiding from their historical responsibilities towards indigenous peoples, but instead try to find ways and means to effectively and permanently protect and preserve the rights of indigenous peoples to their ancestral lands in line with international standards and in cooperation with the indigenous peoples concerned. Only then can the indigenous peoples' survival as separate peoples be permanently secured.

A Step Further on Traditional Peoples Human Rights: Unveiling the Key-Factor for the Protection of Communal Property

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Abstract¹

The purpose of this article is to provide a new perspective in relation to the protection of property rights of indigenous and non-indigenous peoples. Through an analysis based on the jurisprudence of the Inter-American Human Rights System, it is possible to identify the core elements that justify the special protection concerning traditional territories, leading to a rationality that revolves around the unique bond that traditional peoples establish with their land. By studying the recent evolution of the debate within the Inter-American Court of Human Rights, the article intends to shift the focus from formal and constricted ethnic classifications to the underlying cultural identity aspects of the relationship between a certain people and its own land. This change of perspective allows the consolidation of a singular idea of property rights towards traditional territories. Aimed not only at indigenous peoples, but also to any community that shows a distinguished and deep cultural tie to its land, this particular property right notion leads to a more comprehensive and consistent protection of indigenous and non-indigenous peoples' fundamental rights.

A. Introduction: The Protection of Property Rights in the Human Rights Context

Frequently placed in the center of the most pre-eminent human rights debates, the protection of property rights has been increasingly discussed in its various aspects and by distinguished recipients. In this scenario, indigenous peoples and all sorts of traditional communities have become the protagonists of many claims concerning the safeguards of their property rights; but these claims have shown another perspective on the dynamic of the right to property, essentially changing the notion of individual property rights to a concept of communal ownership. Once the traditional view on human rights implies the idea of individuals as recipients, the claims led by traditional communities come along with the necessity to incorporate a collective perspective to the protection

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of certain human rights issues, and the property rights should be reached by this differentiated approach.

As an international jurisdiction for many demands concerning the protection of property rights, the Inter-American Court of Human Rights (Inter-American Court) has managed to develop solid jurisprudence on the protection of communal property rights,² fitting this protection into the scope of Article 21 of the *American Convention on Human Rights* (ACHR)³ primarily interpreted as a safeguard to individual property rights. As the Court dealt with cases concerning the collective ownership of property by indigenous peoples, it became clear that, due to the close ties the community and its members establish with their traditional territories, indigenous peoples should have their communal property rights embraced by the protection under Article 21 ACHR. Furthermore, noticing that tribal peoples also demonstrate such bond to their lands and this bond is a key-element to their cultural integrity, the Inter-American Court extended the scope of communal rights to peoples such as the Moiwana and the Saramaka, even though they do not present the ethnical and cultural aspects that would qualify them as indigenous.⁴

In order to address the integrality of property rights protection, dealing with the communal aspect of such rights is imperative. Through the analysis of cases involving the restriction of property rights, it is possible to identify how the collective perspective of property plays an essential role, once its particularities must be taken into account so as to grant a special protection to communities that perceive their territories as part of their physical and cultural integrity. If a violation or any kind of restriction of traditional communities property rights is in question, the distinctiveness of the recipients of such rights must be considered, comprising not only a *prima facie* perspective of individual property

² For examples of the Court's recognition of a broader scope of Article 21 comprising the protection of communal property rights, see *Saramaka People v. Suriname*, Judgment of 28 November 2007, IACtHR Series C, No. 172, 26-27, paras 88-92 [Saramaka Case]; *Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, Judgment of 31 August 2001, IACtHR Series C, No. 79, 75, paras 152-153 [Awas Tingni Case]; *Indigenous Community Yakye Axa v. Paraguay*, Judgment of 17 June 2005, IACtHR Series C, No. 125, 76-77, paras 138-139 [Yakye Axa Case]; *Sawhoyamaya Indigenous Community v. Paraguay*, Judgment of 29 March 2006, Series C, No. 146, 72, paras 122-123 [Sawhoyamaya Case].

³ *American Convention on Human Rights*, 22 November 1969, Art. 21, 1144 UNTS 123, 150 [ACHR].

⁴ See *infra* discussion (Section D) on the development of the Inter-American Court jurisprudence.

rights, but also the implications of a communal ownership of property and the special ties between traditional communities and their land.

B. A Legal Frame for the Restriction of Property Rights: The Criteria Presented by the International Environmental Law and the American Convention on Human Rights

The rise of economic development policies comes closely attached to a wide range of infra-structural changes that States must undergo in order to pursue their development goals. As the rush for progress expands its domain, along with a variety of environmental and social issues, the struggle between public priorities and the protection of individual rights comes to the center of the debate – especially when it enters the scope of property rights and environmental issues. In this scenario, legal standards of international environmental law have been evoked as an important tool to balance development policies and the impacts they may cause on the sphere of fundamental rights.

Analyzing the international legal framework on the matter, international environmental law addresses the debate between human rights safeguards and development in a broad manner, embracing any individuals that may have their rights restricted.⁵ It is possible to identify explicit mention of the State's duty to consult the people that will be affected by development projects, as Article 1 of the *Aarhus Convention*⁶ and Principle 10 of the *Rio Declaration*⁷ reveal. These texts require that any public initiative that may lead to significant environmental impacts must take into account the implications of these impacts on the potentially affected communities, fostering consultation procedures and other instruments to ensure that the affected population takes part in the decision-making process. The leading argument is that an effective and informed participation of the community is a guarantee that the right to a sustainable and environmentally sound development will not be overlapped by public interest justifications that haven't been thoroughly discussed. According to the *Rio Declaration*, in order to offer a real opportunity for the participation of

⁵ M. N. Shaw, *International Law*, 6th ed. (2008), 847-849.

⁶ *Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters*, 25 June 1998, Art. 1, 2161 UNTS 447, 451.

⁷ *The Rio Declaration on Environment and Development*, UN Doc A/CONF.151/5/Rev. 1, 13 June 1992, 31 ILM 874, 878, Principle 10.

all concerned citizens, States must safeguard the access to administrative and judicial proceedings, as well as an appropriate access to all relevant information related to environmental concerns.⁸

Together with these environmental issues raised by the implementation of development projects, the restriction of property rights, in particular, also implies a series of procedures that should be taken by the State when executing public initiatives that may interfere on the full enjoyment of fundamental rights. Consequently, besides the State's duty to undertake public consultations before the submission of any project that may impact the environment, development initiatives should also be considered under the framework of what is admissible when restricting the right to property on behalf of the public interest. Development goals set by public authorities frequently imply limitations to the full enjoyment of property rights in order to achieve a supposedly 'greater good', which compensates such restrictions and, more importantly, legitimizes them. Therefore, the tipping point is to determine in which cases there is a fair balance between public and private interests.

In *Salvador Chiriboga v. Ecuador*, the Court gives some evidence of how these limitations of individual rights may be possible.⁹ The Inter-American Court held that any limitation to these rights must be exceptional and emphasizes that the property right "must be understood within the context of a democratic society where in order for the public welfare and collective rights to prevail there must be proportional measures that guarantee individual rights".¹⁰ The State is charged and it is necessary to respect not only the requirements set by Article 21 ACHR but also the rules of international law, considering the social role of property.

In the Latin-American context, the incorporation of frenetic development projects is not a recent phenomenon, and neither are its social and environmental impacts. These impacts usually result from a poorly handled assessment of the pre-requisites to restrict individual rights and the failure of the State to recognize the different extensions of the property rights protection. A suitable illustration of the problem is the growing number of complaints that have been placed before the Inter-American Human Rights System concerning the violation of Article 21 ACHR. This Article establishes that "[n]o one shall be deprived of his property except upon payment of just compensation, for reasons of public

⁸ *Ibid.*

⁹ See *Salvador Chiriboga v. Ecuador*, Judgment of 6 May 2008, IACtHR Series C, No. 179, 19-34, paras 60-124 [Salvador Chiriboga Case].

¹⁰ *Ibid.*, 19, para. 60.

utility or social interest, and in the cases and according to the forms established by law” and although the Article itself does not express the implications of these “reasons of public utility or social interest”, the Inter-American Court has already consolidated the criteria to this purpose. As demonstrated in cases such as the *Sawhoyamaxa Indigenous Community v. Paraguay*, the State must demonstrate the imperativeness of the alleged public interest and how the limitations it implies are the least restrictive possible concerning the individual right in question.¹¹

Comprehensively described in the case of the *Community Yakyé Axa v. Paraguay*, a triple-based requirement imposes that the means a State shall use to pursue a public interest must fulfill the criteria of adequacy, necessity, and proportionality in order to properly justify the restriction of an individual’s right to property.¹² Firstly, concerning the adequacy aspect, the restrictions applied to the right to property must be appropriate and clearly connected to the achievement of a legitimate objective in a democratic society. Secondly, the necessity analysis relies on the already mentioned imperativeness of the public interest, in a way that its legitimacy alone is insufficient to support the restriction of a fundamental right. Moreover, an adequate and necessary measure shall also be proportionate, implying that the extent of a right’s restriction is limited to the exact extent of the public interest that is being pursued, avoiding excessive restrictions. The restriction of the right to property will only be considered legitimate after the conclusion of this complex examination, accompanied by the payment of compensations and a specific legal provision concerning this restriction.

The right to just compensation, a general principle of international law¹³ also comprised by Article 21 (2) ACHR, must be respected by the State, which shall determine the amount of the compensation taking into account the balance between public and private interest. The Court also states, in the aforementioned case *Salvador Chiriboga*, that in determining the value of the property, the State must take into account their legal and natural characteristics, in order to provide adequate compensation to the real value that those lands have to the displaced populations.¹⁴ Nevertheless, when the idea of property itself gains

¹¹ *Sawhoyamaxa Case*, *supra* note 2, 76, para. 138.

¹² *Yakyé Axa Case*, *supra* note 2, 78, para. 145.

¹³ *Protocol No. 1 to the Convention for the Protection of Human Rights and Fundamental Freedoms*, 20 March 1952, Art. 1, 213 UNTS 262, 262; *The Case Concerning Certain German Interests in Polish Upper Silesia (Germany v. Poland)*, PCIJ Series A, No. 7 (1926), para. 68; Shaw, *supra* note 5, 743-747.

¹⁴ *Salvador Chiriboga Case*, *supra* note 9, 27, para. 98.

multiple connotations, the recipients of these safeguards must be appropriately distinguished to ensure the effective protection of their fundamental rights.

C. The Special Protection due to the Property Rights of Indigenous and Tribal Peoples: Analysis of the Specific Criteria

Through an evolutionary interpretation of the international human rights instruments, taking into account the *ILO Convention No. 169*¹⁵ and in accordance with Article 29 (b) ACHR, the Inter-American Court has recognized that Article 21 ACHR¹⁶ comprises communal property rights of traditional

¹⁵ International Labor Organization (ILO), *Convention Concerning Indigenous and Tribal Peoples in Independent Countries*, 27 June 1989, 28 ILM 1382 [ILO Convention No. 169]. Although the *ILO Convention No. 169* is only directly binding for those States that have ratified it, its content has been evoked not only by courts of countries that have not ratified the document, such as in the case of the United States Ninth Circuit Appeals Court (*Hoopa Valley Tribe v. Christie*, 812 F.2d 1097 (1986)) and in the case *New Zealand Maori Council v. Attorney General*, [1987] 1 NZLR 641. This increasingly frequent use of the *ILO Convention 169* concerning the indigenous and tribal peoples' rights shows how some of its statements, like the obligation to consult, have been accepted as more than a treaty-based provision, leaning towards the idea of general principles of international law. Furthermore, when it comes to the protection of traditional peoples' property rights, the non-ratification of the *ILO Convention No. 169* should not be considered as an alibi to the violation of these peoples' rights; as some national courts have already outlined, it should rather be (at least) a parameter in order to identify whether or not these peoples are having their rights effectively protected by the State they inhabit, independently of their status as State parties of the *ILO Convention No. 169*. Concerning the employment of the *ILO Convention No. 169* by other courts, see *Kichwa Indigenous People of Sarayaku v. Ecuador*, Judgment of 27 June 2012, IACtHR Series C, No. 245, 41-45, paras 163-165 [Sarayaku Case].

¹⁶ The ACHR is definitely an essential document of the Inter-American System and plays an important role in the OAS as a whole, but has not been ratified by some OAS members such as Canada and the United States. However, even to the States that are not Parties to the Convention, the ACHR is fundamental on the protection of human rights in the region and even in other countries. In this sense, provisions such as the one stated by Art. 21 ACHR should be considered as part of an international *corpus iuris*, specially knowing that several international organisms have already established the importance of safeguarding tribal and indigenous peoples' property rights. Some examples can be identified on *Recommendation XXIII* by the Committee on the Elimination of Racial Discrimination (CERD/C/51/Misc.23/rev.1 (1997)) and on the *Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People* (UN Doc A/HRC/9/9 (2008)) by the Human Rights Council. For further developments on the *corpus iuris* concerning the

peoples.¹⁷ This expansive interpretation is proved necessary due to the close ties that these peoples have with their traditional territory and its natural resources, a direct consequence of their way of life and the basis of their cultures, spiritual life, integrity, and economic survival.¹⁸

The traditional communities have a collective perception of the concept of property, as the ownership of the land “is not centered on an individual, but rather on the group and its community”.¹⁹ This notion diverges from the classic concept of property as an essentially individual right, but should be contemplated, at least, with an equal protection under Article 21 ACHR. Supporting this general idea, there is a provision set forth in Article 13 of the *ILO Convention No. 169*, which establishes that the States must respect “the special importance for the cultures and spiritual values of the peoples concerned of their relationship with the lands or territories, or both as applicable, which they occupy or otherwise use, and in particular the collective aspects of this relationship”.²⁰

Accordingly, the Inter-American Court has already stressed that, when associated to traditional peoples, the term “property” used in Article 21 ACHR incorporates “those material things which can be possessed, as well as any right which may be part of a person’s patrimony; that concept includes all movable and immovable, corporeal and incorporeal elements and any other intangible object capable of having value”,²¹ consolidating that this close connection of

indigenous and tribal peoples’ right to property, see IACHR, *Indigenous and Tribal Peoples’ Rights Over Their Ancestral Lands and Natural Resources: Norms and Jurisprudence of the Inter-American Human Rights System*, OEA/Ser.L/V/II. Doc. 56/09, 30 December 2009, 2-9, paras 5-23 [IACHR, Norms and Jurisprudence of the Inter-American Human Rights System].

¹⁷ See *Awas Tingni Case*, *supra* note 2, 75 & 76, paras 148 & 151; S. J. Anaya & C. Grossman, ‘The Case of Awas Tingni v. Nicaragua: A New Step in the International Law of Indigenous Peoples’, 19 *Arizona Journal of International and Comparative Law* (2002) 1, 1, 12; M. Melo, ‘Recent Advances in the Justiciability of Indigenous Rights in the Inter-American System of Human Rights’, 3 *SUR – International Journal on Human Rights* (2006) 4, 30, 34-37.

¹⁸ See *Plan de Sánchez Massacre v. Guatemala*, Judgement, 19 November 2004, IACtHR Series C, No. 116, 81, para. 85; *Yakye Axa Case*, *supra* note 2, 75 & 76, paras 131 & 135; C. Courtis, ‘Notes on the Implementation by Latin-American Courts of the ILO Convention 169 of Indigenous Peoples’, 6 *SUR – International Journal on Human Rights* (2009) 10, 53, 61-64.

¹⁹ *Awas Tingni Case*, *supra* note 2, 74, para. 149.

²⁰ *ILO Convention No. 169*, Art. 13 (1), *supra* note 15, 1387.

²¹ *Yakye Axa Case*, *supra* note 2, 76, para. 137; *Awas Tingni Case*, *supra* note 2, 74, para. 144; *Sawhoyamaya Case*, *supra* note 2, 72, para. 121. Cf. *Ivcher Bronstein v. Peru*, Judgment of

indigenous peoples with their traditional lands, as well as with the incorporeal elements deriving therefrom, must be secured under Article 21 ACHR. This broader perspective regarding the property rights of traditional peoples clarifies the idea of communal property as a necessary extension under the protection fixed by Article 21 ACHR, once the collective ownership of the land is essential for these communities to protect their cultural heritage.

In the light of the extended interpretation of Article 1 (1) of the Convention concerning the obligation to respect rights, the Inter-American Court has already affirmed that, in order to properly protect the physical and the cultural integrity of traditional peoples, such communities should be entitled to a specific set of safeguards,²² ensuring the “full exercise of their property rights”.²³ These requirements are stated in Articles 6 and 7 of the *ILO Convention No. 169*, determining the obligation of the State authorities to consult the peoples concerned, through appropriate procedures and respecting their representative institutions. It is also a State’s duty to establish means by which these peoples can freely participate in the decision-making process and to foster the full development of these peoples’ own institutions and initiatives. In addition, these Articles of the *ILO Convention No. 169* emphasize that the consultations carried out must be undertaken in good faith and with the objective of achieving consent to the proposed measures.

Thus, in order to guarantee that the restrictions to their property rights do not lead to a denial of their survival as a traditional people, the State must comply with three additional safeguards: it must ensure the effective participation of the community members, while respecting their customs and traditions; it must deliver a reasonable benefit-sharing plan; and, finally, the State shall ensure that no concession will be granted until an independent and adequate assessment of the environmental and social impacts is completed.²⁴

According to the *Saramaka* case, the consultation of the affected communities must be in good faith, through culturally appropriate procedures

6 February 2001, IACtHR Series C, No. 74, 50, para. 122.

²² *Saramaka Case*, *supra* note 2, 25, para. 85.

²³ *Ibid.*; I. M. Cuneo, ‘The Rights of Indigenous Peoples and the Inter-American Human Rights System’, 22 *Arizona Journal of International and Comparative Law* (2005) 1, 53, 56.

²⁴ See *ILO Convention No. 169*, Art. 15 (2), *supra* note 15, 1387; Human Rights Committee (HRC), *General Comment No. 23*, UN Doc CCPR/C/21/Rev.1/Add.5, 26 April 1994, 2 & 4, paras 4 & 7 [General Comment 23]; HRC, *Apirana Mahuika et al. v. New Zealand*, Communication No. 547/1993, UN Doc CCPR/C/70/D/547/1993, 15 November 2000, 14-17, para. 9.

and with the purpose of reaching an agreement.²⁵ Moreover, the consultation process must begin at the early stages of the public initiative itself, not only when it becomes necessary formality for the State to obtain the community approval in order to start implementing the project. Only a truly previous notification will enable the community to undergo adequate internal discussions, with the participation of all interested parties. The State is also required to provide proper access to information, ensuring that the affected communities are aware of the potential risks and securing that the project is accepted knowingly and voluntarily. Lastly, as it was presented in *Maya Indigenous Communities of the Toledo District v. Belize*, and in the case of the *Yakye Axa Indigenous Community v. Paraguay*, the consultation must take account of the peoples' traditional methods of decision-making, respecting their representative structures.²⁶

Additionally, the Court has affirmed that, when dealing with large-scale development or investment projects, the State has the onus, when consulting with the affected people, to obtain their free, prior, and informed consent.²⁷ Following the same argument, the UN Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People observed that a "free, prior and informed consent is essential for the [protection of] human rights of indigenous peoples in relation to major development projects".²⁸

This additional protection is justified by the fact that large-scale projects have the potential to trigger profound and permanent social and economic changes to the affected communities. In the case of the *Maya Indigenous Communities of the Toledo District v. Belize*, the Inter-American Commission on Human Rights (Inter-American Commission) goes further, fleshing out the notion of informed consent and establishing that this requires "at a minimum, that all of the members of the community are fully and accurately informed

²⁵ *Saramaka Case*, *supra* note 2, 40, paras 133-134.

²⁶ *Yakye Axa Case*, *supra* note 2, 91, para. 195.

²⁷ *United Nations Declaration on the Rights of Indigenous Peoples*, 13 September 2007, Art. 10, 19 & 32, GA Res. 61/295 annex, UN Doc A/RES/61/295, 1, 5, 6 & 9 [UNDRIP]; T. Ward, 'The Right to Free, Prior and Informed Consent: Indigenous Peoples' Participation Rights Within International Law', 10 *Northwestern Journal of International Human Rights* (2011) 2, 54, 61.

²⁸ Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People, *Indigenous Issues: Human Rights and Indigenous Issues*, UN Doc E/CN.4/2003/90, 21 January 2003, 23, para. 66 [Special Rapporteur on the Situation of Indigenous People, Human Rights and Indigenous Issues].

of the nature and consequences of the process and provided with an effective opportunity to participate individually or as collectives”.²⁹

The second safeguard the State must observe when carrying out development projects in lands of traditional communities is the offer of a reasonable benefit-sharing plan.³⁰ This concept arises from the right of compensation, recognized under Article 21 (2) ACHR, which states that “[n]o 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”.³¹

In this sense, the Committee on the Elimination of Racial Discrimination (CERD) has recommended that, in the case of large-scale exploitation activities, “[t]he equitable sharing of benefits to be derived from such exploitation [must] be ensured”.³² This same idea is affirmed by the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People – to assure “the human rights of indigenous peoples in relation to major development projects, [States should ensure] a mutually acceptable benefit sharing [...]”.³³ Thus, an appropriate benefit sharing is supposed to guarantee an adequate compensation for any damage caused by the exploitation of communal lands and, as the Inter-American Court has determined, the community shall decide who will be the specific recipient(s) of these shared benefits.

The assessment of environmental and social impacts, the third of the special safeguards is that the State shall observe when restraining the communal property rights of traditional peoples, is a requirement that encompasses the access to information about the possible consequences of the State projects to be conducted on their lands. Therefore, it is imperative that the Environmental and Social Impacts Assessment (ESIA) is not only dedicated to address potential environmental problems, but it should also present the possible social implications of the State’s initiative, such as the modification of migration flows, the end of traditional economic activities, etc. Thus, the process of preparing the ESIA

²⁹ *Maya Indigenous Communities in the Toledo District v. Belize*, IACHR Case 12.053, Report No. 40/04, 12 October 2004, para. 142.

³⁰ UNDRIP, Art. 15 (2), *supra* note 27, 6.

³¹ ACHR, Art. 21 (2), *supra* note 3, 150.

³² Committee on the Elimination of Racial Discrimination (CERD), *Considerations of Reports Submitted by States Parties Under Article 9 of the Convention: Concluding Observations of the Committee on the Elimination of Racial Discrimination: Ecuador*, UN Doc CERD/C/62/CO/2, 2 June 2003, 3-4, para. 16.

³³ Special Rapporteur on the Situation of Indigenous People, *Human Rights and Indigenous Issues*, *supra* note 28, 23, para. 66.

does not represent the mere formality of writing a report – it must thoroughly consider the social and environmental concerns of the affected communities. Additionally, aiming to minimize the damaging consequences of the project, the ESIA shall present alternatives for the economic activities rendered unviable or impeded, as well as for the use of the natural resources affected.

As the specific safeguards to the protection of communal property rights are consolidated, indigenous and tribal people tend to have a more solid legal structure to guarantee their physical and cultural survival, reassuring the collective perspective of their close ties to the land they live in. Acknowledging the key-role played by the Inter-American Court of Human Rights in this matter, a comprehensive analysis of its jurisprudence demonstrates the underlying evolution of the communal property rights framework.

D. The Analysis of the Contentious Jurisprudence of the Inter-American Human Rights System Revealing the Special Link to the Land as a Key-Factor

The special bond that indigenous peoples have with their territories is recognized throughout the jurisprudence of the Inter-American Court, considering the communal property as the determining factor for the protection of traditional peoples' property rights. This finding can be achieved through a systematic analysis of the cases: *Mayagna Awas Tigni v. Nicaragua* (2000); *Moiwana Community v. Suriname* (2005); *Yakye Axa Indigenous Community v. Paraguay* (2005); *Sawhoyamaxa Indigenous Community v. Paraguay* (2006); *Saramaka People v. Suriname* (2007); *Xákmok Kásek Indigenous Community v. Paraguay* (2010); and *Kichwa Indigenous People of Sarayaku v. Ecuador* (2012). Such cases demonstrate that strictly formal factors such as the length of stay in the territory and its continued occupation are not decisive for the right to a differentiated protection of the communal property.

Thus, in this section the article will analyze the evolution of the Inter-American System jurisprudence in the matter, highlighting its major steps. The protection of traditional peoples' property rights has significantly developed, evolving from the recognition that Article 21 ACHR comprises the right to communal property to the clear statement that the need to a special protection, addressed by item 2 of Article 21 ACHR, is based on the close tie that those peoples have with their traditional lands.

I. Tendencies on the Inter-American Human Rights System: The First Cases on Communal Property of its Contentious Jurisprudence

In this first sub-section the article will analyze the major progress brought by the first four cases of communal property of the contentious jurisprudence of the Inter-American Human Rights System. Beginning with the case *Mayagna* and passing by the cases *Moiwana*, *Yakye Axa*, and *Sahoyamaxa*, it will be examined how the Court has developed its jurisprudence with regard to the protection offered by Article 21 ACHR and to the safeguards that must be observed for an admissible restriction of the traditional peoples' property rights.

In the case of the Mayagna community, first to appear in the jurisprudence of the Inter-American System on the subject, the Court explained the reasoning carried out towards the assertion that Article 21 ACHR does encompass the protection of the right to communal property of indigenous peoples:

“Through an evolutionary interpretation of international instruments for the protection of human rights, taking into account applicable norms of interpretation and pursuant to article 29(b) of the Convention -which precludes a restrictive interpretation of rights-, it is the opinion of this Court that article 21 of the Convention protects the right to property in a sense which includes, among others, the rights of members of the indigenous communities within the framework of communal property, which is also recognized by the Constitution of Nicaragua.”³⁴

Also in this case, the Court clarifies the content of Article 21 ACHR to determine that the term “property” therein present “can be defined as those material things which can be possessed, as well as any right which may be part of a person's patrimony; that concept includes all movables and immovables, corporeal and incorporeal elements and any other intangible object capable of having value”.³⁵

Already, in this first of its kind jurisprudence on the matter, the Court addresses the topic that will later be shown at the core of the protection provided to the right to communal ownership of property: the special relationship

³⁴ *Awás Tingni Case*, *supra* note 2, 74, para. 148.

³⁵ *Ibid.*, 73, para. 144.

that this people has with the traditional territory it inhabits. In this sense, it underlines the communal form of exercising property ownership that surrounds these communities, as well as the fact that the relationship with the land is the fundamental basis of their cultures, spiritual life, integrity, and 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.”³⁶

The Court explains that although such bond with the territory is crucial for the recognition of a special protection due to the communal property of these peoples, it is not necessary for the community to have inhabited one single place or possessed the same configuration over the centuries. Therefore, in spite of the community’s different placements along its history, this factor does not withdraw the protection of their property rights under the ACHR.³⁷ In this sense, a report by the Inter-American Commission established that such movements are a natural part of the culture and history of these peoples, adding that “the history of indigenous peoples and their cultural adaptations along time are not obstacles for preserving their fundamental relationship with their territory, and the rights that stem from it”.³⁸

In this case, the Court also draws attention to the fact that the relationship these peoples have with their land and natural resources is also protected by other rights under the ACHR, such as the right to life, honor and dignity, freedom of conscience and religion, freedom of association, family rights, and freedom of movement and resistance.³⁹ This statement not only demonstrates the indivisible character of the human rights, but also reinforces the finding that the relationship with the territory inhabited by these communities goes beyond material aspects, representing an intrinsic part of their entire mode of existence.

In the same case, the Court justifies the violation of the property right of the Mayagna by the fact that the limits of their territory have not been effectively

³⁶ *Ibid.*, 74, para. 149.

³⁷ *Ibid.*, 70, para. 140 a.

³⁸ IACHR, *Norms and Jurisprudence of the Inter-American Human Rights System*, *supra* note 16, 27-28, para. 70.

³⁹ *Awás Tingni Case*, *supra* note 2, 70-74, para. 140-141.

delimited and demarcated by the State, whose officials granted a concession on the lands without the Mayagnas' consent.⁴⁰ Although the Court enumerates the requirements set by Article 21 ACHR for an admissible restriction of the right to property,⁴¹ it still does not develop such criteria. These requirements are better developed in the following cases, and represent an important tool to address the conflict between fundamental rights, when finding a level of compatibility is necessary, but in the least restrictive possible way.

Some years later, the Court analyzes the first case of communal property rights of tribal peoples, the case of the *Moiwana Community*, in which it emphasizes once more the importance of the special relationship that traditional peoples have with their territory and the communal form in which they exercise their property rights.

The *Moiwana* case represents an important step in the jurisprudence of the Inter-American Court towards an increasingly solid protection of the right to communal property. Therein, the Court clearly establishes the necessary extension of the special protection to communal property to tribal communities, taking as a starting point the bond they have with their ancestral lands. The Court begins by stating that the Moiwana people do not have a legal title of the land of Moiwana Village, territory that formally belongs to the State, but adds, in reference to the case of the *Mayagna*, that for indigenous communities who have occupied their traditional lands in accordance with their customary practice, the mere possession of land should be sufficient to obtain legal recognition of property.⁴²

In this regard, the Inter-American Court considers that

“[t]he Moiwana community members are not indigenous to the region; according to the proven facts, Moiwana Village was settled by N'djuka clans late in the 19th Century (supra paragraph 86(11)). Nevertheless, from that time until the 1986 attack, the community members lived in the area in strict adherence to N'djuka custom”.⁴³

⁴⁰ *Ibid.*, 76, para. 153.

⁴¹ *Ibid.*, 74, para. 143.

⁴² *Moiwana Community v. Suriname*, Judgment of 15 June 2005, IACtHR Series C, No. 124, 54, paras 130 & 131. [Moiwana Case].

⁴³ *Ibid.*, 54, para. 132.

Thus, their “all-encompassing relationship” to their traditional lands is a sufficient element to obtain the State recognition of their ownership.⁴⁴

In the following years, the Court reinforces this logic in the cases *Yakye Axa* and *Sawhoyamasa*, making increasingly clear references to the significance of these special ties to the land, until the case of the *Saramaka People v. Suriname* (2007), when the Inter-American Court goes further with regard to the special protection that traditional peoples are entitled concerning communal property rights.

In each one of these cases, the Court refers to the protection already granted in its previous decisions, demonstrating the consistent and evolving character of such protection to property rights. Regarding the case of the Community Yakye Axa, the Court states that it will consider “the special meaning of communal property of ancestral lands for the indigenous peoples, including the preservation of their cultural identity and its transmission to future generation”.⁴⁵

In this case, the Court itself recognizes the importance and the necessity of this development, considering that its interpretation should accompany the evolution of international instruments on the subject, since they are live instruments.⁴⁶ This statement is consistent with the general interpretation presented on Article 29 ACHR and on Article 31 of the *Vienna Convention on the Law of Treaties*.⁴⁷

Likewise, the Court recognizes the need to resort to other international texts on the subject, in an effort to interpret the ACHR according to the evolution of the Inter-American Human Rights System, taking into account the parallel developments in the international human rights law.⁴⁸ Thus, it emphasizes the particular importance of *ILO Convention No. 169*,⁴⁹ since it contains several provisions relating to the right to property concerning indigenous and tribal peoples, which may be used to clarify the content and scope of Article 21 ACHR.

The most important advancement brought about by this case, however, is the development of the content of these requirements present in Article 21 ACHR, setting the guidelines for what can be considered as permissible restrictions on property rights. Accordingly, the Court clarifies that such restrictions must be established by law; must be necessary; must be proportional; and must present a

⁴⁴ *Ibid.*, 54-55, para. 133.

⁴⁵ *Yakye Axa Case*, *supra* note 2, 74, para. 124.

⁴⁶ *Ibid.*, 74, para. 125.

⁴⁷ *Vienna Convention on the Law of Treaties*, 23 May 1969, Art. 31, 1155 UNTS 331, 340.

⁴⁸ *Yakye Axa Case*, *supra* note 2, 74, para. 127.

⁴⁹ *Ibid.*, 75, para. 130.

purpose to attain a legitimate goal in a democratic society.⁵⁰ The Court further declared the following:

“The necessity of legally established restrictions will depend on whether they are geared toward satisfying an imperative public interest; it is insufficient to prove, for example, that the law fulfills a useful or timely purpose. Proportionality is based on the restriction being closely adjusted to the attainment of a legitimate objective, interfering as little as possible with the effective exercise of the restricted right. Finally, for the restrictions to be compatible with the Convention, they must be justified by collective objectives that, because of their importance, clearly prevail over the necessity of full enjoyment of the restricted right.”⁵¹

The criteria, however, refer to general requirements that must be met by the State government when a project may cause restrictions in the enjoyment of property rights of its citizens. The case still does not mention the specific criteria established by the *ILO Convention No. 169* and how this document should be considered when dealing with communal property rights of traditional peoples. The Court limits its statement to the need for compensatory measures when there are no means of restoring the lands and the natural resources taken,⁵² failing to consider other demands such as the right to consultation, benefit sharing and appropriate study of social and environmental impacts.

In the case of the *Sawhoyamaxa Community*, the Court reiterates the need for compensatory measures whenever it is not possible to return the land set aside, adding the requirement that such lands must be chosen through an appropriate consultation procedure,⁵³ to be performed with the affected communities. Once again referencing the first case on the subject, the Court highlights:

“[T]he close ties the members of indigenous communities have with their traditional lands and the natural resources associated with their culture thereof, as well as the incorporeal elements deriving therefrom, must be secured under Article 21 of the American Convention. The culture of the members of indigenous communities reflects a

⁵⁰ *Ibid.*, 77, para. 144.

⁵¹ *Ibid.*, 78, para. 145.

⁵² *Ibid.*, 78, para. 149.

⁵³ *Sawhoyamaxa Case*, *supra* note 2, 76, paras 135 & 212.

particular way of life, of being, seeing and acting in the world, the starting point of which is their close relation with their traditional lands and natural resources, not only because they are their main means of survival, but also because the form part of their worldview, of their religiousness, and consequently, of their cultural identity.”⁵⁴

II. The *Saramaka* Case and the Subsequent Progress: The Consolidation of the Special Link to the Land as a Key-Factor

Leading to another examination of the Inter-American Court about the violation of the right to communal ownership of tribal peoples, the *Saramaka* case is a milestone in the Inter-American System jurisprudence. This case can be considered as a starting point for analyzing the progress made by Inter-American System to consolidate the special link with the territory as the determining factor for granting special protection for the right to communal property. The reasons for this choice will be analyzed in this sub-section.

Originated from the maroon communities of Surinam, the Saramaka people is not indigenous to the region it inhabits, as its members were taken to the area during the colonization period.⁵⁵ Thus, the Saramaka claim their rights as a tribal people, once their community presents characteristics similar to those of indigenous peoples, such as social, cultural, and economic traditions different from other sectors of the society and possesses its own form of organization, being governed at least partially by their own rules, customs, and traditions.⁵⁶ More importantly, their relationship with the land is one of the main aspects of their culture and is intrinsically linked to its historic struggle against slavery.⁵⁷

This case is paradigmatic for the analysis the article wants to achieve because it develops, for the first time in the jurisprudence of the Inter-American Court, the need to conduct consultation, benefit sharing and studies of the social and cultural impacts in situations of restriction on the enjoyment of the right to communal ownership of traditional peoples. Furthermore, the *Saramaka* case establishes, even more clearly, that the criteria for granting such special safeguards to communal property rights were centered on the identification of a particular tie to the territory.⁵⁸

⁵⁴ *Ibid.*, 71, para. 118.

⁵⁵ *Saramaka Case*, *supra* note 2, 23, para. 79.

⁵⁶ *ILO Convention No. 169*, Art. 1 (1), *supra* note 15, 1384-1385.

⁵⁷ *Saramaka Case*, *supra* note 2, 24, para. 82.

⁵⁸ See L. Brunnes, ‘The Rise of Peoples’ Rights in the Americas: The Saramaka People Decision of the Inter-American Court of Human Rights’, 7 *Chinese Journal of International Law* (2008) 3, 699, 702, 704-706, paras 6, 14 & 16.

In this regard, and evolving from the basic requirements already presented, the Court adds an essential factor: such restrictions, although meeting the mentioned criteria, can only be admissible if they do not amount to a denial of the community's traditions and customs in a way that endangers the very survival of the concerned group and its members.⁵⁹

Besides the above-mentioned developments, in the *Saramaka* case, the Inter-American Court states precisely that the special relationship that some peoples have with their traditional territories is the central criterion used by it to give special protection to the right to common property of these populations. In this sense, the Court states "this special relationship to land, as well as their communal concept of ownership, prompted the Court to apply to the tribal Mowiana community its jurisprudence regarding indigenous peoples and their right to communal property under Article 21 of the Convention".⁶⁰ Reinforcing this reasoning, the Court elucidates "decisions to this effect have all been based upon the special relationship that members of indigenous and tribal peoples have with their territory, and on the need to protect their right to that territory in order to safeguard the physical and cultural survival of such peoples".⁶¹

The case of the *Indigenous Community Xákmok Kásek* brings some further innovations in the field when recognizing that the multi-ethnic character of the community concerned does not affect their right to communal property. It emphasizes, referring to the Commission's allegations, that "the multi-ethnic composition of the Community [...] is due to its history" and that the indigenous peoples are dynamic human groups whose cultural composition "is restructured and reconfigured with the passage of time without this giving rise to the loss of its specific indigenous status".⁶² This statement is important in the way that it reinforces the trend that has been settled throughout the jurisprudence on the subject in order to rely upon the protection of communal property rights on criteria related to the ties with the land.

In the case of the *Kichwa Indigenous People of Sarayaku v. Ecuador*, the most recent case of the Inter-American Court's jurisprudence on the matter, consolidates the progressive approach that had been carried out by the previous cases, setting out even more clearly the decisive character of the relationship that traditional peoples establish with their territories. Thus, the Court states

⁵⁹ *Saramaka Case*, *supra* note 2, 38, para. 128.

⁶⁰ *Ibid.*, 25-26, para. 85.

⁶¹ *Ibid.*, 26, para. 90.

⁶² *Xákmok Kásek Indigenous Community v. Paraguay*, Judgment of 24 August 2010, IACtHR Series C, No. 214, 10, para. 35 [Xákmok Kásek Case].

that “[n]evertheless, in addition to the considerations in the chapter on the facts of the case [...], the Court considers it pertinent to emphasize the profound cultural, intangible and spiritual ties that the community has with its territory, in order to understand more fully the harm caused in this case”.⁶³

The Court goes a step further, by referring to the fact that in addition to the indigenous and tribal peoples, native and autochthonous communities must also hold a special protection of the right to property. Thus, it reinforces its argumentative logic that, when dealing with traditional property rights, the main aspect to be considered must be the link to the land, suggesting that other groups, which are not ethnically classified as indigenous or tribal, shall also have access to these rights.

It confirms that the identification of a bond with the territory is the most appropriate criterion for granting this protection, in opposition to criteria based on ethnic aspects, which depend on the classification of these groups as indigenous or tribal peoples and are not able to represent all the complexity that they present.

Those ethnic aspects, insufficient standards for granting the special protection to communal property of traditional peoples, may fail to provide the guarantees to enforce these rights. On one side, they force the classification of these groups into categories that do not represent them, associating their inclusion among the holders of those special protections to an oversimplification of their identity realities. On the other side, they deny these peoples the rights that are owed to them as a community connected to its territory, based on under-inclusive criteria that should not be determinant to safeguard communal property rights.

This tendency can also be identified in the United Nations System, in a series of recent instruments that give other traditional peoples the same rights granted to the indigenous and tribal communities regarding the protection of their communal property. It demonstrates an effort to overcome the restriction imposed by terminological terms, moving towards a protection grounded in the bond established with the territory inhabited by the traditional community. In the *Guiding Principles on Internal Displacement*, the Human Rights Commission discusses the state obligation to take actions to protect against the displacement of indigenous peoples, minorities, peasants, pastoralists and other groups with a special dependency on and attachment to their lands.⁶⁴ The range of recipients

⁶³ *Sarayaku Case*, *supra* note 15, 37, para. 149 [Kichwa Case].

⁶⁴ United Nations Commission on Human Rights, *Guiding Principles on Internal Displacement*, UN Doc E/CN.4.1998/53/Add.2 (1998), reprinted as UN Doc OCHA/

of this particular protection is one more time enlarged, and another reference is made to the essence of communal property rights: the special attachment to their lands.

The Human Rights Committee in its *General Comment No. 23* on Article 27 of the *International Covenant on Civil and Political Rights* brings a similar provision. Article 27 of the document emphasizes the importance that minorities are not denied the right to enjoy their own culture.⁶⁵ These rights consist, according to the *General Comment No. 23*⁶⁶ of the enjoyment of a way of life closely associated with the territory and the use of its resources and complements, stating that

“[C]ulture manifests itself in many forms, including a particular way of life associated with the use of land resources, especially in the case of indigenous peoples. That right may include such traditional activities as fishing or hunting and the right to live in reserves protected by law. The enjoyment of those rights may require positive legal measures of protection and measures to ensure the effective participation of members of minority communities in decisions which affect them.”⁶⁷

In this paragraph, there is also a direct reference to the right of these communities to participate in the decisions that may affect their right to communal property.

The fact that these two examples are featured in recent documents raises an important issue: the binding documents on the protection of communal property of indigenous and tribal peoples in the Inter-American System, among which the most relevant are the ACHR and the *ILO Convention No. 169*⁶⁸ need a contextualization effort to remedy the outdated approach concerning some issues, like the right to communal property. Therefore, to effectively fulfill their role safeguarding human rights, these texts should be adapted and interpreted according to the new developments of the international law. Some

IDP/2004/01 (2004), 5, Principle 9.

⁶⁵ *International Covenant on Civil and Political Rights*, 16 December 1966, Art. 27, 999 UNTS 171, 179.

⁶⁶ HRC, *General Comment 23*, *supra* note 24, 2, para. 3.2.

⁶⁷ *Ibid.*, 4, para. 7.

⁶⁸ See *supra* notes 15 & 16.

of these documents still present an assimilationist approach⁶⁹ when dealing with indigenous and tribal peoples and even those texts that have already surpassed this point of view insist on employing notions that are no longer correspond to the existing demands of traditional communities. Taking into account the progress reported by the jurisprudence development of the Inter-American Court and the international documents on the matter, retaining the use of the classifications such as “indigenous and tribal peoples” may reveal a reluctance to overcome the terminology limits for the offering of an adequate protection to communal property rights.

There have been several evidences of the increasingly broad recognition of special guarantees for the right of communal ownership of traditional peoples, accepting they should be granted based on the analysis of their bond with their territory. This resistance to put aside terminology issues is often based on the apprehension concerning the effects of an excessive extension of such protection, which may lead to an emptying of its meaning and the impossibility of identifying the legitimate recipients of communal property safeguards. Although understandable, this preoccupation should not pose a barrier to the protection of the common property of these groups. It is a question that shall be addressed by the proper analysis of the key-element that substantiates the granting of specific property rights safeguards: the identification of a special bond between the traditional community and its territory.

E. The Limitations of Formal Ethnic Classifications to an Effective Protection of Human Rights: The *Garifuna* Case

The detachment of communal property rights from the terminology discussion regarding indigenous and tribal peoples is an essential element to make sure that the protection of these special property rights reaches all its due recipients – not only due to the difficulty of specifying the holders of indigenous and tribal designations, but mainly because these terminological aspects are

⁶⁹ R. D. Cordero, ‘Los Derechos de los Pueblos Indígenas y la Protección al Medio Ambiente Dentro del Sistema Interamericano de Protección de los Derechos Humanos’, 24 *American University International Law Review* (2008) 1, 7, 9; ILO, *Convention Concerning the Protection and Integration of Indigenous and Other Tribal and Semi-tribal Populations in Independent Countries*, 26 June 1957, Art. 1, 328 UNTS 247, 250 [ILO Convention No. 107]. The Convention describes tribal and semi-tribal peoples as populations whose “social and economics conditions are at a less advanced stage”.

not important to the rights here discussed. Particularly in the Latin-American context, traditional communities often are classified as “indigenous”, “tribal” or “peasants” even though their cultural dynamic over time made this communities undertake a multi-ethnic profile. That is the case of the *Garifuna People*, a community that emerged from the singular combination of multiple ethnic backgrounds, embracing African, Amerindian, and European traditions.⁷⁰

Due to its complex ethnicity, to its claim placed before the Inter-American Commission⁷¹ and to the recently filed application before the Inter-American Courts,⁷² the Garifuna people represents an excellent example to demonstrate the negative effects of basing the safeguarding of property rights on restrictive anthropological classifications. As they built their cultural identity as a community, members of the Garifuna people have persistently maintained a specific relationship to their territory, and this is a constant defining-element of the Garifuna way of life. The traditions from the Caribs and Africans were preserved and blended, forming a hybrid people⁷³ whose traditional customs and values, including their bond to the land, must be considered elements of the Garifuna identity, that should not be restricted to only one of its ethnic origins. Just as well as the communities that fully fulfill all the formal characteristics of what can legally be considered an “indigenous people”, the Garifuna may also present, even though their multi-ethnic heritage, cultural adaptations and structures that are based on a special relationship to their territory.⁷⁴

Closely examining the idea of defining what should be understood as “indigenous peoples”, it is possible to identify a contradiction between the dynamic of the traditional communities and the static characteristic of a legal definition.⁷⁵ Once we admit that definitions like the one established by the *ILO Convention No. 169* make reference to a preset ensemble of elements that should be found in a community in order to consider it “indigenous”

⁷⁰ K. Stevens, ‘Garifuna Cultural History’ (2000), available at http://www.stanford.edu/group/arts/honduras/discovery_eng/history/culthist.html (last visited 02 May 2013).

⁷¹ *Garifuna Community of Cayos Cochinos and its Members v. Honduras*, IACHR Case 1118-03, Report No. 39/07, 24 July 2007, [Garifuna Case].

⁷² *Garifuna Community of “Triunfo de la Cruz” and its Members v. Honduras*, IACHR Case No. 12.548, 21 February 2013.

⁷³ See J. A. Mills, ‘Legal Constructions of Cultural Identity in Latin America: An Argument Against Defining ‘Indigenous Peoples’’, 8 *Texas Hispanic Journal of Law and Policy* (2002), 49, 64-66.

⁷⁴ IACHR, *Norms and Jurisprudence of the Inter-American Human Rights System*, *supra* note 16, 11 & 12, paras 35 & 36.

⁷⁵ Mills, *supra* note 73, 67.

or “tribal”, using these denominations to define the scope of the amplified protection of property rights necessarily excludes traditional communities like the Garifuna from the field of these special safeguards.⁷⁶ However, this exclusion is based on how a static legal definition qualified the recipients of communal property rights protection according to the conjuncture in which the text was elaborated,⁷⁷ improperly dissociating this protection from its core fundament: the special ties these communities have with their territory.

Moreover, the relationship to the land itself is presented as a dynamic and adaptable social phenomenon,⁷⁸ which deserves an accordingly flexible approach. Otherwise, the specificities of the Garifuna historic organization as unique community would implicate a denial of its rights related to the common ownership of property, based on the fact that, according to most international law parameters regarding indigenous peoples’ rights, the Garifuna barely satisfy the requirements to achieve a special protection in order to preserve their

⁷⁶ While the *ILO Convention No. 169* is being used as an example of the insufficiency of legal definitions to an effective safeguard of traditional peoples’ rights, it is necessary to point out how this document already shows a significant evolution on the protection of indigenous and tribal peoples’ rights, specially once it considers, on Art. 1, “[S]elf-identification as indigenous or tribal shall be regarded as a fundamental criterion” in order to define the groups under the protection of the Convention. On the other hand, it still attaches this “self-identification” to the tribal or indigenous classifications – a traditional community, which does not identify itself as tribal or indigenous, would remain excluded from the Convention safeguards, even though such group could demonstrate a special bond to its territory that should justify a broader protection to its property rights.

⁷⁷ The *ILO Convention No. 169* is an example itself of how legal definitions not always respond promptly to constantly evolving demands. Advancing on the protection of indigenous and tribal peoples’ rights, the *ILO Convention No. 169* is the result of several contestations concerning the ILO previous document on the matter, *ILO Convention No. 107*. Although the *ILO Convention No. 169* is a fundamental step towards a more comprehensive and effective protection of indigenous and tribal peoples’ rights, leaving behind the assimilationist ideas that were incrustated in the *ILO Convention No. 107*, it does not mean that the earlier conceptions, which sustained its elaboration in 1989, have not been surpassed by the ever-changing scenario of traditional communities and their claims. The *Garifuna Case* in question, for example, was only brought before the Inter-American Commission on Human Rights in 2007, raising inquiries that the *ILO Convention 169* has not managed to embrace within its text. For an analysis of the evolution of the ILO work on indigenous peoples’ rights, see L. Swepston, ‘A New Step in the International Law on Indigenous and Tribal Peoples: ILO Convention No. 169 of 1989’, 15 *Oklahoma City University Law Review*, (1990) 1, 677.

⁷⁸ M. Chapmam, ‘Indigenous Peoples and International Human Rights: Towards a Guarantee for the Territorial Connection’, 26 *Anglo-American Law Review* (1997) 3, 357, 360.

cultural integrity as a community.⁷⁹ Considering the Commission on Human Rights definition presented in the *Cobo* study,⁸⁰ for example, the Garifuna do qualify as a “non-dominant sector of society”, but they do not show a “historical continuity with pre-invasion and pre-colonial societies that developed on their territories”⁸¹ once they consider themselves a separate and distinguished group from the Carib population.⁸²

The critical point in the *Garifuna* case also relies on a particular tendency towards the modernization of certain practices. Members of the Garifuna community may have acquired new habits, incorporating some aspects of the other sectors of society in a movement towards their adaptation and even to their own survival in a continually changing social conjuncture. Rather than a decharacterization of the community, the process of adaptation is a trait frequently found in the context of indigenous peoples and other traditional groups,⁸³ that do not need to freeze in time in order to demonstrate their legitimate will to uphold their cultural identity. Although this development of their practices does not imply the elimination of the cultural identity of the Garifuna people, it is contrary to the formal exigencies of the legal frame for the protection of indigenous property rights. If these formal requirements are rigidly respected, it might lead to an extremely incongruous scenario:

“[O]ver time the Garifuna might intentionally become less socially, culturally, and economically distinct from the rest of the Honduran community. Nevertheless, the law should recognize and protect the right to retain a unique Garifuna identity despite the fact that self-identified Garifuna individuals choose wealth over poverty. Allowing disinterested lawyers and officials – people who would not

⁷⁹ Mills, *supra* note 73, 66-67.

⁸⁰ The definition presented by M. Cobo also fails to comprise the protection to other traditional communities such as the Wayúu (community living in the outskirts of Maracaibo, Venezuela; although they were unable to preserve ancestral territories, they did not lose their indigenous identity) and the Fijians (a group that has recently achieved preeminence in a nation-state, failing to meet the criterion of non-dominant sector in the society). For more details on the Cobo definition under-inclusiveness, see S. Wiessner, ‘Rights and Status of Indigenous Peoples: A Global Comparative and International Legal Analysis’, 12 *Harvard Human Rights Journal* (1999), 57, 111.

⁸¹ Special Rapporteur of the Sub Commission on Prevention of Discrimination and Protection of Minorities, *Study of the Problem of Discrimination Against Indigenous Populations*, UN Doc E/CN.4/Sub.2/1986/7Add.4 (1986), para. 379.

⁸² See Mills, *supra* note 73, 67 (note 98).

⁸³ D. Stephen & P. Wearne, *Central America's Indians* (1984), 3, 11.

identify themselves as indigenous – to formulate a legal definition of indigenous peoples, could potentially and quite ironically require the Garifuna to choose a hut over a house in order to benefit from the indigenous rights movement.”⁸⁴

This idea demonstrates how the stereotype of indigenous peoples can overshadow the basic notion that traditional communities are not determined to live permanently attached to their native habits in order to prove their cultural identity. In this sense, one cannot sustain that the fact that the community has incorporated other practices – such as variations on its dialect or changes on its traditional clothing – will completely suppress its cultural integrity. In fact, it is due to its adaptations overtime that the Garifuna have been able to maintain their uniqueness, absorbing new cultural elements as long as they represented an actual contribution to the Garifuna culture itself.⁸⁵

On the other hand, it is important to underline that it is not a matter of enlarging the concept of indigenous peoples itself; the focus is rather on how the Garifuna people should qualify to a special protection of their communal property rights once their cultural subsistence as a community is attached to their relationship to the territory. Consequently, observing the existence of a tie to the land as a key-factor, the impossibility to formally classify the Garifuna people as a tribal or indigenous community should not interfere in the protection of their right to communal property. This reasoning, although not yet directly applied by the Inter-American Court, is perfectly suitable to support the Inter-American Commission allegation in the Admissibility Report of the Garifuna Community of Cayos Cochinos and its members’ petition, acknowledging the violation of Article 21 of the Convention, in conjunction with Article 1 (1).⁸⁶ The Report states that once the Garifuna were prevented to fully enjoy their communal property rights, being unable to pursue the traditional activities linked to their territory.

The Inter-American Commission recognizes, consequently, the importance of the due respect of Article 21 ACHR towards the Garifuna community, once their traditional activities are closely related to the property collectively owned by them. Questions concerning the ancestral character of such lands or if the members of the community have an indigenous heritage are left aside, prioritizing the effective tie the Garifuna people establishes

⁸⁴ See Mills, *supra* note 73, 68.

⁸⁵ See Stevens, *supra* note 70.

⁸⁶ *Garifuna Case*, *supra* note 71, para. 66.

with its territory and how this specific connection to the land is an essential element for the preservation of the cultural and physical integrity of the Garifuna community and its members. If the Commission were to consider the legal definitions of indigenous and tribal peoples consolidated by the international *corpus iuris*,⁸⁷ the Garifuna would not be reached by the protection of communal property rights, because these legal frames favor the historic continuity with a preinvasion society and other requirements that are not centered on the actual relationship between the community and the territory.⁸⁸

Showing a complex composition and particular conditions of cultural development, the Garifuna case is able to reveal the limitations of applying a pre-established legal definition in order to define the recipients of the safeguard of communal property rights. The lively structure of this community – and definitely of other cases of multi-ethnic communities⁸⁹ – is not compatible with the static nature of the attempt to classify all kinds of traditional communities into the “indigenous” or “tribal” denomination provided by international human rights instruments. Furthermore, the controversy and evolution of such definitions themselves demonstrate that indigenous and tribal peoples are also susceptible to dynamic legal frames.⁹⁰ However, once a close tie to the land

⁸⁷ Some examples of the most commonly used legal definitions used in the field of the international human rights law can be found in Article 1 of the *ILO Convention No. 169* and in Cobo, *supra* note 81.

⁸⁸ See Mills, *supra* note 73, 67.

⁸⁹ For the analysis of how several traditional communities in the United States still wait for a recognition in order to be entitled to the safeguards restricted to those who present the status of “Indian tribe” based on scientific evidence see Chairperson-Rapporteur of the Working Group on Indigenous Populations, *Standard-Setting Activities: Evolution of Standards Concerning the Rights of Indigenous People: Working Paper*, UN Doc E/CN.4/Sub.2/AC.4/1996/2, 10 June 1996.

⁹⁰ It is important to emphasize that, today, we can find other international instruments that attribute the indigenous status to groups that not necessarily demonstrate historical continuity with pre-colonial communities (this element is more present in the Cobo definition and is used only as a subsidiary objective element to define indigenous peoples on the *ILO Convention No. 169*). Such examples may include the World Bank’s *Operational Policy 4.10*, the International Law Association’s *Final Report on the Rights of Indigenous Peoples* and on UN works such as the *Guidelines on Indigenous Peoples’* (Issue 8 (2008)) by the UN Development Group. However, even these more updated documents on indigenous peoples’ rights, fail to relate the protection of traditional territories to the special bond traditional peoples have with their lands. Determining the protection of such rights based on their self-identification as tribal or indigenous is already a step forward considering criteria like historical continuity or perpetuation of cultural specificity, but it still obliges traditional people to choose between two pre-defined ethnical classifications

emerges as a fundamental aspect of the cultural integrity of these peoples, the formality of a legal definition cannot deny the due respect of their rights to property, safeguarding the full enjoyment of the range of human rights that arises from the special relationship the community nurtures with its territory.

F. A Step Further on the Protection of Traditional Lands and Cultural Identity

Presenting a substantial jurisprudence on tribal and indigenous peoples' rights, the Inter-American Human Rights System has shown a progressive understanding on the matter, leading to a more comprehensive protection of the rights of these traditional communities. However, the addressing of communal property rights issues needs to take a step further in order to properly deal with the increasingly complexity of the cases presented before the Inter-American Court and Commission on Human Rights. As the Inter-American System exercises a global influence on the subject, it plays a key-role on the consolidation of traditional peoples' rights.⁹¹ The effectiveness of this consolidation, nevertheless, relies on the acknowledgement of the fundamental importance of a community's close tie to the land when it comes to property rights.

Again, it is imperative to point out, nevertheless, that considering the bond to traditional territories as the defining element to the safeguard of communal property does not imply an unlimited extension of the special standards on the protection of property rights. The relationship between traditional communities to the land they inhabit is relevant from the moment it represents an essential element of these communities' cultural identity and integrity. This specific characteristic is clearly distinguishable from the cultural patterns of other society segments, and there resides the need to a distinguished protection of the property rights. Consequently, a careful analysis of the existence of a true bond to the territory in question should be carried out when demands concerning communal property rights are placed; but this examination shall not be based on

– tribal or indigenous – in order to qualify as recipients of a special protection of property rights that should rather focus on the actual relationship these communities nurture with their territories (see *supra* note 76).

⁹¹ See A. R Harrington, 'Internalizing Human Rights in Latin America: The Role of the Inter-American Court of Human Rights System', 26 *Temple International & Comparative Law Journal* (2012) 1, 1, 20. Concerning the Inter-American jurisprudence on the recognition and protection of communal property rights, see also *Sawhoyamaxa Case*, *supra* note 2, 30-58, 71-72 & 105-106, paras 73, 120 & 248; *Xákmok Kásek Case*, *supra* note 62, 21, paras 85-86.

pre-established definitions regarding the ethnical classification of a traditional people.

Moreover, the change of perspective from the ethnical classification of a community to what its close ties to the land really mean is not linked to an amplification of the “indigenous people” concept. Although indigenous peoples are the main figure when it comes to communal property issues, it is not necessary to frame, in a single ethnic group, all the other peoples that demonstrate a special bond to their traditional lands. This remark is crucial to support the reasoning developed in this article, once we believe that to guarantee a peoples’ right to communal property, the relationship of these peoples to their land transcends the need to attribute a classification to the community in question. Thus, discussions on how a certain people should be considered tribal, indigenous or whichever other ethnic designation should be put aside in order to avoid the exclusion of peoples that do have a close tie to their traditional lands, but fail to fulfill the criteria that would allow them to be classified as one of these juridical categories.

Through the analysis of the *Moiwana* case it is possible to notice that while the Inter-American Court did recognize that tribal peoples should have their communal property rights guaranteed *due to their bond with their ancestral lands*,⁹² the argument used by the Court remains attached to the concept of “tribal people”. According to the reasoning presented on this case, the Court set out a new extent for the special protection to communal property rights: tribal communities should also fall under the expanded protection of Article 21 ACHR. On the other hand, as the Court does not sufficiently emphasize the centrality of a community’s tie to its territory when granting a special protection of property rights, other traditional peoples that do not correspond to the legal definitions for tribal or indigenous peoples remain vulnerable on the matter of communal property rights safeguards. The ultimate consequence of this logic is that communities like the Garifuna people, despite having on its relationship to the land a determinant factor for the physical and cultural survival of the community, cannot rely on this tie to its territory to be granted the due protection of their communal property rights.

When the bond of the community to its territory comes to the center of the legal analysis on communal property rights, defining which ethnical category this community belongs to is taken to a second plan, and the focus is given to the essence of the reasoning behind the special protection of traditional peoples’ property rights. The definition of indigenous and tribal peoples may

⁹² *Moiwana Case*, *supra* note 42, 54-55, para. 133.

embody important tools for the study of traditional peoples, but they should not be the basis of the legal analysis performed here. Besides the fact that they fail to include traditional communities that equally demonstrate to be entitled to a wider right to property, it artificially forces a complex ethnic group into either the indigenous or the tribal people classification. The critical point here is to risk denying basic rights to traditional peoples based on the fact that these differentiated groups will not reduce their cultural identity to one single ethnical background. Hereafter, the non-recognition of special standards on the protection of property rights to certain groups due to the absence of specific elements required to their classification as indigenous or tribal peoples – such as historical continuity with pre-invasion societies – is inconsistent with the protection of all the fundamental rights of these groups right to uphold their cultural integrity as a community.

The provision of a special protection to the right of communal ownership should not be centered on another aspect than the special bond of intrinsic dependence they establish with their territories. Nonetheless, by disengaging the offer of such protection from ethnic classifications, we do not intend to extend such rights to any person to whom the land has any significance. Our main objective is to use the progressive understanding already reached on the matter to lead to a more comprehensive protection of the rights of these traditional communities, being aware that an unreasonable extension of this protection may take away the material and legal substance of such rights. In this sense, the employment of the tie to the land as the defining element to the protection on of communal property rights should be considered as a legal criterion to grant a distinctive range of juridical safeguards and as such, should maintain the exclusion of those individuals and groups that do not meet the necessary criterion to be qualify as a recipient of this amplified protection.

These excluded recipients would be, for instance, minorities that depend economically on their land, but would not have their cultural integrity affected if their relationship by the interruption of their relationship with the territory. This commonly found interdependence to the land resources based on a relationship of physical subsistence differs from the cultural bonds traditional communities develop with their territories, failing to demonstrate the strong spiritual and cultural dimensions of a non-physical relationship to the land.⁹³ Notwithstanding some communities like the peasant groups present this

⁹³ E. Dannenmaier, 'Beyond Indigenous Property Rights: Exploring the Emergence of a Distinctive Connection Doctrine', 86 *Washington University Law Review* (2008-2009) 1, 53, 103.

economical link to the territory they inhabit, this interdependence does not imply an outspread understanding of property, which means that the concept of communal property cannot be evoked in such situations.

It is crucial to clearly identify the criteria to be considered on the field of communal property rights, directly linking them to the aims of providing a differentiated protection. At the same time, these criteria cannot lead to the under-inclusiveness presented by the restrictive placement of traditional communities under a preset ensemble of categories, such forcing to fit them into the indigenous or tribal classification. Hence, the close ties to the land cannot be considered as a random criterion; it is, in fact, an essential element of the community structure⁹⁴ and when deprived of its due protection, can disrupt the entire existence of the community, which represents a violation of its cultural integrity and may conduce to its ethnic suppression. Furthermore, an adequate identification of the key-elements of communal property rights protection prevents a boundless extension of these guarantees to any ethnic groups that use their lands purely as a mean of subsistence. The specific protection to communal property rights is rather directed to safeguard those who, if deprived of their territories, will also be deprived of the main aspects of their own lives, being unable to maintain their cultural, religious, and social traditions – the foundation of their existence as a people.

⁹⁴ At this point, it is possible to approximate the reasoning of this article to the “distinctive connection doctrine” proposed by Professor Eric Dannenmaier, when the author refrains from adopting a pre-defined concept of what is “indigenous”, stating “It is important to note, however, that a unique relationship with the land is inherent in most [of these] understandings of what is indigenous. It is also a critical feature of many public statements by indigenous peoples and advocates. Thus, it should be seen not merely as a collateral feature of an indigenous lifestyle, but rather as a core element of indigenous identity”. *Ibid.*, 63.

Indigenous Peoples' Rights and the Extractive Industry: Jurisprudence From the Inter-American System of Human Rights

Efrén C. Olivares Alanís*

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Abstract

The right of indigenous peoples over their lands, territories, and natural resources has been developed in recent years by the Inter-American Court of Human Rights. When this right is in apparent or real conflict with the rights or interests of the extractive industry over these lands or natural resources, resolving the conflict presents complex legal and practical problems. The Inter-American Court has established standards that must be met in order to restrict indigenous peoples' rights over their lands and natural resources, as well as the requirement to conduct transparent consultations in good faith and, when applicable, obtain the free, prior, and informed consent of the affected indigenous peoples before a project can be approved in their territories. This article explores these standards and requirements, and analyzes their application by the Inter-American Court and the Inter-American Commission on Human Rights.

A. Introduction

In recent years, various international legal bodies have recognized the content of the rights of indigenous peoples. In the Americas, the Inter-American Commission on Human Rights (Inter-American Commission) and the Inter-American Court of Human Rights (Inter-American Court) have developed standards to give content to and define the contours of these rights, particularly the right to collective ownership of indigenous lands and territories. As these rights have expressly become part of Inter-American law, States are called upon to abide by them. In practice, however, respect for these rights often faces obstacles, particularly when faced with significant economic interests. For instance, when indigenous peoples' rights "compete" with the interests of members of the extractive industry – such as when the right to own or use a piece of land and its resources is disputed between an indigenous people and a mining concessionaire – legal rights on paper do not always translate into actual rights in practice.

This article explores the way the Inter-American Court and Commission have developed the content of the property rights of indigenous peoples over their lands and territories in the context of extractive projects. The article first provides an overview of the origin of the rights of indigenous peoples in modern international law, followed by a summary of Inter-American case law on the subject. The concluding sections provide a snapshot of the current status of the law in the Americas and concluding remarks for what may be expected in the near future in this area of Inter-American law.

B. Origins of the Right to Consultation

In a large number of extractive projects authorized on lands occupied by indigenous peoples, the indigenous peoples do not participate in the process that leads to the concession or exploitation agreement. Yet many of these indigenous peoples have inhabited the territories they now occupy for centuries, long before the current Nation States were created. The case could be made that the rights of indigenous peoples – including those over their lands and territories – exist irrespective of their recognition by the States, since the indigenous peoples pre-date the modern States. However, that is not the purpose of this article. Rather, its focus is on the recognition of indigenous peoples' rights in contemporary international law.

I. ILO Conventions

The International Labour Organization (ILO) was one of the first international bodies to expressly recognize the rights of indigenous peoples, when it adopted the *Indigenous and Tribal Peoples Convention* (ILO Convention No. 107)¹ in 1957. As the ILO now acknowledges, *ILO Convention No. 107* was founded on the assumption that indigenous and tribal peoples were “less advanced” temporary societies destined to disappear with modernization.² *ILO Convention No. 107* referred to indigenous “populations” and generally encouraged integration.³

As the views on the rights of indigenous peoples evolved in the 1970's and 1980's, and as indigenous peoples themselves began to participate more actively in the international legal arena, the United Nations revisited the integrationist approach of *ILO Convention No. 107*. In 1986, the Governing Body of the ILO convened a Committee of Experts to review the issue, and it concluded that “the integrationist approach of the Convention was obsolete and that its application was detrimental in the modern world”.⁴ As a result, in 1989 the ILO adopted

¹ International Labour Organization (ILO), *Convention Concerning the Protection and Integration of Indigenous and Other Tribal and Semi-tribal Populations in Independent Countries*, 26 June 1957, 328 UNTS 247 [ILO Convention No. 107].

² *Ibid.*, Art. 1 (a), 250.

³ ILO, *ILO Convention on Indigenous and Tribal Peoples, 1989 (No. 169): A Manual* (2003), 4.

⁴ M. Tomei & L. Swepston, *A Guide to ILO Convention No. 169* (1995), 2.

the *Convention on Indigenous and Tribal Peoples in Independent Countries* (ILO Convention No. 169).⁵

Among other things, *ILO Convention No. 169* is founded on the belief that indigenous peoples are permanent societies, refers to indigenous and tribal “peoples” (as opposed to “populations”), and recognizes and respects ethnic and cultural diversity.⁶ *ILO Convention No. 169* provides that governments shall consult indigenous or tribal peoples whenever the government is considering legislative or administrative measures that may affect them.⁷ Consultations must be conducted “in good faith and in a form appropriate to the circumstances, with the objective of achieving agreement or consent to the proposed measures”.⁸

Articles 13 to 19 of *ILO Convention No. 169* address indigenous peoples’ rights over their lands, territories, and natural resources. The Convention first states that “governments shall respect the special importance for the cultures and spiritual values of the peoples concerned of their relationship with the lands or territories, or both as applicable, which they occupy or otherwise use, and in particular the collective aspects of this relationship”.⁹ Article 15 addresses natural resources specifically, and provides that the “rights of the peoples concerned to the natural resources pertaining to their lands shall be specially safeguarded. These rights include the right of these peoples to participate in the use, management and conservation of these resources.”¹⁰ It adds that

“[i]n cases in which the State retains the ownership of mineral or sub-surface resources or rights to other resources pertaining to lands, governments shall establish or maintain procedures through which they shall consult these peoples, with a view to ascertaining whether and to what degree their interests would be prejudiced, before undertaking or permitting any programmes for the exploration or exploitation of such resources pertaining to their lands. The peoples concerned shall wherever possible participate in the benefits of

⁵ ILO, *Convention Concerning Indigenous and Tribal Peoples in Independent Countries*, 27 June 1989, 28 ILM 1382 [ILO Convention No. 169].

⁶ ILO, ‘Convention No. 107’, available at http://www.ilo.org/indigenous/Resources/Publications/WCMS_114385/lang--en/index.htm (last visited 15 June 2013).

⁷ *ILO Convention No. 169*, Art. 6, *supra* note 5, 1386.

⁸ *Ibid.*, Art. 6 (2), 1386.

⁹ *Ibid.*, Art. 13 (1), 1387. As explained in Art. 13 (2), the use of the term “land” includes “the concept of territories, which covers the total environment of the areas which the peoples concerned occupy or otherwise use.” *Ibid.*, Art. 13 (2), 1387.

¹⁰ *Ibid.*, Art. 15 (1), 1387.

such activities, and shall receive fair compensation for any damages which they may sustain as a result of such activities.”¹¹

ILO Convention No. 169 has become a primary international source of legal obligations for States with respect to indigenous peoples. The Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous Peoples has described it as a “momentous step in the consolidation of the contemporary international regime of indigenous peoples”, noting that it “provides significant recognition of indigenous peoples’ collective rights in key areas, including cultural integrity; consultation and participation; self-government and autonomy; land, territory and resource rights; and non-discrimination in the social and economic spheres”.¹²

As of July 2013, 22 countries have ratified *ILO Convention No. 169*. Fifteen of these are in the Americas: Argentina, Bolivia, Brazil, Chile, Colombia, Costa Rica, Dominica, Ecuador, Guatemala, Honduras, Mexico, Nicaragua, Paraguay, Peru, and Venezuela.

II. United Nations Declaration on the Rights of Indigenous Peoples

After years of public debate, the United Nations General Assembly adopted the *Declaration on the Rights of Indigenous Peoples* on 13 September 2007.¹³ As a declaration, it has no binding legal effect, but serves as a guideline for the conduct and aspirations of States. Similar to *ILO Convention No. 169*, the Declaration provides that “[i]ndigenous peoples have the right to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired”.¹⁴

¹¹ *Ibid.*, Art. 15 (2), 1387.

¹² Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People, *Promotion and Protection of all Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development*, UN Doc A/HRC/9/9, 11 August 2008, 11, para. 32.

¹³ *United Nations Declaration on the Rights of Indigenous Peoples*, 13 September 2007, GA Res. 61/295 annex, UN Doc A/RES/61/295, 1 [Declaration on the Rights of Indigenous People]. The declaration was adopted by an overwhelming majority, with 144 votes in favor, 4 against (Australia, Canada, New Zealand, and the United States) and 11 abstentions (Azerbaijan, Bangladesh, Bhutan, Burundi, Colombia, Georgia, Kenya, Nigeria, Russian Federation, Samoa, and Ukraine).

¹⁴ *Ibid.*, Art. 26 (2), 8.

Articles 27 and 32 of the Declaration both address the right to consultation with respect to projects affecting lands and natural resources. Article 27 provides that States shall establish “a fair, independent, impartial, open and transparent process, giving due recognition to indigenous peoples’ laws, traditions, customs and land tenure systems, to recognize and adjudicate the rights of indigenous peoples pertaining to their lands, territories and resources”, and that indigenous peoples shall have the right to participate in this process.¹⁵ Article 32, in turn, specifically establishes the duty to consult with indigenous peoples and obtain their free and informed consent with respect to the exploitation of natural resources in their territories:

“States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.”¹⁶

As mentioned above, not all countries in the Americas have ratified *ILO Convention No. 169*, and the UN Declaration does not have binding legal effect for States. Nonetheless, regional instruments in the Inter-American human rights system also create obligations related to indigenous peoples.

III. Instruments of the Inter-American System of Human Rights

The 1948 *American Declaration on the Rights and Duties of Man* (“American Declaration”)¹⁷ and the 1969 *American Convention on Human Rights* (ACHR)¹⁸ address a broad range of human rights. The Declaration was one of the first international human rights instruments, and it addresses various fundamental rights and duties. The ACHR, in turn, addresses many fundamental rights and duties, and in addition establishes the Inter-American Commission and the Inter-American Court as the principal and autonomous OAS bodies with a mandate to promote and protect human rights in the Americas. While all OAS

¹⁵ *Ibid.*, Art. 27, 8.

¹⁶ *Ibid.*, Art. 32 (2), 9.

¹⁷ *American Declaration of the Rights and Duties of Man*, OAS Res. XXX, 2 May 1948, OEA/ser.L/V/II.23, doc. 21 rev. 6 (1979) [American Declaration].

¹⁸ *American Convention on Human Rights*, 22 November 1969, 1144 UNTS 123 [ACHR].

Member States have ratified the *American Declaration*, not all have ratified the ACHR.

The Declaration and the ACHR protect the rights of indigenous peoples, primarily the right to property,¹⁹ as well as the right to judicial protection,²⁰ and to participate in public affairs.²¹ Of particular importance for the present analysis, Article 21 ACHR provides:

- “1. Everyone has the right to the use and enjoyment of his property. The law may subordinate such use and enjoyment to the interest of society.
2. No one shall be deprived of his property except upon payment of just compensation, for reasons of public utility or social interest, and in the cases and according to the forms established by law.
3. Usury and any other form of exploitation of man by man shall be prohibited by law.”²²

In addition, the Permanent Council of the Organization of American States (“OAS”) has been reviewing a draft *American Declaration on the Rights of Indigenous Peoples*. The draft Declaration has been under review for over ten years, and there is no clear indication as to whether it will be approved in the near future.²³

C. Consultation and the Extractive Industry: Application in the Inter-American System of Human Rights

In the Inter-American System, a victim or victims wishing to initiate a case must first file a petition with the Inter-American Commission. If the petition meets the admissibility criteria established in the ACHR, and the Commission finds that the State has violated the petitioner(s)' human rights, the Commission typically issues a report on the merits of the case, including recommendations to the State. If the State does not comply with the recommendations, the

¹⁹ *American Declaration*, Art. XXIII, *supra* note 17; ACHR, Art. 21, *supra* note 18, 150.

²⁰ *American Declaration*, Art. XXV, *supra* note 17; ACHR, Art. 25, *supra* note 18, 151.

²¹ *American Declaration*, Art. XX, *supra* note 17; ACHR, Art. 23, *supra* note 18, 151.

²² ACHR, Art. 21, *supra* note 18, 150.

²³ For further information about the negotiation and review process, see the website established for that purpose by the Department of International Law of the OAS, ‘Indigenous Peoples’, available at http://www.oas.org/dil/indigenous_peoples_prepari ng_draft_american_declaration.htm (last visited 15 June 2013).

Commission may decide to take the case to the Inter-American Court, in accordance with Chapter VII of the ACHR, if the State concerned has ratified the ACHR and recognized the jurisdiction of the Inter-American Court.

The Court has binding authority only over States that have submitted to its jurisdiction. As mentioned above, not all OAS States have accepted the Inter-American Court's jurisdiction, so not all petitions can go to the Court. To date, 25 out of the 36 OAS Member States have ratified the *American Convention*, and 22 have recognized the Court's jurisdiction.²⁴ If a State has not ratified the ACHR, the Commission can issue recommendations based on the 1948 *American Declaration*, which was initially a non-binding instrument but is now interpreted as a source of legal obligations for all OAS Member States.²⁵

The Inter-American Commission and the Inter-American Court have received numerous petitions related to the rights of indigenous peoples in the context of extractive industry. Both the Commission and the Court have highlighted the importance and non-material value of natural resources for many indigenous peoples, for whom the relationship with the natural resources in the territories they occupy is "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".²⁶ When these

²⁴ For a complete list of ratifications and recognition of the Court's jurisdiction, see IACHR, 'American Convention on Human Rights', available at <http://www.oas.org/en/iachr/mandate/Basics/conventionrat.asp> (last visited 15 June 2013).

²⁵ *Maya Indigenous Communities in the Toledo District v. Belize*, IACHR Case 12.053, 12 October 2004, Report No. 40/04, para. 85 [Maya Indigenous Communities Case].

²⁶ *Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, Judgment of 31 August 2001, IACtHR Series C, No. 79, 75, para. 149 [Awas Tingni Case] (" [...] the close ties of indigenous people with the land must be recognized and understood as the fundamental basis of their cultures, their spiritual life, their integrity, and their economic survival. For indigenous communities, relations to the land are not merely a matter of possession and production but a material and spiritual element which they must fully enjoy, even to preserve their cultural legacy and transmit it to future generations."); *Maya Indigenous Communities Case*, *supra* note 25, para. 114 (" [...] indigenous peoples enjoy a particular relationship with the lands and resources traditionally occupied and used by them, by which those lands and resources are considered to be owned and enjoyed by the indigenous community as a whole and according to which the use and enjoyment of the land and its resources are integral components of the physical and cultural survival of the indigenous communities and the effective realization of their human rights more broadly."); see also IACHR, *Indigenous and Tribal Peoples' Rights Over Their Ancestral Lands and Natural Resources: Norms and Jurisprudence of the Inter-American Human Rights System*, OEA/Ser.L/V/II. Doc. 56/09, 30 December 2009, 20-22, paras 55-57 [IACHR, Norms and Jurisprudence of the Inter-American Human Rights System].

collective, holistic spiritual connections with natural resources compete with substantial economic interests, the stakes of protecting human rights take on a different, greater dimension.

I. Early Pronouncements Related to the Rights of Indigenous Peoples Over Their Territories

As early as 1970, the Inter-American Commission recalled the duty of States to protect the rights of indigenous peoples to their lands.²⁷ In 1985, the Inter-American Commission issued a resolution in *Case 7615* regarding the Yanomami indigenous peoples of Brazil.²⁸ The case related to alleged human rights violations that followed the discovery in the 1970's of precious minerals in the territories traditionally occupied by the Yanomami. The discovery led to the rapid arrival in Yanomami territories of miners, explorers, and other non-indigenous people related to the mining projects; the newcomers brought with them diseases and epidemics that killed and severely affected many Yanomami. The Inter-American Commission found that the State had failed to take prompt and effective measures to protect the Yanomami indigenous people in this mining rush, which resulted in violations of the Yanomami's rights to life, liberty, and personal security (Article I of the *American Declaration*) to residence and movement (Article VIII), and to the preservation of health and well-being (Article XI).²⁹ The Inter-American Commission accordingly recommended, among other things, that Brazil demarcate the territory of the Yanomami Park, where mining and other non-indigenous activities would be prohibited. The resolution marked an important point in the development of indigenous peoples' rights in the Americas, as it confirmed that collective rights were protected in the Inter-American system of human rights.³⁰ Notably, the resolution did not discuss whether the Yanomami had a property right under the *American Declaration* to the lands and territories they occupied.

²⁷ IACHR, *The Human Rights Situation of the Indigenous Peoples in the Americas*, Chapter III: Doctrine and Jurisprudence of the IACHR on Indigenous Rights, OEA/Ser.L/V/II.108, doc. 62, 20 October 2000, 122 [IACHR, *The Human Rights Situation of Indigenous People*, Chapter III] (referring to *Guahibo Communities v. Colombia*, IACHR Case 1.690 (1970)).

²⁸ *Yanomami Indigenous Peoples v. Brazil*, IACHR Case 7615, Resolution No. 12/85, OEA/Ser.L/V/II.66/doc.10, rev. 1, 5 March 1985.

²⁹ *Ibid.*, para. 1 (dispositive section). Cf. *American Declaration*, Arts I, VIII, XI, *supra* note 17.

³⁰ IACHR, *The Human Rights Situation of Indigenous People*, Chapter III, *supra* note 27, 120.

In 1997, the Inter-American Commission noted the serious dangers that indigenous peoples faced in Brazil due to extractive projects. It stated that indigenous peoples'

“ownership and effective possession [was] constantly being threatened, usurped or eroded by various acts—in particular, by invasion and unlawful intrusion for the purpose of lumbering, mining, or agricultural operations, or for nonindigenous settlements [...] [and] by decisions to establish infrastructure in the form of roads, public works or energy, without the due consent of the indigenous populations affected thereby”.³¹

Although no cases had been decided in the Inter-American System at the time regarding the “due consent”, this report foreshadowed what would come in the following years.

Similarly, in 1997, the Inter-American Commission reported that the indigenous peoples of the Oriente region of Ecuador had been subjected to the full impact of oil development and extraction for many years.³² In particular, the Commission observed that it had received information regarding the alleged improper handling and disposal of toxic waste, which reportedly jeopardized the local indigenous communities' health and lives.³³

II. Decisions and Reports From the Petition and Case System: The Right to Consultation Begins to Take Shape

The issue of indigenous peoples' rights over their territories and natural resources had its first major iteration in the petition and case system in 2001, when the Inter-American Court decided the merits of the seminal case of *The Mayagna (Sumo) Awas Tingni Community v. Nicaragua*.³⁴ The case related to the Mayagna (Sumo) Awas Tingni community, a community of over 600 people located in the Northern Atlantic Autonomous Region of Nicaragua. Although the community claimed the territory it inhabited as ancestral lands,

³¹ IACHR, *Report on the Situation of Human Rights in Brazil*, Chapter VI, OEA/Ser.L./V/II.97, doc. 29 rev. 1, 29 September 1997, para. 33.

³² IACHR, *Report on the Situation of Human Rights in Ecuador*, Chapter VII, OEA/Ser.L./V/II.96, doc. 10 rev. 1, 24 April 1997.

³³ *Ibid.*

³⁴ *Awas Tingni Case*, *supra* note 26.

it did not have legal title over it.³⁵ In the mid-1990's, the national and regional governments granted a logging concession to a private entity in the territory occupied by the Awas Tingni community, without its participation or consent.³⁶ The community claimed, among other things, that it had ancestral rights over the lands it occupied, even if the State of Nicaragua did not recognize them formally; it also argued that Nicaragua had violated its collective property rights over its lands by failing to demarcate it, granting logging concessions without consulting it, and by failing to provide effective remedies in its domestic legal regime for the community to assert those rights.³⁷ The State responded that the community had not made a formal request for their lands to be titled, and that it was in the process of enacting laws to address the issues raised by the Awas Tingni community.³⁸

The Court began its analysis of whether Nicaragua had violated Article 21 ACHR by noting that the property rights protected by Article 21 encompass material and immaterial things, "all movables and immovables, corporeal and incorporeal elements and any other intangible object capable of having value."³⁹ The Court then explained that Article 21 property rights include "the rights of members of the indigenous communities within the framework of communal property",⁴⁰ and, in a commonly cited passage, stated:

"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. Indigenous groups, by the fact of their very existence, have the right to live freely in their own territory; the close ties of indigenous people with the land must be recognized and understood as the fundamental basis of their cultures, their spiritual life, their integrity, and their economic survival. For indigenous communities, relations to the land are not merely a matter of possession and production but a material and spiritual element which they must fully enjoy, even to preserve their cultural legacy and transmit it to future generations."⁴¹

³⁵ *Ibid.*, 51, para. 103 (g).

³⁶ *Ibid.*, 52-53, para. 103 (m)-(o).

³⁷ *Ibid.*, 58-60, para. 104.

³⁸ *Ibid.*, 60-62, para. 105.

³⁹ *Ibid.*, 74, para. 144.

⁴⁰ *Ibid.*, 75, para. 148.

⁴¹ *Ibid.*, 75, para. 149.

The Court also emphasized the need to take indigenous peoples' customary law into account in order to give full protection to their property rights. Based on this understanding of the right to property, the Court held that the Awas Tingni community had the right to (i) have their lands demarcated and titled; and (ii) have the State abstain from authorizing or acquiescing in activities that may affect the use and enjoyment of the Awas Tingni's communal lands.⁴² Accordingly, the Court found that Nicaragua had violated the rights of the Awas Tingni community to use and enjoy their property, protected by Article 21 ACHR, by failing to demarcate and title those lands, and by granting concessions to third parties on those lands.⁴³ In this landmark case, the Court did not address the consultation process.⁴⁴

Shortly thereafter, the Inter-American Commission issued its merits report in another case touching upon the issue of indigenous peoples' rights in the context of the extractive industry, *Case of Mary and Carrie Dann v. United States*.⁴⁵ The case involved, among other things, claims by members of the Shoshone indigenous people that the government of the United States had authorized prospecting for gold mining in what they claimed were their ancestral lands in the State of Nevada, which they owned through their customary land tenure system.⁴⁶ The petitioners claimed that the government permitted mining prospecting, and that private actors conducting mining activities were poised to take control of the lands by operation of U.S. mining legislation or land exchanges with the U.S. government.⁴⁷ They claimed these acts violated their right to property, as protected by Article XXIII of the *American Declaration*.⁴⁸

The Commission first stated that Article XXIII of the *American Declaration* requires Member States to ensure that the determination of the status of alleged ancestral indigenous lands is "based upon a process of fully

⁴² *Ibid.*, 76, para. 153.

⁴³ *Ibid.*

⁴⁴ At the time *Awas Tingni* was decided, Nicaragua had not yet ratified *ILO Convention No. 169*. It did so on 25 August 2010.

⁴⁵ All IACHR cases discussed herein are available on the web page of the Rapporteurship on the Rights of Indigenous Peoples, 'Reports on Petitions and Cases', available at <http://www.oas.org/en/iachr/indigenous/decisions/iachr.asp> (last visited 15 June 2013).

⁴⁶ *Mary and Carrie Dann v. United States*, IACHR Case 11.140, 27 December 2002, Report No. 75/02, paras 40 & 45 [Dann Case].

⁴⁷ *Ibid.*, para. 40.

⁴⁸ Article XXIII of the *American Declaration*, *supra* note 17, states: "Every person has a right to own such private property as meets the essential needs of decent living and helps to maintain the dignity of the individual and of the home." Since the United States has not ratified the ACHR, the petitioners could not assert violations of that treaty.

informed and mutual consent on the part of the indigenous community as a whole".⁴⁹ The Commission specifically rejected the State's argument that the property rights protected by the *American Declaration* were only individual rights, and not collective ones.⁵⁰ Since only a few members of the Shoshone people had participated in an alleged process to transfer title to the government, the Commission found that the property rights of the petitioners had not been respected. Accordingly, it recommended to the State to adopt an effective remedy to ensure respect for the petitioners' right to property in accordance with Article XXIII of the *American Declaration* in connection with their claims to property rights over their ancestral lands.⁵¹

The Commission addressed the issue more directly in the case of *Maya Indigenous Community of the Toledo District (Belize)*. There, the petitioners claimed that the State of Belize had violated, among others, Article XXIII of the *American Declaration*⁵² with respect to lands traditionally used and occupied by the Maya indigenous community for centuries, by granting logging and oil concessions in those lands, and failing to recognize and secure the territorial rights of the Maya people in those lands.⁵³ The petitioners also claimed that they owned their lands communally in accordance with their customary laws.⁵⁴ Following *Awas Tingni*, the Commission recognized the Maya community's collective right to own their ancestral lands, and the State's corresponding obligation to demarcate those lands.⁵⁵ The Commission added that the demarcation process "necessarily includes engaging in effective and informed consultations with the Maya people concerning the boundaries of their territory, and that the traditional land use practices and customary land tenure system be taken into account in this process".⁵⁶

The *Toledo District* petitioners also argued that logging and oil exploration concessions in their territories violated their property rights under Article XXIII of the *American Declaration*. The State acknowledged that it had granted

⁴⁹ *Dann Case*, *supra* note 46, para. 140.

⁵⁰ *Ibid.*, paras 93 & 131.

⁵¹ *Ibid.*, para. 173 (1). Since the United States has not ratified the ACHR has not submitted to the jurisdiction of the Inter-American Court, and consequently the case could not be referred to the Court.

⁵² Belize has not ratified the ACHR.

⁵³ *Maya Indigenous Communities Case*, *supra* note 25, para. 28.

⁵⁴ *Ibid.*, para. 124.

⁵⁵ *Ibid.*, paras 130-131, 151.

⁵⁶ *Ibid.*, para. 132. The report did not cite authority for this proposition, presumably because none existed at the time within the Inter-American system.

concessions in those lands, but that they did not affect the environment or communities located in those lands, so their granting did not violate the petitioners' rights.⁵⁷ The Commission rejected the State's argument, and held that a process to grant concessions to exploit natural resources in indigenous territories, "requires, at a minimum, that all of the members of the community are fully and accurately informed of the nature and consequences of the process and provided with an effective opportunity to participate individually or as collectives".⁵⁸ As will be seen below, this pronouncement started to give content to the right of indigenous peoples to be consulted when projects affect their territories and natural resources.

III. The Right to Consultation Defined: From *Yakye Axa* to *Saramaka*

After *Toledo District*, a series of cases from the Inter-American Court reiterated, albeit tangentially, the right of indigenous peoples over their lands and territories. Although some did not address the right to consultation directly, they each reinforced the rights of indigenous peoples over their territories, which has been a precursor to the right to consultation. *Moiwana v. Suriname*, for instance, related to the 1986 massacre of members of a Maroon village in rural Suriname and the displacement of the survivors.⁵⁹ The Court found that Suriname violated the property rights of the survivors by displacing them and maintaining their displacement from their traditional lands, and ordered that their lands be demarcated following a process "with the participation and informed consent of the victims [...]".⁶⁰

Two days after *Moiwana*, the Inter-American Court decided *Yakye Axa Indigenous Community v. Paraguay*.⁶¹ In the late 19th century, the government of Paraguay sold approximately two-thirds of the Paraguayan Chaco in the London stock exchange to raise funds to pay for the debt incurred following the so-called War of the Triple Alliance.⁶² Perhaps not surprisingly, the indigenous peoples who inhabited the Chaco at the time were not aware of this sale or of the sales

⁵⁷ *Ibid.*, para. 137.

⁵⁸ *Ibid.*, para. 142.

⁵⁹ *Moiwana Community v. Suriname*, Judgment of 15 June 2005, IACtHR Series C, No. 124, 2, para. 3.

⁶⁰ *Ibid.*, 81 & 55, paras 210, 135 & 209.

⁶¹ *Yakye Axa Indigenous Community v. Paraguay*, Judgment of 17 June 2005, IACtHR Series C, No. 125 [Yakye Axa Case].

⁶² *Xákmok Kásek Indigenous Community v. Paraguay*, Judgment of 24 August 2010, IACtHR Series C, No. 214, 15, para. 58 [Xákmok Kásek Case].

and transfers that followed among private, non-indigenous individuals and missionaries.⁶³ Among these indigenous peoples was the Yakye Axa indigenous community, part of the Enxet-Lengua people, which had traditionally occupied the Paraguayan Chaco for centuries.⁶⁴ As of 2002, the Yakye Axa community had approximately 319 members, who derive their livelihood mostly from hunting, fishing, and gathering.⁶⁵

In the case before the Inter-American Court, the Yakye Axa community alleged that as a result of these sales and the State's failure to respect the community's ancestral claims over their lands and territories, the members of the Yakye Axa community lived in terrible conditions, in violation of their rights to life (Article 4), property (Article 21), and judicial protection (Article 25), among others. With respect to the right to property, the Court noted that Paraguay has ratified *ILO Convention No. 169*, and highlighted the special relationship that the Yakye Axa community and its members have with their land and territories.⁶⁶

The State of Paraguay acknowledged the rights of the Yakye Axa over their traditional lands; what was in dispute was whether and to what extent the State had ensured that the Yakye Axa community and its members effectively enjoyed this right in practice.⁶⁷ The Court agreed with the State's position that Article 21 protects the ancestral rights of indigenous peoples as well as the property rights of the non-indigenous persons who had bought parts of these lands, but noted that "merely abstract or juridical recognition of indigenous lands, territories, or resources, is practically meaningless if the property is not physically delimited and established".⁶⁸ When the rights of indigenous peoples are in conflict with the property rights of private individuals,

"the American Convention itself and the jurisprudence of the Court provide guidelines to establish admissible restrictions to the enjoyment and exercise of those rights, that is: a) they must be established by law; b) they must be necessary; c) they must be proportional, and d) their purpose must be to attain a legitimate goal in a democratic society".⁶⁹

⁶³ *Yakye Axa Case*, *supra* note 61, 27, 50 (10).

⁶⁴ *Ibid.*, 24-25, para. 50 (1).

⁶⁵ *Ibid.*, 25-26, paras 50 (3) & 50 (7).

⁶⁶ *Ibid.*, 75-76, paras 130-135. Paraguay ratified *ILO Convention No. 169* in 1993.

⁶⁷ *Ibid.*, 77, paras 140-141.

⁶⁸ *Ibid.*, 77, para. 143.

⁶⁹ *Ibid.*, 77, para. 144.

These four factors would gain relevance in subsequent cases, as indigenous peoples' rights over their territories and natural resources are often in "conflict" with the interests of other rights-holders, such as extractive companies. The Court expanded on the specific content of these four factors to consider:

"The necessity of legally established restrictions will depend on whether they are geared toward satisfying an imperative public interest; it is insufficient to prove, for example, that the law fulfills a useful or timely purpose. Proportionality is based on the restriction being closely adjusted to the attainment of a legitimate objective, interfering as little as possible with the effective exercise of the restricted right. Finally, for the restrictions to be compatible with the Convention, they must be justified by collective objectives that, because of their importance, clearly prevail over the necessity of full enjoyment of the restricted right."⁷⁰

The Court also emphasized that States must take into account the collective nature of indigenous peoples' ancestral ownership of their lands, and the importance of land and territory to ensure survival of a community as a whole. The Court found that, although Paraguay recognized the right to communal property in its legislation, it had not taken the necessary domestic legal steps to ensure the effective use and enjoyment of the Yakye Axa's traditional lands.⁷¹ Accordingly, the Court found that Paraguay had violated Article 21 ACHR and ordered Paraguay, among other things, to identify the traditional territory of the Yakye Axa community and grant it to them free of cost.⁷²

In another case involving largely similar facts, *Sawhoyamaya v. Paraguay*,⁷³ the Court echoed the reasoning of *Awás Tingni* and *Yakye Axa*. It again confirmed that the indigenous peoples' collective "notion of ownership and possession

⁷⁰ *Ibid.*, 78, para. 145.

⁷¹ *Ibid.*, 79, para. 155.

⁷² *Ibid.*, 104, para. 242 (6). In an interpretation of the Judgment, the Inter-American Court explained that in the process of identifying these territories, "Paraguay must comply with the provisions in the Court's judgment, giving careful consideration to the values, uses, customs and customary laws of the members of the Community, which bind them to an specific territory." *Yakye Axa Indigenous Community v. Paraguay*, Judgment of 6 February 2006 (Interpretation of the Judgment of 17 June 2005), IACtHR Series C, No. 142, 9, para. 26.

⁷³ *Sawhoyamaya Indigenous Community v. Paraguay*, Judgment of 29 March 2006, Series C, No. 146.

of land does not necessarily conform to the classic concept of property, but deserves equal protection under Article 21 of the American Convention⁷⁴. As in *Yakye Axa*, the Court found that Paraguay had violated Article 21 to the detriment of the Sawhoyamaxa community by failing to secure effective use and enjoyment of their ancestral lands, including their physical delimitation and actual conveyance.⁷⁵ The Court also ordered Paraguay to enact into its domestic legislation a mechanism so that the community could reclaim their ancestral lands within a reasonable time.⁷⁶

Although it is difficult to pinpoint a case that by itself crystallizes indigenous peoples' right to consultation, *Saramaka v. Suriname* is close to being such a case.⁷⁷ The case involved the Saramaka, a tribal community in Suriname.⁷⁸ The Saramaka argued, among other things, that Suriname did not recognize their ancestral rights over their lands, territories, and natural resources, and that the State had authorized concessions for the extraction and exploitation of natural resources in their territories without consulting them.⁷⁹ The petitioners alleged that Suriname had violated the property rights of the Saramaka enshrined in Article 21 ACHR, in connection with Articles 1 (1) and 2 of that Convention.⁸⁰

The Court first recognized the internal organization of the Saramaka according to their customs, in which matriarchal clans (called *lös*) were the land-owning entities.⁸¹ It then evaluated the Surinamese domestic legislation with respect to collective land-ownership, and found that it did not adequately

⁷⁴ *Ibid.*, 71, para. 120.

⁷⁵ *Ibid.*, 77, para. 143.

⁷⁶ *Ibid.*, 103 & 106, paras 235 & 248 (12).

⁷⁷ *Saramaka People v. Suriname*, Judgment of 28 November 2007, IACtHR Series C, No. 172 [Saramaka Case].

⁷⁸ As explained by the Court, tribal communities, unlike indigenous peoples, are not indigenous to (i.e., originally from) the region they inhabit; rather, it was brought there at some point (in this case during the colonization of Suriname). Like indigenous peoples, tribal communities have social, cultural, and economic traditions different from other sections of the national community, identify themselves with their ancestral territories and regulate themselves according to their own norms, customs, and traditions. *Ibid.*, 23, para. 79. Under international law, tribal communities and indigenous people enjoy similar rights and protection.

⁷⁹ *Ibid.*, 2, para. 2.

⁸⁰ Art. 1 (1) ACHR establishes the obligation to respect the human rights established in the Convention, while article 2 establishes the obligation to give domestic legal effect to give effects to those rights.

⁸¹ *Ibid.*, 30, para. 100.

safeguard the Saramaka's property rights, as it did not provide an adequate recourse to protect collective land ownership by indigenous and tribal peoples.⁸²

The Court then conducted an extensive analysis of the scope of the Article 21 property rights with respect to natural resources located in ancestral lands of the Saramaka. Noting that the protection of indigenous peoples' collective property rights is aimed at guaranteeing their very survival as a people, the Court noted that the right to use and enjoy their territory would be meaningless for indigenous peoples if it were not connected to the natural resources located in their territory.

“[T]he demand for collective land ownership by members of indigenous and tribal peoples derives from the need to ensure the security and permanence of their control and use of the natural resources, which in turn maintains their very way of life. *This connectedness between the territory and the natural resources necessary for their physical and cultural survival is precisely what needs to be protected under Article 21 of the Convention* in order to guarantee the members of indigenous and tribal communities' right to the use and enjoyment of their property.”⁸³

Based on this reasoning, the Court concluded that natural resources found in indigenous territories are protected by Article 21, and then examined which natural resources found in Saramaka territory were essential for the survival of their way of life.

Suriname had granted forestry and mining concessions on Saramaka territory. The petitioners claimed that it did so without a full and effective consultation, thus violating their property rights, while the State argued that all land ownership, including natural resources, is vested in the State, and thus it can grant concessions at its discretion, albeit respecting Saramaka customs as much as possible.⁸⁴ The Court first noted that, although not *every* natural resource is essential for the way of life of the Saramaka, those that are essential are “likely to be affected by extraction activities related to other natural resources that are not traditionally used by or essential for the survival of the Saramaka people”.⁸⁵

⁸² *Ibid.*, 31-35, paras 104-117.

⁸³ *Ibid.*, 36, para. 122 (emphasis added).

⁸⁴ *Ibid.*, 37, para. 124.

⁸⁵ *Ibid.*, 37, para. 126. The Court explained, for instance, that water is an essential natural resource likely to be affected by mineral extractive activities, even if those activities are

The Court restated the four factors enunciated in *Yakye Axa* and stated that a State may interfere with an indigenous peoples' right over natural resources located in their territories only when it complies with those four factors and, "additionally, when it does not deny their survival as a tribal people [...]".⁸⁶ In order for restrictions on indigenous or tribal peoples' rights over their natural resources not to "deny their survival" as a people, they must comply with the following requirements, as stated by the Court:

"First, the State must ensure the effective participation of the members of the [indigenous or tribal] people, in conformity with their customs and traditions, regarding any development, investment, exploration or extraction plan [...] within [their] territory. Second, the State must guarantee that the [indigenous or tribal people] will receive a reasonable benefit from any such plan within their territory. Thirdly, the State must ensure that no concession will be issued within [indigenous or tribal] territory unless and until independent and technically capable entities, with the State's supervision, perform a prior environmental and social impact assessment."⁸⁷

The Court elaborated on the first point, noting that effective participation of the community in question must be through a consultation process done in good faith, and through culturally appropriate procedures that take into account the indigenous people's traditions and customs, with the objective of obtaining their consent.⁸⁸ In addition, the consultation must be conducted early on in the initial stages of the development or extractive project, so that the consulted community may carry out internal discussions, and it must be

aimed at extracting other non-essential natural resources. This would hinder the Saramaka's ability to carry out fishing activities, which are essential to their way of life. Similarly, although trees per se may not be essential to the way of life of the Saramaka, forestry concessions are likely to affect negatively the environment where the fauna of the region live, thus preventing the Saramaka from conducting hunting, another essential activity to their traditional way of life. *Ibid.*

⁸⁶ *Ibid.*, 38, para. 128.

⁸⁷ *Ibid.*, 38, para. 129. The Court also cited observations by the Human Rights Committee and Art. 32 of the *Declaration on the Rights of Indigenous Peoples* (*supra* note 13) in support of this proposition.

⁸⁸ *Ibid.*, 40, para. 133.

informed regarding potential health, environmental or other risks.⁸⁹ Lastly, the consultation must respect the community's own decision-making processes.⁹⁰

Moreover, the Court stated that, in addition to consultation, the indigenous or tribal people's consent is required in certain cases: "regarding large-scale development or investment projects that would have a major impact within Saramaka territory, the State has a duty, not only to consult with the Saramakas, but also to obtain their free, prior, and informed consent, according to their customs and traditions".⁹¹ In other words, while a consultation process as outlined by the Court is required whenever a proposed project affects the territories and/or natural resources of indigenous peoples, free, prior and informed consent is required when the project in question "may have a profound impact on the property rights" of the indigenous or tribal people over their territory and/or natural resources.⁹²

In an interpretation of the *Saramaka* Judgment, the Court explained that who should be the specific person or persons to be consulted is a decision that should be made by the indigenous people involved, in accordance with their customs and traditions.⁹³ Similarly, the structure of any benefit-sharing program among the indigenous or tribal people must be decided through consultation with the indigenous or tribal people, and not unilaterally by the State.⁹⁴ The interpretation also provided additional details regarding the required environmental and social impact assessments, such as the need for these assessments to take into account the collective survival of the indigenous people as such (in addition to the physical survival of its individual members).⁹⁵

Following *Saramaka* and the standard it set, the Inter-American Court confirmed the requirement that States conduct consultation processes when projects affect indigenous territories. For instance, in *Xákmok Kásek v. Paraguay* – which was also based on essentially the same historical facts as *Yakye Axa* and *Sawhoyamasa* – the Court found that Paraguay had violated the Xákmok

⁸⁹ *Ibid.*

⁹⁰ *Ibid.*

⁹¹ *Ibid.*, 40, para. 134.

⁹² *Ibid.*, 41, para. 137.

⁹³ *Saramaka People v. Suriname*, Judgment of 12 August 2008 (Interpretation of the Judgment of 28 November 2007), IACtHR Series C, No. 185, 6-7, paras 18-19 [*Saramaka Case*, Interpretation of the Judgment].

⁹⁴ *Ibid.*, 8, para. 25.

⁹⁵ *Ibid.*, 10, paras 37-38. For an additional, extensive discussion of the rights of indigenous peoples over their lands and natural resources, see IACHR, *Norms and Jurisprudence of the Inter-American Human Rights System*, *supra* note 26.

Kásek's property rights when it declared part of their territory a nature reserve without consulting the community, as required by the *American Convention* and Inter-American jurisprudence.⁹⁶

IV. Consultation in the Precautionary Measures System

In the years after *Saramaka*, the Inter-American Commission received requests for precautionary measures related to indigenous peoples and their rights over natural resources located in their ancestral lands. While the scope and analysis for granting precautionary measures is markedly different from that undertaken in the petition and case system, precautionary measures illustrate how the rights of indigenous peoples over their natural resources often clash with significant economic interests in practice. For instance, on 1 April 2011, the Inter-American Commission granted precautionary measures for the members of the indigenous communities of the Xingu River Basin in Pará, Brazil.⁹⁷ The request for precautionary measures alleged that the life and physical integrity of the applicants was at risk due to the impact of the construction of the Belo Monte hydroelectric power plant.

The Inter-American Commission requested that the State of Brazil immediately suspend the licensing process for the Belo Monte Hydroelectric Plant project and stop any construction work from moving forward until certain minimum conditions were met.⁹⁸ However, after the State and the applicants presented additional information, the Inter-American Commission modified the original aim of the measure. On 29 July 2011, the Commission requested Brazil to, among other things: (1) adopt measures to protect the lives, health, and physical integrity of the members of the Xingu Basin indigenous

⁹⁶ *Xákmok Kásek Case*, *supra* note 62, 37-38, paras 155-162.

⁹⁷ IACHR, 'PM 382/10', available at <http://www.oas.org/en/iachr/indigenous/protection/precautionary.asp> (last visited 20 May 2013) [PM 382/10].

⁹⁸ The original conditions were that Brazil had to: (1) conduct consultation processes in accordance with international standards – meaning prior consultations that are free, informed, of good faith, culturally appropriate, and with the aim of reaching an agreement – in relation to each of the affected indigenous communities; (2) guarantee that, in order for this to be an informed consultation process, the indigenous communities have access beforehand to the social and environmental impact study related to the project, including translations into the respective indigenous languages; (3) adopt measures to protect the life and physical integrity of the members of the indigenous peoples in voluntary isolation of the Xingu Basin, and to prevent the spread of diseases and epidemics among the indigenous communities as a consequence of the construction of the Belo Monte hydropower plant. See *ibid.*

communities in voluntary isolation, and implement specific measures to mitigate the effects that the construction of the Belo Monte dam would have on the territory and life of these communities; (2) adopt measures to protect the health of the members of the indigenous communities affected by the Belo Monte project, including guaranteeing that the processes to regularize their ancestral lands would be finalized promptly, and protect those ancestral lands against intrusion and occupation by non-indigenous people and against the exploitation or deterioration of their natural resources. Of particular interest for this article, the Inter-American Commission also decided that the debate between the parties regarding prior consultation and informed consent related to the Belo Monte project had evolved into a discussion on the merits of the matter, which was beyond the scope of precautionary measures.⁹⁹ According to public information, a group of NGO's and indigenous communities affected by the Belo Monte project presented a petition regarding this matter to the Inter-American Commission on 16 June 2011.¹⁰⁰

In another example, the Inter-American Commission granted precautionary measures in favor of the members of 18 communities of the Maya indigenous people of Guatemala.¹⁰¹ The applicants alleged that, in 2003, the State of Guatemala granted a license to a private company to mine gold and silver in an area of 20 square kilometers within their territories. As alleged, the concession's environmental and hydrological impact area would encompass the territories of at least 18 communities of the Maya people. The petitioners alleged that the mining concession was issued and mining began without the prior, complete, free, and informed consultation of the affected communities. The concessionaire reportedly began constructing the Marlin I Mine in 2003 and extracting gold and silver in 2005. The petitioners maintained that the mining had grave consequences for the life, personal integrity, environment, and property of the affected indigenous people. According to the request, a number of water wells and springs dried up, and metals were present in the water as a result of the mining activity, which had harmful effects on the health of members of the community.

⁹⁹ See *ibid.*

¹⁰⁰ See Amazon Watch, 'Belo Monte Dam May Lead Brazil to OAS High Court' 16 June 2011, available at <http://amazonwatch.org/news/2011/0616-belo-monte-dam-may-lead-to-oas-high-court> (last visited 15 June 2013).

¹⁰¹ IACHR, 'PM 260/07', available at <http://www.oas.org/en/iachr/indigenous/protection/precautionary.asp>. (last visited 15 June 2013).

On 20 May 2010, the Inter-American Commission asked the State of Guatemala to suspend mining of the Marlin I project and other activities related to the concession granted to *Goldcorp/Montana Exploradora de Guatemala S.A.* It also requested, among other things, that the State implement effective measures to prevent environmental contamination, and to adopt the necessary measures to decontaminate, as much as possible, the water sources of the 18 beneficiary communities and to ensure their members access to water fit for human consumption. However, after the parties provided additional information, the Inter-American Commission modified the aim of the precautionary measures. On 7 December 2011, it requested Guatemala adopt measures to ensure that the 18 communities involved had access to drinking water safe for human consumption, and, particularly, to adopt measures to ensure that the water sources of the 18 communities are not contaminated by mining activities.

As the *Belo Monte* and *Marlin Mine* precautionary measures reflect, when the rights of indigenous peoples over their natural resources come in direct conflict with the interests of extractive companies, resolving them can become a very difficult and delicate process.

V. After *Saramaka*: *Sarayaku* and the Question of Consent

The most recent pronouncement by the Inter-American Court on the issue of indigenous peoples and natural resources came in August 2012, with the judgment in the case of *Sarayaku v. Ecuador*.¹⁰² There, the Court analyzed, among other things, whether the State of Ecuador had violated the property rights of the Kichwa people of Sarayaku by awarding an oil exploration and exploitation concession to a private company partially in lands claimed by the Kichwa people of Sarayaku as their ancestral lands, without having conducted a consultation process or having obtained their free, prior, and informed consent.

Sarayaku is one of the largest communities of Kichwa indigenous people in the Amazon, and the territory they occupy is one of the most biodiverse in the world.¹⁰³ Unlike in *Saramaka*, in *Sarayaku* the petitioners actually had legal title to their lands, as these had been awarded by the State in 1992.¹⁰⁴ Also unlike in *Saramaka*, in *Sarayaku* the private oil company, *Compañía General de Combustibles, S.A.* ("CGC"), commissioned an environmental impact

¹⁰² *Kichwa Indigenous People of Sarayaku v. Ecuador*, Judgment of 27 June 2012, IACtHR Series C, No. 245 [Sarayaku Case].

¹⁰³ *Ibid.*, 16-17, para. 52.

¹⁰⁴ *Ibid.*, 18-19, para. 61.

assessment, which was approved by the Ecuadoran authorities (although not implemented in practice).¹⁰⁵ The petitioners alleged – and the State did not dispute – that CGC attempted to obtain the “consent” of the members of the Sarayaku people by offering them gifts, employing some people to recruit others who might support the exploration activities, medical assistance (conditioned on signing a letter supporting CGC’s activities), and cash in some instances, among other measures.¹⁰⁶ CGC allegedly was able to form a group of “independent” Sarayaku members who supported its incursion into the territory.¹⁰⁷

After the approval of a second, updated environmental management plan, the project finally started in 2002.¹⁰⁸ In the first year, CGC placed over 1,400 kg of explosives in wells located throughout Sarayaku territory, where they remain to this day.¹⁰⁹ CGC was also accused of destroying sites spiritually significant for the Sarayaku, as well as caves, water sources, and fauna that were culturally and environmentally important, as well as a source of food for the Sarayaku people.¹¹⁰ The Sarayaku were consistently opposed to the project: social conflict and tension were constant in the exploration zone in the late 1990’s, and the Sarayaku even sent a letter to the Ecuadoran government expressing their opposition to the project in their ancestral territories.¹¹¹

The Court began its analysis by noting that the right of the Sarayaku people to their ancestral lands was not in dispute, and what was under discussion was whether Ecuador had respected their right to be consulted.¹¹² By way of introduction, the Court stated unequivocally that Article 21 ACHR “protects the close relationship between indigenous peoples and their lands, and with the natural resources of their ancestral territories and intangible elements arising from these”.¹¹³ The Court continued and noted that although the communitarian tradition of collective land tenure, common among most indigenous peoples, does not conform to the “classic” concept of property, it deserves protection

¹⁰⁵ *Ibid.*, 20, para. 69.

¹⁰⁶ *Ibid.*, 21, para. 73.

¹⁰⁷ *Ibid.*, 21, para. 74. The State did not dispute this allegation either. However, in April 2002, the people of Sarayaku sent a letter to the Minister of Energy and Mines expressing their opposition to the incursion of oil companies into their ancestral territory.

¹⁰⁸ *Ibid.*, 23, para. 81.

¹⁰⁹ *Ibid.*, 26, para. 101.

¹¹⁰ *Ibid.*, 26-27, paras 102 & 105.

¹¹¹ *Ibid.*, 21, 23, paras 72, 74 & 80.

¹¹² *Ibid.*, 31-32, para. 124.

¹¹³ *Ibid.*, 36, para. 145.

under Article 21 ACHR, and that holding otherwise would render the property rights illusory for millions of people.¹¹⁴

The Court cited *Saramaka* and *Yakye Axa* as it outlined the conditions that must be met in order to restrict indigenous peoples' property rights over their territories and natural resources. Since no arguments were presented regarding the adequacy or inadequacy of such restrictions in this case, the Court then examined the right to consultation. The Court noted that in democratic, pluralistic societies, every individual is guaranteed the right to effective participation in public acts that affect his or her rights; in the case of indigenous peoples and, particularly, in the context of projects that affect their collective right to communal property, their right to consultation is "one of the fundamental guarantees to ensure [their] participation".¹¹⁵ *Sarayaku* cited a series of decisions by international bodies and domestic tribunals that reflect that the right of indigenous peoples to consultation has become a tenet of international human rights law.¹¹⁶ The Court emphasized that the consultation process must involve all relevant State agencies at an early stage of the project planning, in order to create a "process of dialogue and consensus-building" in which indigenous peoples "can truly participate in and influence the decision-making process".¹¹⁷

Ecuador ratified *ILO Convention No. 169* in 1998, i.e., after the contract with CGC was signed, but before the project operations commenced.¹¹⁸ The Court reasoned that Ecuador was under an obligation to consult with the Sarayaku "at least since May 1999", when *ILO Convention No. 169* entered into force.¹¹⁹ Therefore, the international legal obligation to consult stemming from *ILO Convention No. 169* arose before project operations commenced in 2002.

The Court then conducted a meticulous analysis of the consultation process, focused on the following five components: (i) the prior nature of the consultation; (ii) good faith and attempts to reach agreement; (iii) appropriate and accessible consultation; (iv) environmental impact assessments; and (v)

¹¹⁴ *Ibid.*

¹¹⁵ *Ibid.*, 40, para. 160.

¹¹⁶ *Ibid.*, 40-45, paras 161-166.

¹¹⁷ *Ibid.*, 46, para. 167.

¹¹⁸ *Ibid.*, 20, para. 70.

¹¹⁹ *Ibid.*, 50, para. 176. The Court also noted that, in accordance with the *Vienna Convention on the Law of Treaties* (Article 18), Ecuador had an obligation, since the moment it signed *ILO Convention No. 169*, to act in good faith in accordance with the object and purpose of that Convention, and to refrain from acts that would defeat its object and purpose. *Ibid.* (note 235).

informed consultation.¹²⁰ The Court found, based on the evidence submitted, that Ecuador did not carry out an effective and appropriate consultation process: (i) the “consultation” was not conducted prior to commencing the project; (ii) it was not done in good faith, as there were repeated attempts to corrupt indigenous leaders; (iii) the process did not respect the traditional decision-making processes of the Sarayaku; (iv) the environmental impact assessments which were conducted by CGC and not by State agencies – did not take into account the cultural and social impacts of the project on the Sarayaku people; and (v) the Sarayaku did not receive adequate information about the proposal. Importantly, the Court also stated that the obligation to consult cannot be delegated to a private actor, as it was done in this case, “much less [...] to the very company that is interested in exploiting the resources in the territory of the community” that is the subject of the consultation.¹²¹

The Court found that Ecuador had violated Article 21 ACHR, and its analysis of the right to consultation ended there. It did not discuss explicitly the requirement that, in large-scale projects that impact the territory of the indigenous community, the State must not only consult with the indigenous community, but actually obtain its consent. Nonetheless, a comprehensive reading of *Sarayaku* leads one to conclude that this requirement must also be met. First of all, in paragraph 177, which lists the characteristics of a proper consultation process, the Court cited paragraph 134 of *Saramaka*, which is specifically about the requirement to obtain consent.¹²² Moreover, *Sarayaku* repeatedly refers to a process of dialogue,¹²³ the indigenous peoples’ ability to “truly [...] influence the decision-making process”,¹²⁴ the need to reach agreement¹²⁵ and “reach [...] consensus between the parties”,¹²⁶ and quotes Article 6 (2) of *ILO Convention No. 169*, stating that “consultations must be ‘carried out [...] in good faith and

¹²⁰ *Ibid.*, 51-60, paras 180-211.

¹²¹ *Ibid.*, 53, para. 187.

¹²² *Ibid.*, 50, para. 177 (citing *Saramaka Case*, *supra* note 77, 40, para. 134. That paragraph of the *Saramaka* decision states in full: “Additionally, the Court considers that, regarding large-scale development or investment projects that would have a major impact within Saramaka territory, the State has a duty, not only to consult with the Saramakas, but also to obtain their free, prior, and informed consent, according to their customs and traditions. The Court considers that the difference between ‘consultation’ and ‘consent’ in this context requires further analysis.”). The *Sarayaku* judgment also cited para. 134 of *Saramaka* (*Sarayaku Case*, *supra* note 102, 52, para. 185 (note 242)).

¹²³ *Ibid.*, 46, para. 167.

¹²⁴ *Ibid.*

¹²⁵ *Ibid.*, 52, para. 185.

¹²⁶ *Ibid.*, 52-53, para. 186.

in a manner appropriate to the circumstances, with the aim of **reaching an agreement or obtaining consent** regarding the proposed measures.”¹²⁷

All these references, and the emphasis on “effective participation” as the bedrock principle underlying the right to consultation,¹²⁸ support the view that States must obtain the consent of indigenous peoples before approving large-scale development projects in their territories that may significantly affect their way of life.¹²⁹ A consultation process in which the indigenous peoples do not have the right to withhold their consent would be nearly meaningless. A reasonable reading of *Sarayaku*'s silence on the question of consent may be that the Court, having determined that the obligation to conduct a consultation process had been breached, did not find it necessary to examine whether consent had been obtained, as no consent could be obtained when the consultation process itself was insufficient.

D. The Contents of the Right to Consultation in Summary

In short, as the foregoing case law reflects, a State can only restrict the property rights of indigenous peoples over their lands, territories, and natural resources if such restrictions are established by law, necessary, proportional, and their purpose is to attain a legitimate goal in a democratic society. Secondly, when a State is considering approving projects in territories traditionally occupied by indigenous or tribal peoples in the Americas, and which may affect their rights over natural resources essential to their way of life, it is required to: (1) ensure the effective participation of the members of the indigenous or tribal people, in conformity with their customs and traditions, in the approval of the development, exploration or extraction plan; (2) guarantee that the indigenous or tribal people will receive a reasonable benefit from any such project; and

¹²⁷ *Ibid.*, 52, para. 185 (emphasis added). In note 242, the *Sarayaku* judgment also cites Arts 19 and 32 of the *United Nations Declaration on the Rights of Indigenous Peoples*, which refer specifically to the need to obtain the prior, free, and informed consent of indigenous peoples before the State can approve legislative or administrative measures (Article 19) or extractive projects (Article 32) in their territories.

¹²⁸ *Ibid.*, 41-45, paras 163-165. See also *Saramaka Case*, *supra* note 77, 38, para. 129.

¹²⁹ See also L. Brunner & K. Quintana, *The Duty to Consult in the Inter-American System: Legal Standards After Sarayaku*, 16 *ASIL Insights No. 35* (2012), 3-4. In addition, Art. 6 of *ILO Convention No. 169* explicitly establishes the obligation to obtain the free, prior, and informed consent of the indigenous people in question.

(3) ensure that no project is approved within indigenous or tribal territory until independent and technically capable entities, with the State's supervision, perform a prior environmental and social impact assessment.

With respect to (1) above, a proper consultation process must meet the following requirements: (a) the consultation process must be conducted prior to the approval of the project, and in the early stages of planning; (b) it must be conducted in good faith and with the aim of reaching consensus; (c) it must employ appropriate consultation methods that take into account the customs and traditions of the indigenous people, respecting their own decision-making methods; (d) it must be accompanied by culturally adequate environmental and social impact assessments; and (e) it must be a transparent and informed process. In addition, when a proposed large-scale project is likely to have a profound impact within the indigenous territory, the State has a duty to obtain the free, prior, and informed consent of the indigenous people affected, according to its customs and traditions.

E. Conclusion

As discussed in this paper, the right of indigenous peoples to be consulted when extractive projects are planned in their territories is well established in Inter-American law. While some fine aspects and details remain to be clarified, the Inter-American Court has been consistent in holding that Article 21 ACHR protects the collective right of indigenous peoples over the natural resources located in their ancestral lands.

As more cases come through the system, specific details are likely to be fleshed out. For instance, the Inter-American Commission has approved at least two admissibility reports that touch on the issue.¹³⁰ In the near future, these cases are likely to either be heard by the Inter-American Court or lead to a public report on the merits by the Inter-American Commission. As these and other cases make their way through the Inter-American system, they will likely clarify the scope of the rights of indigenous peoples over their lands, territories, and natural resources.

¹³⁰ *Kalina and Lokono Peoples v. Suriname*, IACHR Petition 198/07, Report No. 76/07, 15 October 2007. This case deals with, among other things, alleged sand mining and logging concessions granted in the ancestral territories of the Kaliña and Lokono peoples of Suriname. *Diaguíta Agricultural Communities of the Huascoaltinos and Their Members v. Chile*, IACHR Petition 415/07, Report 141/09, 30 December 2009. This case deals with, among other things, the Pascua Lama mining project, a bi-national gold and silver mining project located high in the Andes on the border between Chile and Argentina.

Pascua Lama, Human Rights, and Indigenous Peoples: A Chilean Case Through the Lens of International Law

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Abstract

In recent decades, experience has shown that private corporations have been increasingly involved in environmental disasters and human rights abuses in all parts of the world. Many of these corporations belong to the energy, metallurgy, extraction, and mining sectors. Pascua Lama is the name of a major mining project on the border of Chile and Argentina. Since the onset of this mining project, civil society organizations have warned of the risk of serious threats to freshwater resources and indigenous rights. This Chilean case illustrates the difficulty of holding corporations accountable for environmental and indigenous rights abuses. The article suggests that interactions between three branches of public international law; namely, international human rights law, international law of indigenous peoples, and international environmental law can be helpful for individuals and communities affected to have access to an effective remedy.

A. Introduction

*“The environment is not an abstraction but represents the living space, the quality of life and the very health of human beings, including generations unborn.”*¹

On 6 November 2012, the Latin American Water Tribunal submitted a verdict on water damages in the case of Pascua Lama.² Recalling the United Nations General Assembly *Resolution on the Human Right to Water and Sanitation*,³ the Tribunal urged the States of Chile and Argentina to declare a moratorium on the mining project of Pascua Lama.

The Canadian transnational corporation *Barrick Gold* is undertaking a large-scale mining project that is located in the Andean Mountains on the border

¹ *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, ICJ Reports 1996, 226, 241-242, para. 29 (emphasis added); *Case Concerning the Gabcikovo-Nagymaros Project (Hungary v. Slovakia)*, Judgment, ICJ Reports 1997, 7, 41, para. 53 [Gabcikovo-Nagymaros Project Case] (emphasis added).

² Latin American Water Tribunal, ‘Caso Amenaza de Daños Irreversibles a Glaciares Transfronterizos y Afectación Permanente de la Cuenca del río Huasco (Chile), por la Ejecución del Proyecto Minero Binacional «Pascua Lama», Desarrollado por la Compañía Minera Transnacional Barrick Gold Corporation (Canadiense), República de Chile y República de Argentina’ (6 November 2012), available at <http://tragua.com/wp-content/uploads/2012/11/pascualama.pdf> (last visited 15 June 2013).

³ *The Human Right to Water and Sanitation*, GA Res. 64/292, UN Doc A/RES/64/292, 28 July 2010 [Resolution on the Human Right to Water and Sanitation].

of Chile and Argentina, making Pascua Lama the first bi-national gold mining project in the world. Even though the project is of bi-national character, the most important part of the mining activity is carried out on the Chilean side. As a matter of fact, the Pascua Lama Project is carried out in Chile by *Nevada Mining Company Ltd.*, a subsidiary of *Barrick Gold*. Therefore, when this paper refers to *Nevada Mining Company Ltd.*, it should be understood as *Barrick Gold*.

This project is currently under construction to exploit an open-pit gold and silver deposit. Once in production, it is “expected to be one of the world’s largest lowest cost mines and is expected to contribute significant free cash flow to Barrick for many years to come”.⁴ In addition, according to the company, the project will “generate enduring and substantial benefits for all concerned, through a combination of attractive economics, significant production at low cash costs, support by the governments of Chile and Argentina and robust environmental and community programs”.⁵

The mining zone covers 3000 km², which is six times the size of the city of Montreal, Canada. The climate where the project is carried out is mountainous and semi-arid, at an elevation of 3,800 to 5,200 meters, approximately 10 kilometers from Barrick’s Veladero mine. On the Chilean side, the project is located at the source of several rivers; among them, Del Estrecho River, tributary of Huasco River, which irrigates the entire fertile valley of Huasco. Currently, these water sources mitigate serious drought that can affect the whole region. Those most affected by this major mining project are farmers and breeders of the Huasco valley as well as indigenous communities. This mining project is currently in the final phase of construction. Even at this early stage of development of the Pascua Lama Mining Project, its operations have contributed to environmental pollution and have put the Andean ecosystem at risk, particularly in regard to the availability of and quality of water in this region. In addition to environmental concerns, this major mining project has been challenged because of its negative impact upon land and water rights of indigenous communities, namely the Diaguita Huascoaltinos. The Diaguita are one of the indigenous peoples living in the North of Chile. According to Sergio Campusano, a Diaguita leader (Comunidad Diaguita Huascoaltinos),

⁴ Trefis, ‘Barrick Gold’s Crucial Mega Mine May Be Delayed At Least By One Year’ (4 June 2013), available at <http://www.trefis.com/stock/abx/articles/189839/barrick-golds-crucial-mega-mine-may-be-delayed-at-least-by-one-year/2013-06-04> (last visited 15 June 2013).

⁵ Barrick Gold Corporation, ‘Pascua- Lama FAQs’, available at <http://www.barrick.com/operations/projects/pascua-lama/faq/default.aspx> (last visited 15 June 2013).

his community is affected by Barrick's extractive activities in the Andean zone of the Huasco River basin and has started to suffer the consequences of the Pascua Lama Project.

The Pascua Lama Project brings to light the difficulties in protecting access to clean and drinkable water when domestic law is not fully harmonized with international standards. In this context, various questions arise: What would be the practical relevance and positive impact that would result from advocating for the observance of international law in relation to the Pascua Lama Project? What are the State obligations concerning freshwater provision and access to freshwater? Which indigenous rights are at stake?

The aim of this paper is to address the tensions between the extractive industries, indigenous peoples' rights, and environmental law in the light of a particular case, the Pascua Lama Mining Project in Chile. An additional purpose of this paper is to examine the strengths and challenges that derive from the interaction between human rights, indigenous peoples, and environmental law. This paper does not intend to deeply analyze the topic of corporate social responsibility, however, it deals with the crucial issue of the impact of corporate activities on the human right to water, particularly in the context of indigenous peoples' lands and territories. Throughout this paper, the word "abuse" will be used for private corporations' interferences with the enjoyment of human rights and "violation" will be used specifically for States' direct infringements of human rights.⁶

⁶ Traditionally, the expression "human rights violations" refers to a State's acts or omissions, and "human rights abuses" to non-state actors' interferences. Compare A. Clapham & S. Jerbi, 'Categories of Corporate Complicity in Human Rights Abuses', 24 *Hastings International and Comparative Law Review* (2001) 3, 339, 340: "While companies may not be in the habit of referring to themselves as 'organs of society', they are a fundamental part of society. As such, they have a moral and social obligation to respect the universal rights enshrined in the Declaration. While a company is not legally obliged under international law to comply with these standards, those companies who have violated them have found, to their cost, that society at large will condemn them. A growing nucleus of transnational companies has incorporated an explicit commitment in their business principles and codes of conduct to uphold the rights enshrined in the UDHR." Amnesty International and The Prince of Wales Leadership Forum, *Human Rights: Is it any of Your Business?* (2000), 23; A. R. Kolbe & R. A. Hutson, 'Human Rights Abuse and Other Criminal Violations in Port-au-Prince, Haiti: A Random Survey of Households', 368 *Lancet* (2006) 9538, 864, 867. See as an example where human rights violations and human rights abuses are used indistinctly: M. Stohl *et al.*, 'State Violation of Human Rights: Issues and Problems of Measurement', 8 *Human Rights Quarterly* (1986) 4, 592, 595; J. M. Mann, 'Health and Human Rights', 1 *Health and Human Rights* (1994) 1, 6, 17.

Consequently, in order to thoroughly analyze the Pascua Lama case, this paper will first address relevant international law standards in the field of environmental law, human rights, and indigenous rights (B). Subsequently, it will focus on the Chilean legal framework and international obligations (C). Finally, this case study will examine Pascua Lama in light of environmental standards, the human right to water, and indigenous peoples' rights to land, territories, and natural resources (D).

B. International Law

This section is structured around three cross-cutting issues; namely, environment, water, and indigenous peoples' rights within the specific context of extractive business activities. Extractive projects usually engender a significant impact on ancestral indigenous land, territories, and natural resources. International human rights law, international law of indigenous peoples, and international environmental law can simultaneously apply to these situations.

I. International Environmental Law

Like public international law, international environmental law is mainly composed of State's obligations regarding other States or the international community.⁷ Some of these environmental obligations come from widely accepted international environmental law principles, such as the duty to prevent environmental harm.⁸ Much of these obligations have to be applied at the domestic level, as they represent general environmental principles; for instance, the customary obligation to conduct an environmental impact

⁷ See *Case Concerning Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Judgment, ICJ Reports 2010, 14, 56, para. 101 [Pulp Mills on the River Uruguay Case].

⁸ "Since the Stockholm Conference on the Environment in 1972 there has been a marked development of international law relating to the protection of the environment. [...] Importantly, these emerging principles now integrate environmental protection into the development process. Environmental law and the law on development stand not as alternatives but as mutually reinforcing, integral concepts, which require that where development may cause significant harm to the environment there is a duty to prevent, or at least mitigate, such harm. This duty, in the opinion of the Tribunal, has now become a principle of general international law." See *Award in the Arbitration Regarding the Iron Rhine ("IJZEREN RIJN") Railway Between the Kingdom of Belgium and the Kingdom of the Netherlands*, Award of the Arbitral Tribunal, 24 May 2005, 27 Reports of International Arbitral Awards (2008), 35, 66-67, para. 59. See *Gabčíkovo-Nagymaros Project*, *supra* note 1, 78, para. 140.

assessment (EIA).⁹ Prevention and due diligence are also paramount principles in international environmental law. According to the International Court of Justice (ICJ), they have met the standard of a customary rule.¹⁰

Additionally, the ICJ asserted in a case related to the protection of the environment and the preservation of freshwater resources that the principle of due diligence implied at least the duty of vigilance and prevention.¹¹ The Court affirmed that this due diligence principle would be infringed “if a party planning works liable to affect the regime of the river or the quality of its waters did not undertake an environmental impact assessment on the potential effects of such works”.¹² Furthermore, the Court concluded that “the responsibility of a party [...] would therefore be engaged if it was shown that it had failed to act diligently

⁹ “It has been defined as a process for identifying the likely consequences for the biogeophysical and socio-economic environments and for human health and welfare of implementing particular activities and for conveying this information, at a stage when it can materially affect their decision, to those responsible for sanctioning the proposals.” R. Ramanathan, ‘A Note on the Use of the Analytic Hierarchy Process for Environmental Impact Assessment’, 63 *Journal of Environmental Management* (2001) 1, 27, 27.

¹⁰ “[T]he principle of prevention, as a customary rule, has its origins in the due diligence that is required of a State in its territory. It is ‘every State’s obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States’ [...]. This Court has established that this obligation ‘is now part of the corpus of international law relating to the environment’ [...]. See ICJ, *Pulp Mills on the River Uruguay Case*, *supra* note 7, 58, para. 101; *Corfu Channel (United Kingdom v. Albania)*, Judgment, ICJ Reports 1949, 4, 22; *Legality of the Threat or Use of Nuclear Weapons*, *supra* note 1, 242, para. 29.

¹¹ “This vigilance and prevention is all the more important in the preservation of the ecological balance, since the negative impact of human activities on the waters of the river may affect other components of the ecosystem of the watercourse such as its flora, fauna, and soil.” *Pulp Mills on the River Uruguay Case*, *supra* note 7, 77, para. 188. The ICJ emphasized in the *Gabčíkovo-Nagymaros* case that “in the field of environmental protection, vigilance and prevention are required on account of the often irreversible character of damage to the environment and of the limitations inherent in the very mechanism of reparation of this type of damage”. *Gabčíkovo-Nagymaros Project Case*, *supra* note 1, 78, para. 140.

¹² *Pulp Mills on the River Uruguay Case*, *supra* note 7, 83, para. 204. The decisions of the Human Rights Committee (HRC) support this statement: “[T]he State did not require studies to be undertaken by a competent independent body in order to determine the impact that the construction of the wells would have on traditional economic activity, nor did it take measures to minimize the negative consequences and repair the harm done. The Committee also observes that the author has been unable to continue benefiting from her traditional economic activity owing to the drying out of the land and loss of her livestock.” The Committee concluded therefore that the State party violated the right enshrined in Article 27 of the Covenant. See HRC, *Ángela Poma Poma v. Peru*, Communication No. 511/1992, UN Doc CCPR/C/95/D/1457/2006, 24 April 2009, 11, para. 7.7 [HRC, *Ángela Poma Poma v. Peru*].

and thus take all appropriate measures to enforce its relevant regulations on a public or private operator under its jurisdiction”.¹³

As previously mentioned, international environmental law mainly deals with legal obligations addressed to States; it does not provide legal entitlements for individuals or corporations. In contrast, international human rights law focuses on the human being and therefore provides legal entitlements for individuals to make claims in case of human rights violations. Consequently, the international human rights law framework seems to be a better option to protect individuals from water rights infringements. Indeed, individuals whose life, integrity, security, health, private life, etc. are affected due to water scarcity, accessibility or pollution would be entitled to claim reparation for such violations. It remains to be seen whether individuals can claim reparations for direct damage caused by water pollution or whether individuals can make such claims on behalf of future generations.

II. International Human Rights Law

Most of the time, activities of extractive business have a negative impact on environment and biodiversity, particularly on the availability of water resources. In this context, the United Nations Committee on Economic, Social and Cultural Rights has often reiterated the obligation that States Parties must “ensure that companies demonstrate due diligence to make certain that they do not impede the enjoyment of the Covenant rights by those who depend on or are negatively affected by their activities”.¹⁴ According to this Committee, all States Parties to the *International Covenant on Economic, Social and Cultural Rights* (ICESCR) have the obligation “to ensure that all economic, social and cultural rights laid down in the Covenant are fully respected and rights holders adequately protected in the context of corporate activities”.¹⁵

¹³ “The obligation of due diligence [...] is further reinforced by the requirement that [...] the rules and measures adopted by the parties both have to conform to applicable international agreements and to take account of internationally agreed technical standards.” *Pulp Mills on the River Uruguay Case*, *supra* note 7, 79, para. 197.

¹⁴ Committee on Economic, Social and Cultural Rights (CESCR), *Statement on the Obligations of States Parties Regarding the Corporate Sector and Economic, Social and Cultural Rights*, UN Doc E/C.12/2011/1, 20 May 2011, 2, para. 4 [CESCR, Statement on the Obligations of States Parties]. See also CESCR, *General Comment No. 3*, UN Doc HRI/GEN/1/Rev.9 (Vol. I), 27 May 2008, 7, 9, para. 10 [CESCR, General Comment No. 3].

¹⁵ CESCR, *Statement on the Obligations of States Parties*, *supra* note 14, 1, para. 1.

To address human rights concerns in the context of business activities, it is worth bearing in mind that there is an international consensus that water is considered to be an internationally recognized human right, as clearly stated in *Resolution 64/292* (2010) of the United Nations General Assembly.¹⁶ It is noteworthy to recall that Catarina de Albuquerque, the United Nations Independent Expert on Human Rights Obligations Related to Access to Safe Drinking Water and Sanitation, pointed out that safe and clean drinking water and sanitation is a human right essential to the full enjoyment of life and all other human rights.¹⁷ The human right to water is a paradigmatic right where the indivisibility of human rights plays a paramount role.

For instance, access to safe drinking water and adequate sanitation must be considered a determinant of health, as pointed out by the former Special Rapporteur on the Right to Health.¹⁸ There is a close relation; they are

¹⁶ “Recognizes the right to safe and clean drinking water and sanitation as a human right that is essential for the full enjoyment of life and all human rights”. *Resolution on the Human Right to Water and Sanitation*, *supra* note 3, 1, para. 1. “By recognising the right to water the international community is making a moral statement about its commitment to support southern countries to scale up efforts to provide safe, clean, accessible and affordable water and sanitation for all.” A. M. Walnycki, ‘UN Recognises Access to Water and Sanitation as a Human Right’ (2 August 2010), available at <http://www.ids.ac.uk/go/news/un-recognises-access-to-water-and-sanitation-as-a-human-right> (last visited 15 June 2013).

¹⁷ G. Dupont, ‘Droit à l’Eau: “Passer de la Théorie à la Mise en Œuvre”’, *Le Monde* (10 September 2010), available at http://www.lemonde.fr/planete/article/2010/09/10/droit-a-l-eau-passer-de-la-theorie-a-la-mise-en-oeuvre_1409388_3244.html (last visited 15 June 2013). Compare Human Rights Council, *Report of the Independent Expert on the Issue of Human Rights Obligations Related to Access to Safe Drinking Water and Sanitation*, UN Doc A/HRC/12/24, 1 July 2009, 7, para. 13. See S. McCaffrey, ‘A Human Right to Water: Domestic and International Implications’, 5 *Georgetown International Environmental Law Review* (1992) 1, 1, 12; S. Klawwiter & H. Qazzaz, ‘Water as a Human Right: The Understanding of Water in the Arab Countries of the Middle East’, 21 *International Journal of Water Resources Development* (2005) 2, 253, 254; J. Moe, ‘An Introduction to Human Rights and the Human Right to Health’, 2 *Queen’s Medical Review* (2008) 1, 19, 20; A. Cahill, ‘The Human Right to Water – A Right of Unique Status: The Legal Status and Normative Content of the Right to Water’, 9 *International Journal of Human Rights* (2005) 3, 389, 397; J. Scanlon, A. Cassar & N. Nemes, ‘Water as a Human Right?’, *IUCN Environmental Policy and Law Paper No. 51* (2004), 3.

¹⁸ “The right to health is an inclusive right, extending not only to timely and appropriate health care, but also to the underlying determinants of health, such as access to safe and potable water and adequate sanitation, healthy occupational and environmental conditions, and access to health-related education and information, including on sexual and reproductive health.” See Special Rapporteur on the Right to Health, *Economic, Social and Cultural*

independent and interrelated because human rights tend to protect the integrality of the human being. There is also a close relation between clean and unpolluted water and a non-degraded and healthy environment. Concerning water access and water management, “human rights standards specify the essential minimum level of water access that must be protected”.¹⁹

In accordance with international human rights law, domestic law must incorporate control measures as well as legal remedies and reparations available for victims of human rights violations and abuses.²⁰ For instance, in *General*

Rights: The Right to Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health, UN Doc E/CN.4/2003/58, 13 February 2003, 8, para. 23.

¹⁹ E. Filmer-Wilson, ‘The Human Rights-Based Approach to Development: The Right to Water’, 23 *Netherlands Quarterly of Human Rights* (2005) 2, 213, 237.

²⁰ “In general, legally binding international human rights standards should operate directly and immediately within the domestic legal system of each State party, thereby enabling individuals to seek enforcement of their rights before national courts and tribunals. The rule requiring the exhaustion of domestic remedies reinforces the primacy of national remedies in this respect. The existence and further development of international procedures for the pursuit of individual claims is important, but such procedures are ultimately only supplementary to effective national remedies.” CESCR, *General Comment No. 9*, UN Doc E/C.12/1998/24, 3 December 1998, 2, para. 4. “Among the measures which might be considered appropriate, in addition to legislation, is the provision of judicial remedies with respect to rights which may, in accordance with the national legal system, be considered justiciable. The Committee notes, for example, that the enjoyment of the rights recognized, without discrimination, will often be appropriately promoted, in part, through the provision of judicial or other effective remedies. Indeed, those States parties which are also parties to the International Covenant on Civil and Political Rights are already obligated (by virtue of articles 2 (paras. 1 and 3), 3 and 26) of that Covenant to ensure that any person whose rights or freedoms (including the right to equality and non-discrimination) recognized in that Covenant are violated, ‘shall have an effective remedy’ (art. 2 (3) (a)). In addition, there are a number of other provisions in the International Covenant on Economic, Social and Cultural Rights, including articles 3, 7 (a) (i), 8, 10 (3), 13 (2) (a), (3) and (4) and 15 (3) which would seem to be capable of immediate application by judicial and other organs in many national legal systems. Any suggestion that the provisions indicated are inherently non-self-executing would seem to be difficult to sustain.” CESCR, *General Comment 3*, *supra* note 14, 8, para. 5. *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, Art. 2, 993 UNTS 3, 5. “Each State Party to the present Covenant undertakes [...] [t]o ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy.” *International Covenant on Civil and Political Rights*, 16 December 1966, Art. 2 (3) (b), 999 UNTS 171, 174 [ICCPR]. “Where the exercise of any of the rights or freedoms referred to in Article 1 is not already ensured by legislative or other provisions, the States Parties

Comment No. 15 concerning the right to water, the Committee on Economic, Social and Cultural Rights has interpreted that

“[b]efore any action that interferes with an individual’s right to water is carried out by the State party, or by any other third party, the relevant authorities must ensure that such actions are performed in a manner warranted by law, compatible with the Covenant, and that comprises: (a) opportunity for genuine consultation with those affected; (b) timely and full disclosure of information on the proposed measures; (c) reasonable notice of proposed actions; (d) legal recourse and remedies for those affected; and (e) legal assistance for obtaining legal remedies (see also General Comments No. 4 (1991) and No. 7 (1997)). Where such action is based on a person’s failure to pay for water their capacity to pay must be taken into account. Under no circumstances shall an individual be deprived of the minimum essential level of water.”²¹

The obligation to grant access to effective remedies has been developed with regard to human rights abuses from non-state actors.²² This is related to the State’s positive obligation concerning the right to water and sanitation in cases of third party interferences, including corporate interference.²³ According

undertake to adopt, in accordance with their constitutional processes and the provisions of this Convention, such legislative or other measures as may be necessary to give effect to those rights or freedoms.” *American Convention on Human Rights*, 22 November 1969, Art. 2, 1144 UNTS 123, 145.

²¹ CESCR, *General Comment No. 15*, UN Doc E/C.12/2002/11, 20 January 2003, 17-18, para. 56 [CESCR General Comment 15].

²² “As part of their duty to protect against business-related human rights abuse, States must take appropriate steps to ensure, through judicial, administrative, legislative or other appropriate means, that when such abuses occur within their territory and/or jurisdiction those affected have access to effective remedy.” Human Rights Council, *Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises: Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework*, UN Doc A/HRC/17/31, 21 March 2011, 22, para. 25 (emphasis omitted).

²³ The notion of positive obligations with regard to human rights in the context of environmental pollution has been developed for the European Court of Human Rights. See *Taşkın and Others v. Turkey*, ECHR Application No. 46117/99, Judgment of 10 November 2004; *Öneryıldız v. Turkey*, ECHR Application No. 48939/99, Judgment of 30 November 2004; *Fadeyeva v. Russia*, ECHR Application No. 55723/00, Judgment of 9 July 2006; *Giacomelli v. Italy*, ECHR Application No. 59909/00, Judgment of 2 November 2006.

to the Committee on Economic, Social and Cultural Rights, the obligation to protect requires States Parties “to prevent third parties from interfering in any way with the enjoyment of the right to water”.²⁴ States’ positive obligations include the obligation to act with due diligence, which has been developed by the European Court of Human Rights and the Inter-American Court of Human Rights (Inter-American Court), as well as international and regional political forums.²⁵ The State must take a variety of effective measures in order to prevent third parties from polluting, degrading, or unfairly collecting water resources, including natural freshwater.

Since international human rights law must be incorporated into domestic law considering that its aim is centered on the individual, as a legal framework it may be in a better position to render access to water and sanitation justiciable for the individual. At any rate, any act that jeopardizes human access to safe water at the domestic level could mean human rights violations, and in some cases, violations of State environmental obligations.

III. Indigenous Rights

The *ILO Convention on Indigenous and Tribal Peoples* (1989) (ILO Convention No. 169) imposes on States the obligation to consult and afford wide participation to indigenous peoples. The right to participate does not confine itself merely to development projects but also includes larger topics such as self-government. As a general policy, Article 5 (a) of the *ILO Convention No. 169* states that in applying the provisions of this Convention “the social, cultural, religious and spiritual values and practices of these peoples shall be recognized and protected” and (c) “policies [...] shall be adopted, with the participation and

²⁴ See CESCR, *General Comment No. 15*, *supra* note 21, 9, para. 23.

²⁵ See International Conference on the Great Lakes (ICGLR) & Organisation for Economic Co-operation and Development (OECD), ‘Key Outcomes of the ICGLR-OECD Joint Consultation on Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas and ICGLR Ministerial Meeting’ (29-30 September & 1 October 2010), available at <http://www.oecd.org/investment/mne/46128642.pdf> (last visited 15 June 2013); OECD, ‘OECD Pilot Project in the Mining Sector: Promoting Responsible Investment Through Enhanced Due Diligence: Draft Hypothetical Critical Scenarios and Examples of Key Challenges to be addressed in the Practical Guidance’ (8 December 2009), available at <http://www.oecd.org/daf/inv/investment-policy/44322960.pdf> (last visited 15 June 2013). The UN Security Council has mandated the UN Group of Experts on the DRC to develop guidelines on due diligence for companies sourcing minerals from eastern DRC. See SC Res. 1896, UN Doc S/RES/1896 (2009), 7 December 2009, 3, para. 7.

co-operation of the peoples affected”.²⁶ In this line, Article 6 (1) (a) establishes that governments shall “consult the peoples concerned, through appropriate procedures and in particular through their representative institutions, whenever consideration is being given to legislative or administrative measures which may affect them directly”.²⁷

In this respect, Article 13 (1) provides that governments

“shall respect the special importance for the cultures and spiritual values of the peoples concerned of their relationship with the lands or territories, or both as applicable, which they occupy or otherwise use, and in particular the collective aspects of this relationship”.²⁸

Further, it must be borne in mind that Article 13 (2) of *ILO Convention No. 169* states that “the use of the term lands in Articles 15 and 16 shall include the concept of territories, which covers the total environment of the areas which the peoples concerned occupy or otherwise use”.²⁹ Additionally, Article 14 (1) recognizes “the rights of ownership and possession of the peoples concerned over the lands which they traditionally occupy shall be recognised”.³⁰ And, finally, Article 15 (1) provides that

“the rights of the peoples concerned to the natural resources pertaining to their lands shall be specially safeguarded. These rights include the right of these peoples to participate in the use, management and conservation of these resources.”³¹

The *ILO Convention No. 169* is complemented and reinforced by the *United Nations Declaration on the Rights of Indigenous Peoples* (UNDRIP).³² The free, prior, and informed consent of the indigenous peoples concerned is one of the main principles established in this Declaration. Indeed, Article 18 states

²⁶ International Labor Organization (ILO), *Convention Concerning Indigenous and Tribal Peoples in Independent Countries*, 27 June 1989, Art. 5 (a) & (c), 28 ILM 1382, 1385 [ILO Convention No. 169].

²⁷ *Ibid.*, Art. 6 (a), 1386.

²⁸ *Ibid.*, Art. 13 (1), 1387.

²⁹ *Ibid.*, Art. 13 (2), 1387.

³⁰ *Ibid.*, Art. 14 (1), 1387.

³¹ *Ibid.*, Art. 15 (1), 1387.

³² *United Nations Declaration on the Rights of Indigenous Peoples*, 13 September 2007, Art. 26, GA Res. 61/295 annex, UN Doc A/RES/61/295, 1, 8 [UNDRIP].

that “[i]ndigenous peoples have the right to participate in decision-making in matters which would affect their rights”³³ and Article 19 lays down that

“States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them”.³⁴

Another important pillar of this Declaration is the indigenous peoples’ right to land, territories, and natural resources. Articles 26, 29, and 32 reinforce the provisions of *ILO Convention No. 169*. Article 29 (1) states that “[i]ndigenous peoples have the right to the conservation and protection of the environment and the productive capacity of their lands or territories and resources”.³⁵ Furthermore, Article 32 (2) establishes that

“States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources”.³⁶

The adverse environmental, economic, social, cultural, and spiritual impact on the lands, territories, and resources which indigenous peoples have traditionally owned, occupied, or used has also been addressed by the Inter-American Court, as in the case of *Kichwa Indigenous People of Sarayaku v. Ecuador*.³⁷ Indeed, Article 21 (Right to Property) of the *American Convention on*

³³ *Ibid.*, Art. 18, 6.

³⁴ *Ibid.*, Art. 19, 6.

³⁵ *Ibid.*, Art. 29 (1), 8.

³⁶ *Ibid.*, Art. 32 (2), 9.

³⁷ See *Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, Judgment of 1 February 2000, IACtHR Series C, No. 66; *Moiwana Community v. Suriname*, Judgment of 15 June 2005, IACtHR Series C, No. 124; *Sawhoyamaxa Indigenous Community v. Paraguay*, Judgment of 29 March 2006, IACtHR Series C, No. 146; *Saramaka People v. Suriname*, Judgment of 28 November 2007, IACtHR Series C, No. 172; *Xákmok Kásek Indigenous Community v. Paraguay*, Judgment of 24 August 2010, IACtHR Series C, No. 214; *Kichwa Indigenous People of Sarayaku v. Ecuador*, Judgment of 27 June 2012, IACtHR Series C, No. 245.

Human Rights (American Convention) constitutes a crucial provision to protect indigenous lands, territories, and natural resources, including water.³⁸

Moreover, the Human Rights Committee (HRC) “recognizes that a State may legitimately take steps to promote its economic development. Nevertheless, it recalls that economic development may undermine the rights protected by Article 27 [of the International Covenant on Civil and Political Rights]”.³⁹ Indeed, Article 27 of the *International Covenant on Civil and Political Rights* (ICCPR) provides that

“[i]n those States in which ethnic, religious, or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to

³⁸ “[T]he Court found that the members of the Yakye Axa Community live in extremely destitute conditions as a consequence of lack of land and access to natural resources, caused by the facts that are the subject matter of this proceeding, as well as the precariousness of the temporary settlement where they have had to remain, waiting for a solution to their land claim. This Court notes that, according to the statements of Esteban López, Tomás Galeano and Inocencia Gómez during the public hearing held in the instant case, the members of the Yakye Axa Community could have been able to obtain part of the means necessary for their subsistence if they had been in possession of their traditional lands. Displacement of the members of the Community from those lands has caused special and grave difficulties to obtain food, primarily because the area where their temporary settlement is located does not have appropriate conditions for cultivation or to practice their traditional subsistence activities, such as hunting, fishing, and gathering. Furthermore, in this settlement the members of the Yakye Axa Community do not have access to appropriate housing with the basic minimum services, such as clean water and toilets.” *Yakye Axa Indigenous Community v. Paraguay*, Judgment of 17 June 2005, IACtHR Series C, No. 125, 85, para. 164 [Yakye Axa Case]. Ancestral right to water as natural resource has been recognized by Chilean case law, see, for instance, *Alejandro Papic Dominguez Con Comunidad Indígena Aymara Chusmiza v. Usmagama*, Supreme Court of Chile, Case No. 2840-2008, Judgment of 25 November 2009.

³⁹ “Thus the leeway the State has in this area should be commensurate with the obligations it must assume under article 27. The Committee also points out that measures whose impact amounts to a denial of the right of a community to enjoy its own culture are incompatible with article 27, whereas measures with only a limited impact on the way of life and livelihood of persons belonging to that community would not necessarily amount to a denial of the rights under article 27.” HRC, *Ángela Poma Poma v. Peru*, *supra* note 12, 10, para. 7.4. Concerning logging activities, see HRC, *Länsman et al. v. Finland*, Communication No. 1023/2001, UN Doc CCPR/C/83/D/1023/2001, 15 April 2005, 14, para. 10.2.

enjoy their own culture, to profess, and practise their own religion, or to use their own language”.⁴⁰

IV. Interactions

According to Weeramantry, there are confluences rather than conflicts in the interplay between environmental protection and human rights.⁴¹ The concept that best articulates the relation between environment and human rights is sustainable development. This notion is also the decisive principle to settle irreconcilable conflicts between economic development and human dignity. As Scanlon affirmed, “human rights cannot be secured in a degraded or polluted environment”.⁴²

There is an obvious reciprocal interaction and interdependence between human rights and the environment, even though they are distinct fields.⁴³

⁴⁰ ICCPR, *supra* note 20, Art. 27, 179.

⁴¹ “The protection of the environment is likewise a vital part of contemporary human rights doctrine, for it is a *sine qua non* for numerous human rights such as the right to health and the right to life itself. It is scarcely necessary to elaborate on this, as damage to the environment can impair and undermine all the human rights spoken of in the Universal Declaration and other human rights instruments.” Separate Opinion of Vice-President Weeramantry, *Gabcikovo-Nagyymaros Project Case*, *supra* note 1, 88, 91-92.

⁴² “Linking human rights and the environment appears *prima facie* straightforward—especially in view of the now well-accepted fundamental relationship between human rights and sustainable development, one key element of which is environmental protection. Human rights cannot be secured in a degraded or polluted environment.” Scanlon, Cassar & Nemes, *supra* note 17, 14.

⁴³ “The contribution of environmental protection to the realization of basic human rights, and the role of human rights in protection of the environment are undeniable. Substantive rights such as the right to food, health and the right to life itself will not materialize for all of the world’s inhabitants unless we maintain a clean and healthy environment with a sustainable base of environmental and natural resources.” Statement by Klaus Töpfer (Executive Director of the United Nations Environment Programme), founded in Office of the High Commissioner for Human Rights (OHCHR), *Human Rights and the Environment: Conclusions of a Meeting of Experts*, OHCHR Doc HR/PUB/02/2 (2002), 5 [OHCHR, Human Rights and the Environment]. “While human rights and the environment are distinct fields, their interdependence is now broadly recognized. Similarly, there is a growing consensus around the specific role of procedural rights in relation to environmental matters, rights such as those to information, participation and access to justice.” Statement by Mary Robinson (United Nations High Commissioner for Human Rights), founded in OHCHR, *Human Rights and the Environment*, *supra* note 43, 3.

The Former United Nations High Commissioner for Human Rights, Mary Robinson, clarified this point by stating that

“the specific impact of environmental factors on the promotion and protection of human rights has been progressively more clearly illustrated: the effect of pollution on individuals’ right to health; the consequences of soil degradation for the right to food; the rights of individuals to be informed of the environmental conditions surrounding them and their families”.⁴⁴

Lador rightly added that “[w]e can hardly imagine an environmental issue not having a human rights dimension”.⁴⁵ Therefore, a wide range of human rights may be seriously affected and totally lose their meaning as people and communities cannot live in an environment that is not free from air, water, and land pollution.⁴⁶ The *Stockholm Declaration* first officially recognized the link between human rights and environmental protection in 1972.⁴⁷ Each of these

⁴⁴ Statement by Mary Robinson (United Nations High Commissioner for Human Rights), founded in OHCHR, *Human Rights and the Environment*, *supra* note 43, 2.

⁴⁵ Y. Lador, ‘The Challenges of Human Environmental Rights’, in United Nations Environment Programme, *Human Rights and the Environment: Proceedings of a Geneva Environment Network Roundtable* (2004), 7, 8. “Today the international community is becoming more inclined to perceive the objectives of human rights, environmental protection and economic development as complementary rather than as unrelated or opposing disciplines.” Statement by Klaus Töpfer, founded in OHCHR, *Human Rights and the Environment*, *supra* note 43, 5.

⁴⁶ “[...] [T]he realization of the right to adequate housing loses its meaning unless processes are put into place that ensure that people and communities can live in an environment that is free from pollution of air, water and the food chain.” Statement of Mr. Miloon Kothari (Special Rapporteur on Adequate Housing), at the World Summit on Sustainable Development (Johannesburg, 30 August 2002), available at <http://www.unhchr.ch/Hurricane/Hurricane.nsf/60a520ce334aaa77802566100031b4bf/f9025f723f7eb70ec1256f5b003ae963?OpenDocument> (last visited 15 June 2013).

⁴⁷ “The principle of IEL [International Environmental Law] recognized in the Stockholm and Rio Conferences are both inspired by, and consistent with, recognized principles of international human rights law, including the principle of ‘non-discrimination’, ‘non-retrogression’, ‘right to participation’, ‘right to a remedy’, ‘international cooperation’, among others. The congruence between these principles reinforces the human rights and environmental linkages and provides a further basis for action for the CESCR with respect to climate change.” See M. A. Orellana, M. Kothari & S. Chaudhry, *Climate Change in the Work of the Committee on Economic, Social and Cultural Rights* (2010), 11. “Man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being, and he bears a solemn responsibility

rights plays an important role both in international human rights law and in international environmental law. In 2002, a group of experts recognized that

“[...] since 1992 important developments have occurred at the national and international levels. They indicate a growing inter-connectedness between the fields of human rights and environmental protection. The overall context for these developments is the concept of sustainable development, which requires that different societal objectives be treated in an integrated manner”.⁴⁸

The 2002 *Plan of Implementation of the World Summit on Sustainable Development* showed clearly that water is a critical nexus between human rights law and environmental law.⁴⁹ For this reason, water should receive protection both from human rights law and environmental law. This evolutionary dynamic involving environmental protection, human rights, and sustainable development was referred by Kothari as the “human rights paradigm”.⁵⁰

What is the exact link between the environment and human rights? According to the body of international and domestic case law, the linkages have been clarified by

“(1) recognizing the right to a healthy environment as a fundamental human right; (2) allowing litigation based on this right, and facilitating its enforceability in domestic law by liberalizing provisions on standing; (3) acknowledging that other human rights

to protect and improve the environment for present and future generations. In this respect, policies promoting or perpetuating apartheid, racial segregation, discrimination, colonial and other forms of oppression and foreign domination stand condemned and must be eliminated.” *Declaration of the United Nations Conference on the Human Environment*, 16 June 1972, Principle 1, UN Doc A/Conf.48/14/Rev. 1 (1973), 3, 11 ILM 1416, 1416.

⁴⁸ OHCHR, ‘Final Text: Meeting of Experts on Human Rights and the Environment’, in OHCHR, *Human Rights and the Environment*, *supra* note 43, para. 4 [OHCHR, Final Text: Meeting of Experts on Human Rights and the Environment].

⁴⁹ “The provision of clean drinking water and adequate sanitation is necessary to protect human health and the environment.” See UN, *Report of the World Summit on Sustainable Development*, UN Doc A/CONF.199/20 (200), 11, para. 8.

⁵⁰ See Orellana, Kothari & Chaudhry, *supra* note 47, 11. “Only the human rights paradigm can offer fundamental and systemic solutions and changes to attain sustainable development.” See Statement of Mr. Miloon Kothari, *supra* note 46 (emphasis omitted).

recognized in domestic legal systems can be violated as a result of environmental degradation”.⁵¹

Environmental legal concerns have developed more quickly at the international level while the human dimension of global environmental concerns has been broadly recognized at the domestic level in the form of human rights. There is essentially, through the basic human needs dimension, an interaction between both environmental and human rights on the one hand, and international and domestic levels on the other hand.

Cases before the Inter-American Commission on Human Rights (Inter-American Commission) and the Inter-American Court show that in situations of environmental pollution or degradation or if environmental protection fails, there are a number of human rights which may be threatened or violated, such as the right to life, the right to health, the right to an adequate standard of living, the right to private and family life, the right to property, and the right to water and sanitation, in addition to many other socio-economic rights.⁵²

What is at play in cases of watercourse pollution? Concerning an international watercourse, there could be a violation of international human rights law, international environmental law, and international water law. With respect to inland watercourses, however, there can be an international human rights law violation or international environmental law violation. There can also be domestic law violations; particularly under human rights and environmental constitutional provisions. Environmental protection and respect for human

⁵¹ OHCHR, ‘Final Text: Meeting of Experts on Human Rights and the Environment’, *supra* note 48, para. 15.

⁵² “Environmental degradation can start with a violation of a human right, the right to know. The inability to have an ecologically healthy environment violates other rights as well such as the right to health or to food and even has consequences for children who can no longer gain access to education.” Lador, *supra* note 45, 8. “The judiciary of Pakistan firmly established the right to safe and unpolluted drinking water as part of the right to life.” For a revision of judicial decisions in India, Bangladesh and Pakistan, see J. Razzaque, ‘Environmental Human Rights in South Asia: Towards Stronger Participatory Mechanisms’, in United Nations Environment Programme, *supra* note 45, 29 [Razzaque, Human Rights in South Asia].

rights are two sides of the same coin.⁵³ Therefore, “it is difficult to make a clear cut division between human rights cases and environmental cases”.⁵⁴

There is a coherent and harmonious relationship between environmental protection and human rights concerning human access to safe drinking water, and adequately complemented, they can play an important role in both international and domestic protection of the right to water, such as in the Chilean case.

B. The Chilean Situation

In light of international standards, there is not sufficient protection in Chile with regard to the human right to water and indigenous rights. This situation has been facilitated by the Chilean legal framework, as explained below.

I. Domestic Legal Framework

Despite the fact that more than 20 years have passed since the end of Pinochet’s dictatorship (1973-1990), the *Constitution of Chile* and most of the domestic legislation is still marked by the dictatorial legal and political orientations, with a clear trend towards liberalization and privatization. This includes public interest services, such as regulation and management of freshwater supply. Such a process has led to an imbalance between public welfare and the interests of private actors. There is a disproportionate concentration on the appropriation of the use of water in order to produce hydroelectric energy. Incredibly, almost 90% of the rights of usage belong to only three main private corporations.⁵⁵

The *Constitution of Chile* and legislation on land, water, mines, forest, fishing, etc. have essentially placed natural resources within the realm of the free market, with its exchange of goods and services as well as investments.⁵⁶ In the

⁵³ “National judicial systems have, in judicial decisions, translated the right to life as the basis of environmental and human rights. The [trends in the observance of human rights and freedom] integrate these concepts which in effect are two sides of one coin.” Statement by Klaus Töpfer, founded in OHCHR, *Human Rights and the Environment*, *supra* note 43, 8.

⁵⁴ J. Razzaque, ‘Human Rights and the Environment: National Experiences’, 32 *Journal of Environmental Policy and Law* (2002) 2, 99, 104; Razzaque, ‘Human Rights in South Asia’, *supra* note 52, 31.

⁵⁵ ‘Mensaje No. 1774-357’ (6 January 2010), available at http://www.unesco.org.uy/iya2009/fileadmin/templates/conaphi.cl/documentos/1774-357_ref_cl_aguas.pdf (last visited 15 June 2013), 4.

⁵⁶ Centro de Derechos Humanos, Universidad Diego Portales, *Chile: Informe Intermediario de las ONG Sobre el se Guimiento de las Observaciones Finales (CCPR/C/CHL/CO/5)*, 6-12

case of indigenous peoples, these natural resources shape their customs and way of life, and are crucial in order to guarantee their economic, social, and cultural development. The Constitution and legislation on land, water, mines, forest, etc. allow private parties to appropriate those natural resources by means of a system of concessions from public authorities to private parties. The Constitution and the legislation guarantee the rights of the concessionaire through property rights, regardless of indigenous peoples' basic needs and rights.

The situation is made worse by the weaknesses and flaws of the environmental legislation as well as lax public environmental policy and management. Public policy has been characterized by the loosening of environmental checks and balances in order to facilitate extractive projects of natural resources, without taking proper account of environmental and social interests.⁵⁷

The *Constitution of Chile* only recognizes a limited number of fundamental rights, and not all of them are protected by a legal remedy. The Constitution only considers water as a good in which individuals and corporations can hold private rights. Indeed, water in the constitution is treated in the context of the right to property.⁵⁸ Thus, the right-holder of the right to use water is constitutionally protected by the right to property.⁵⁹ Water is seen as a good whose use becomes an appropriable right.⁶⁰ All attempts to reform the Constitution did not consider the possibility of explicitly recognizing the human right to water, but rather established at the constitutional level the principle that water is a public good.⁶¹

At the legal level, a process of establishment of rights to use water has occurred since the 1981 *Water Code* was passed. This Code is a landmark legislation that represents a turning point in the process of privatization of water. In Chile, civil law considers water as a public good.⁶² Specialized legislation

[Centro de Derechos Humanos, Chile: Informe Intermediario de las ONG].

⁵⁷ *Ibid.*

⁵⁸ See *Constitution of the Republic of Chile*, Art. 19 (24) (final paragraph).

⁵⁹ "The rights of private citizens over waters, recognized or constituted in conformity with the law, shall grant proprietorship to the owners thereof [...]" *Ibid.*

⁶⁰ A. Dourojeanni & A. Jouravlev, *El Código de Aguas de Chile: Entre la Ideología y la Realidad* (1999), 11.

⁶¹ See *Mensaje No. 1774-357*, *supra* note 55, 5-6. Parliament of Chile, 'Modifica Art. 19, N° 24, de la Constitución Política de la República, con el Objeto de Establecer que el Aprovechamiento y Consumo Humano del Agua, es de Carácter Prioritario', Número de Boletín 6795-07, 16 December 2009; Parliament of Chile, *Modifica Artículo 19 N° 24 de la Constitución Política de la República, con el Objeto de Establecer que las Aguas, Tienen la Calidad de Bienes Nacionales de Uso Público*, Boletín N° 6268-07, 16 December 2008.

⁶² *Civil Code of the Republic of Chile*, Art. 595. See also Dourojeanni & Jouravlev, *supra* note 60, 10.

such as the *Water Code* incorporates this view and legal approach into its text.⁶³ However, the *Water Code* also allows private actors, if certain requirements are met, to hold the rights to permanently use water.⁶⁴ After 20 years, the *Water Code* is still in force in Chile and there has been no further opportunity to amend it to incorporate into it the view of water as a vital human need that must be legally protected. As a result, there is no more water available to access because the vast majority of rights to use water have been recognized in favor of private actors.⁶⁵ Further, the domestic legal framework does not take into account international principles and standards, such as those that have been previously mentioned concerning water, i.e. the human right to access water and the right to a healthy environment in the context of sustainable development.

To sum up, the Chilean legal domestic system has facilitated private appropriation of water and also large-scale private mining projects, such as Pascua Lama, which jeopardize the effective fulfillment of Chile's international obligations concerning both human rights, including the right to water and indigenous rights, as explained below.

II. International Obligations

Chile has to comply with its international commitments, including the 1948 *Universal Declaration of Human Rights*,⁶⁶ the 1976 (revised in 2011) *OECD Guidelines for Multinational Enterprises*,⁶⁷ the 1977 ILO *Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy* (MNE Declaration),⁶⁸ the 1992 *Non-Legally Binding Authoritative Statement of Principles for a Global Consensus on the Management, Conservation and Sustainable Development of All Types of Forests*,⁶⁹ the 1992 *Rio Declaration on Environment*

⁶³ *Water Code* (13 August 1981), Art. 5.

⁶⁴ *Ibid.*, Art. 6.

⁶⁵ Centro de Derechos Humanos, *Chile: Informe Intermediario de las ONG*, *supra* note 56, 6-12.

⁶⁶ *Universal Declaration of Human Rights*, 10 December 1948, GA Res. 217 A (III), UN Doc A/810, 71.

⁶⁷ OECD, *Guidelines for Multinational Enterprises* (2011).

⁶⁸ ILO, *Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy*, 16 November 1977, 17 ILM 422.

⁶⁹ *Non-Legally Binding Authoritative Statement of Principles for a Global Consensus on the Management, Conservation and Sustainable Development of All Types of Forests*, UN Doc A/CONF.151/6/Rev.1, 13 June 1992, 32 ILM 882.

and Development⁷⁰ and Agenda 21,⁷¹ the 1995 *Copenhagen Declaration for Social Development*,⁷² the 1998 *ILO Declaration on Fundamental Principles and Rights at Work*,⁷³ and the 2004 *Voluntary Guidelines to Support the Progressive Realization of the Right to Adequate Food in the Context of National Food Security*.⁷⁴ These instruments encompass internationally widely accepted principles and standards related to human rights and environmental protection, including human access to healthy water and respect for water-related needs. In 1966, the International Law Association established a set of rules known as the *Helsinki Rules on the Uses of the Waters of International Rivers*.⁷⁵ Until the adoption of the 1997 *Convention on the Law of the Non-Navigational Uses of International Watercourses*,⁷⁶ the Helsinki rules “remained the single most authoritative and widely quoted set of rules for regulating the use and protection of international watercourses”.⁷⁷

Besides the aforementioned international standards, binding instruments such as the 1992 *Convention on Biological Diversity*,⁷⁸ the 1992 *Framework Convention on Climate Change* (UNFCCC),⁷⁹ the 1994 *United Nations Convention to Combat Desertification in Countries Experiencing Serious Drought*

⁷⁰ *Rio Declaration on Environment and Development*, UN Doc A/CONF.151/5/Rev.1, 13 June 1992, 32 ILM 876.

⁷¹ *Agenda 21*, UN Doc A/CONF.151/26 (Vol. I), 12 August 1992, 14.

⁷² *Copenhagen Declaration for Social Development and Programme of Action of the World Summit for Social Development*, UN Doc A/CONF.166/9, 4, 19 April 1995.

⁷³ ILO, *Declaration on Fundamental Principles and Rights at Work*, 18 June 1998, 37 ILM 1237.

⁷⁴ Food and Agriculture Organization, *Voluntary Guidelines to Support the Progressive Realization of the Right to Adequate Food in the Context of National Food Security*, FAO Doc CL 127/10-Sup.1 annex, Guideline 8.11.

⁷⁵ C. Spiegel, ‘International Water Law: The Contributions of Western United States Water Law to the United Nations Convention on the Law of the Non-Navigable Uses of International Watercourses’, 15 *Duke Journal of Comparative & International Law* (2005) 2, 333, 340.

⁷⁶ *Convention on the Law of the Non-Navigational Uses of International Watercourses*, 21 May 1997, 36 ILM 700.

⁷⁷ S. M. A. Salman, ‘The Helsinki Rules, the UN Watercourses Convention and the Berlin Rules: Perspectives on International Water Law’, 23 *International Journal of Water Resources Development* (2007) 4, 625, 629. See also generally P. Beaumont, ‘The 1997 UN Convention on the Law of Non-Navigational Uses of International Watercourses: Its Strengths and Weaknesses from a Water Management Perspective and the Need for New Workable Guidelines’, 16 *International Journal of Water Resources Development* (2000) 4, 475.

⁷⁸ *Convention on Biological Diversity*, 5 June 1992, 31 ILM 818. Ratified by Chile in 1994.

⁷⁹ *Framework Convention on Climate Change*, 9 May 1992, 1771 ILM 107. Ratified by Chile in 1995.

and/or Desertification, Particularly in Africa,⁸⁰ the 1997 *Kyoto Protocol*,⁸¹ and the 1997 *Convention on the Law of the Non-navigational Uses of International Watercourses*, provide a concrete environmental and human rights legal framework to be respected, protected and fulfilled in the context of foreign investments.⁸²

In the field of indigenous rights, Chile's international obligations derive from the 1989 *ILO Convention No. 169* and the 2007 UNDRIP. For instance, Rodolfo Stavenhagen, the former Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People, in his 2003 country report concerning Chile, highlighted the inconsistencies between the legislation on land, water, mines, and other sectors and the provisions of the *Indigenous Act*.⁸³ These contradictions also arise with respect to the provisions of international instruments such as the ICCPR, the ICESCR, and the *ILO Convention No. 169*. The *Constitution of Chile* also raises serious doubts as to its compatibility with the abovementioned international instruments. The former Special Rapporteur also emphasized the crucial principle that the protection of human rights "should take precedence over private commercial and economic interests".⁸⁴

In 2007, the HRC was troubled "to learn that 'ancestral lands' are still threatened by forestry expansion and megaprojects in infrastructure and energy".⁸⁵ Therefore, according to obligations set by Articles 1 and 27 of the ICCPR the HRC stated that Chile should "[c]onsult indigenous communities before granting licences for the economic exploitation of disputed lands, and

⁸⁰ *United Nations Convention to Combat Desertification in Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa*, 17 June 1994, 1954 UNTS 3. Ratified by Chile in 1997.

⁸¹ *Kyoto Protocol to the United Nations Framework Convention on Climate Change*, 11 December 1997, 37 ILM 22. Ratified by Chile in 2002.

⁸² United Nations Conference on Trade and Development (UNCTAD), *World Investment Report 1993: Transnational Corporations and Integrated International Production* (1993), 33.

⁸³ Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People, *Indigenous Issues: Human Rights and Indigenous Issues: Addendum: Mission to Chile*, UN Doc E/CN.4/2004/80/Add.3, 17 November 2003, 21, para. 59.

⁸⁴ *Ibid.* See also Centro de Derechos Humanos, *Chile: Informe Intermediario de las ONG*, *supra* note 56, 6-12.

⁸⁵ HRC, *Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant: Concluding Observations of the Human Rights Committee: Chile*, UN Doc CCPR/C/CHL/CO/5, 18 May 2007, 5-6, para. 19.

guarantee that in no case will exploitation violate the rights recognized in the Covenant”.⁸⁶

In 2009, Chile provided information on the implementation of the concluding observations issued by the HRC. Concerning the issue of consulting indigenous communities before granting licenses for economic exploitation of disputed lands, as well as the Committee’s advice to guarantee that in no case would exploitation violate the rights recognized in the Covenant, the State asserted that

“Chile has legislation establishing procedures for consulting and involving indigenous communities in projects that are carried out on their lands. These procedures depend on the type of licence or concession that is being sought. [...] Mining concessions have special legal status under the Constitution and the Mining Code, which regulates their ownership, use and enjoyment”.⁸⁷

In addition, the Chilean State points out that “the statute regulating indigenous lands is supplemented by other laws such as the *Environment (Framework) Act*, and establishes a consultation process for environmental impact studies.”⁸⁸ The document ended by mentioning that

“the 1989 ratification of the International Labour Organization (ILO) Convention concerning Indigenous and Tribal Peoples in Independent Countries (No. 169), which was recently approved by Congress, will ensure that indigenous communities participate in projects involving their lands without prejudice to the protection afforded to them by the State under the Indigenous Law.”⁸⁹

The information provided by the Chilean government in 2009 affirms that consultation and fair participation of indigenous communities in projects involving their lands will take place. According to this information, indigenous

⁸⁶ *Ibid.*, 5-6, para. 19 (c).

⁸⁷ See HRC, *Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant: Chile: Addendum: Information provided by the Government of Chile on the Implementation of the Concluding Observations of the Human Rights Committee (UN Doc CCPR/C/CHL/CO/5)*, UN Doc CCPR/C/CHL/CO/5/Add.1, 22 January 2009, 7, para. 24.

⁸⁸ *Ibid.*, 8, para. 25.

⁸⁹ *Ibid.*, 8, para. 26.

communities are protected at least by international human rights instruments such as the ICCPR and the *ILO Convention No. 169*, and by domestic legal instruments such as the *Environment Framework Act* and the *Indigenous Act*.

Regarding investments on indigenous peoples' lands in Chile, the Committee on the Elimination of Racial Discrimination (CERD) acknowledged "that indigenous peoples are affected by the exploitation of subsoil resources in their traditional lands and that in practice the right of indigenous peoples to be consulted before the natural resources of their lands are exploited is not fully respected".⁹⁰ In this context, the CERD recalled international standards enshrined in the *ILO Convention No. 169* and the Committee's *General Recommendation No. XXIII* (1997).⁹¹ In consequence, the Committee urged the State to "hold effective consultations with indigenous peoples on all projects related to their ancestral lands and to obtain their consent prior to implementation of projects for the extraction of natural resources, in accordance with international standards".⁹² The approval and the implementation of projects for the extraction of natural resources must be conducted in accordance with the right to participate, the duty to hold effective consultations, and the duty to obtain affected peoples' consent prior to approval. In this regard, the HRC argued,

"participation in the decision-making process must be effective, which requires not mere consultation but the free, prior and informed consent of the members of the community. In addition, the measures must respect the principle of proportionality so as not to endanger the very survival of the community and its members".⁹³

⁹⁰ Committee on the Elimination of Racial Discrimination (CERD), *Consideration of Reports Submitted by States Parties Under Article 9 of the Convention: Concluding Observations of the Committee on the Elimination of Racial Discrimination: Chile*, UN Doc CERD/C/CHL/CO/15-18, 7 September 2009, 4, para. 22 [CERD, Concluding Observations: Chile].

⁹¹ In *General Recommendation No. XXIII* the Committee affirmed that it is conscious of the fact that in many regions of the world indigenous peoples have lost their land and resources to colonists, commercial companies and State enterprises. The Recommendation then adds that "[t]he Committee calls in particular upon States parties to: [...] (c) Provide indigenous peoples with conditions allowing for a sustainable economic and social development compatible with their cultural characteristics; (d) Ensure that members of indigenous peoples have equal rights in respect of effective participation in public life and that no decisions directly relating to their rights and interests are taken without their informed consent". CERD, *General Recommendation No. XXIII*, UN Doc HRI/GEN/1/Rev.6, 27 May 2008, 285, 285-286, para. 4 (c) & (d).

⁹² CERD, *Concluding Observations: Chile*, *supra* note 90, 4, para. 22.

⁹³ HRC, *Ángela Poma Poma v. Peru*, *supra* note 12, 11, para. 7.6.

Finally, in 2010, the CERD addressed a letter to Chile requesting more information about recommendation 22 concerning the obligation to conduct prior and effective consultations with indigenous peoples.⁹⁴ The Committee asked about the procedures to obtain prior and informed consent from indigenous peoples concerning projects that involve the extraction of natural resources – which significantly affect indigenous rights and interests – as well as the compatibility of such procedures *vis-à-vis* international standards.⁹⁵ Effective consultation and free, prior, and informed consent form an integral part of participatory rights and are closely related to a number of other human rights, such as the freedom of opinion, the freedom of expression, and the right to access information.⁹⁶

The Pascua Lama mining project constitutes a good example of the interaction between international environmental law, international law of indigenous peoples, and international human rights law.

C. Pascua Lama

The Pascua Lama mining project was examined twice by the State environmental agency in charge of the environmental impact assessment system. This mechanism has existed in Chile since 1997.⁹⁷ The first time the

⁹⁴ CERD, ‘Letter from Anwar Kemal’ (27 August 2010), available at http://www2.ohchr.org/english/bodies/cerd/docs/followup/Chile_27082010.pdf, 2.

⁹⁵ *Ibid.*

⁹⁶ “Under article 27, a State party’s decision-making that may substantively compromise the way of life and culture of a minority group should be undertaken in a process of information-sharing and consultation with affected communities [...]” HRC, *General Comment No. 34*, UN Doc CCPR/C/GC/34, 12 September 2011, 4-5, para. 18. See also HRC, *Ángela Poma Poma v. Peru*, *supra* 12, UN Doc CCPR/C/95/D/1457/2006, 10, para. 7.2.

⁹⁷ The Chilean environmental impact assessment system (EIAS) was established by the *Chilean Environmental Framework Act* which was adopted in March 1994. Since the enactment in 1997 of the *Executive Decree No. 30/97*, or *Environmental Impact Assessment System (EIAS) Regulations*, public and private projects listed in those regulations (Article 3) cannot be executed or modified unless they are first submitted to the EIAS. The EIAS was implemented by the National Environmental Commission (Conama) when more than one region was involved, or by the respective regional Commission (Corema) when only a single region was involved. *Law 19.300* was recently modified by *Law 20.417*, that creates new environmental institutions such as: the Ministry of the Environment, which is in charge of environmental policies and programmes; the Environmental Assessment Agency, which is in charge of managing the EIAS; and, the National Bureau of the Environment, which is in charge of overseeing compliance with environmental laws. Baker & McKenzie,

project was submitted was in 2000, and its execution was authorized in 2001.⁹⁸ *Barrick Gold* submitted the project to the State environmental agency again in 2004, due to the company introducing modifications to the initial project. These modifications seriously threatened the existence of three Chilean glaciers known as Toro 1, Toro 2, and Esperanza. The modification of the project in 2004 planned to displace a large portion of each glaciers to a nearby location.

Eventually, in 2006, the environmental agency issued *Environmental Qualification Resolution No 24/2006*, which approved the modifications to the project.⁹⁹ However, the authorization pointed out that the company could have access to minerals only if the mining activity did not cause any retreat, displacement, destruction, or physical intervention of the three glaciers.¹⁰⁰ This signified that the effective protection of the existing glaciers in the zone of exploitation would be a decisive condition for the execution of the project. *Barrick Gold* would have an obligation to regularly control the glaciers in the zone of exploitation and to periodically conduct studies in order to verify and provide evidence that the mining activity would not affect the glaciers, nor the water quantity or quality of the basin.

Despite these mandatory requirements, Barrick's extractive activities pose a major risk of polluting the Huasco River basin and destroying the glaciers Toro I, Toro II, and Esperanza, as well as other glaciers close to the zone of operations. Since the execution of the project, various anomalies and environmental threats have appeared. In 2009, the Operational Control Committee (a governmental supervisory body), after a verification visit, found that Barrick Gold had failed to comply with several requirements imposed by *Resolution N°24/2006* regarding water and glaciers. First, Barrick has extracted water from a non-authorized point, which jeopardizes the water resources of the Huasco River basin.¹⁰¹ Second,

'Chile: The Environmental Impact Assessment System Under Chilean Law', 5 *Latin American Legal Developments Bulletin* (1997) 3, available at <http://db.natlaw.com/interam/ch/en/sp/spchen1.htm> (last visited 15 June 2013); R. Vergara, P. Sandoval & P. Infante, 'Environment-Chile', available at <http://www.latinlawyer.com/reference/article/40629/chile/> (last visited 15 June 2013).

⁹⁸ Regional Environmental Commission of Chile (CONAMA), *Resolution of Environmental Qualification No. 39/01* (2001) (modified by CONAMA, *Resolution of Environmental Qualification No. 59/01* (2001)).

⁹⁹ CONAMA, *Resolution of Environmental Qualification No. 24/06* (2006).

¹⁰⁰ *Ibid.*, § 9.22.

¹⁰¹ Ministry of Public Affairs, 'Informe Técnico COF: Visita Inspectiva del Comité Operativo de Fiscalización: RCA Corema Atacama N° 24/2006' (22 December 2009), available at http://www.e-seia.cl/archivos/Inf_Tec_DGA____COF_-_EIA_ModificacionesProyecto_Pascua_Lama__Dic_09_.pdf (last visited 15 June 2013).

Barrick has conducted operations such as transporting filler material with heavy machinery that produces particle dust around the mining project location. This particle dust can accumulate on the glaciers located near the project, particularly on the Estrecho Glacier.¹⁰² This could lead to an enhanced melting of mountain glaciers and the subsequent danger of seriously affecting the water resources of the Huasco River basin.¹⁰³ Third, due to the construction of a road that crosses the Huasco River, Barrick has altered the free flow of water of the Estrecho River and therefore has threatened the water resources of the Huasco River basin.¹⁰⁴

On 19 January 2010, the Chilean authorities decided to initiate an administrative procedure in order to sanction the irregularities in the execution of the mining project. One of the most serious problems was the existence of particle dust on the glaciers. The dust was swept up in the air by the permanent activity of big mining tracks and afterwards installs itself on glaciers, causing an abnormally rapid melting process. The corporation did not dampen the roads and its big tracks were not covered with a tarpaulin in order to avoid the release of dust. These irregularities caused, *inter alia*, the accelerated melting of the Estrecho Glacier, a phenomenon that had not been taken into account in the environmental impact assessment study. That affected water supplies of the Huasco River basin. According to the scientific data, a dust layer of one millimeter increases the normal rate of glacial melting by 15%. Moreover, the corporation allegedly drew water from prohibited locations. Consequently, the State environmental agency fined the *Nevada Mining Company Ltd.* due to constant infringements.¹⁰⁵

In April 2013, in the context of a *recurso de protección*, the Court of Appeal of Copiapó temporarily ordered Pascua Lama Mining Project building operations to cease, except those operations that were aimed at preventing further environmental damages.¹⁰⁶

¹⁰² The Estrecho Glacier is the main source of the Estrecho River.

¹⁰³ *Ibid.*, 18.

¹⁰⁴ *Ibid.*, 20.

¹⁰⁵ V. Vargas Rojas, 'Estado Chileno Acusado en Washington por Proyecto Pascua Lama', *El Ciudadano* (25 October 2011), available at <http://www.elciudadano.cl/2011/10/25/43129/estado-chileno-acusado-en-washington-por-proyecto-pascua-lama/> (last visited 15 June 2013).

¹⁰⁶ Court of Appeal of Copiapó, 'Corte de Copiapo Acoge Orden de no Innovar y Paraliza Obras del Proyecto Pascua Lama' (10 April 2013), available at http://www.poderjudicial.cl/modulos/Home/Noticias/PRE_txtnews.php?cod=5082&opc_menu=&opc_item= (last visited 15 June 2013). Without mention of author, 'Barrick Suspense Trabajos de Construcción de Pascua Lama Tras Fallo Judicial', *La Tercera* (10 April 2013), available at <http://www.latercera.com/noticia/negocios/2013/04/655-518141-9-barrick-suspende->

In every stage of the Pascua Lama Project, it seems that the Chilean State did not fully comply with its international obligations concerning water, environmental protection, and indigenous peoples' rights. The Chilean State granted authorization to the Pascua Lama Project without considering the concerns raised by indigenous communities during the environmental assessment process.¹⁰⁷ Hence, the rights to consultation and to free, prior, and informed consent were not respected.¹⁰⁸ The environmental impact assessment study did not consider the socio-cultural impact on the life systems and traditional customs of indigenous peoples, who have freely occupied and used the Andean Mountains since time immemorial.¹⁰⁹ Allowing *Barrick Gold* to take possession of those lands has allowed the appropriation of an indigenous natural and socio-cultural heritage, which has conserved indigenous culture for

trabajos-de-construccion-de-pascua-lama-tras-fallo-judicial.shtml (last visited 15 June 2013).

¹⁰⁷ “As regards the allegation that the Community was not consulted in connection with the environmental impact evaluation of the Pascua Lama Project and modifications thereof, the Commission considers that right of access to information is one of the components of the prior consultation process. On that, the Commission has stated: “[O]ne of the central elements to the protection of indigenous property rights is the requirement that States undertake effective and fully informed consultations with indigenous communities regarding acts or decisions that may affect their traditional territories... [and that member States are obliged] to ensure that any determination... is based upon a process of fully informed consent on the part of the indigenous community as a whole. This requires, at a minimum, that all of the members of the community are fully and accurately informed of the nature and consequences of the process and provided with an effective opportunity to participate individually or as collectives [...]...” *Diaguaita Agricultural Communities of the Huascoalinos and Their Members v. Chile*, IACHR Petition 415/07, Report 141/09, 30 December 2009, para. 60 [Diaguaita Agricultural Communities of the Huascoalinos].

¹⁰⁸ A good example of international recognition of this fundamental principle is the *Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters*, 25 June 1998, 2161 UNTS 447.

¹⁰⁹ “With respect to the arguments on approval of the environmental study for modifications to the Pascua Lama project, which envisions locating said project on the ancestral territory of the Huasco-Altino Diaguaita Community, without any environmental and cultural impact study on the community and the members thereof, as well as failing to consult them prior to approval being granted for the Pascua Lama project, and the unresolved civil suit to render the acquisition by the Nevada Mining Company of the Chollay ranch null and void, the Commission notes that these arguments tend to establish a potential violation of Article 21 of the American Convention.” *Diaguaita Agricultural Communities of the Huascoalinos*, *supra* note 107, para. 57.

centuries.¹¹⁰ The latter adds an element to the discussion of water uses, namely, the cultural or traditional dimension of water use. The State did not protect and still does not protect the rights of the communities and peoples affected because it does not adopt the appropriate measures needed to prevent the company from seriously affecting the availability and quality of the water in the zone. In addition, the Chilean authorities have not taken the necessary measures to prevent the company from jeopardizing the very existence of the glaciers present in the area.¹¹¹ The State must abide by its human rights obligation to protect the right to water as a human right and to protect the glaciers as a vital source of water in the region. Furthermore, the State has to take all measures to ensure the full implementation of, *inter alia*, the ICECSR, the *ILO Convention No. 169* (Articles 13, 14, and 15) and the *American Convention*. Finally, the State has also failed to guarantee that in no case will exploitation violate the rights recognized in the ICCPR. Indeed, the State has failed to guarantee the rights embodied in Articles 1 and 27 of the Covenant.

From an environmental point of view, in Pascua Lama, Chile did not abide by its international obligations related to desert or semi-arid zones. Furthermore, the Chilean State failed to respect the precautionary principle when analyzing the environmental impact of the project. The precautionary principle is a rule of conduct in which, in order to protect the environment, States must apply precautionary measures when there is a risk of a serious and irreversible harm, and there is no absolute scientific certainty of the capacity of either impeding or avoiding it.¹¹² It may be noted that the environmental impact assessment, as it is referred to in Chilean domestic legislation and implemented by Chilean authorities, is not in conformity with Chilean international obligations,

¹¹⁰ See M. Lundberg & Y. Zhou, 'Hunting-Prohibition in the Hunters' Autonomous Area: Legal Rights of Oroqen People and the Implementation of Regional National Autonomy Law', 16 *International Journal on Minority and Group Rights* (2009) 3, 349, 375; See also HRC, *Länsman et al. v. Finland*, Communication No. 511/92, UN Doc CCPR/C/52/D/511/1992, 8 November 1994, 10-11, paras 9.6 & 9.8. These principles were further developed in *Apirana Mahuika et al. v. New Zealand*, Communication No. 547/1993, UN Doc CCPR/C/70/D/547/1993, 16 November 2000, 15, para. 9.5 and in HRC, *Ángela Poma Poma v. Peru*, *supra* note 12, 10, para. 7.2.

¹¹¹ Concerning the very importance of the glaciers in the Andes Mountains, see A. Rabatel *et al.*, 'Current State of Glaciers in the Tropical Andes: A Multi-Century Perspective on Glacier Evolution and Climate Change', 7 *The Cryosphere* (2013) 1, 81.

¹¹² P. Daillier & A. Pellet, *Droit International Public*, 8th ed. (2009), 1453; UNESCO, *The Precautionary Principle: World Commission on the Ethics of Scientific Knowledge and Technology* (2005), 14.

especially concerning the right to consultation, indigenous rights, and the right to water.

In practice, neither the Constitution nor the *Mining Code* provide for a special consultation procedure of the affected indigenous communities. In the case of Pascua Lama mining activities, the indigenous rights violation appears crystal clear if we bear in mind Article 15 (2) of the *ILO Convention No. 169*. It states that

“in cases in which the State retains the ownership of mineral or sub-surface resources or rights to other resources pertaining to lands, governments shall establish or maintain procedures through which they shall consult these peoples, with a view to ascertaining whether and to what degree their interests would be prejudiced, before undertaking or permitting any programmes for the exploration or exploitation of such resources pertaining to their lands. The peoples concerned shall wherever possible participate in the benefits of such activities, and shall receive fair compensation for any damages which they may sustain as a result of such activities”.¹¹³

Extractive megaprojects have been increasingly developed on indigenous ancestral lands over the last few decades. Generally speaking, the State's failure to recognize and demarcate indigenous lands has facilitated land privatization and deprivation of their lands, resources and livelihood, to the benefit of private third parties. State authorization to private third parties to carry out extractive activities on disputed lands has contributed to indigenous land spoliation. In the specific case of the Pascua Lama Project, the Inter-American Commission took into account that indigenous peoples' rights were at stake. The Commission declared in 2009 the admissibility of a petition submitted in June 2007 by the Comunidad Agrícola Diaguita “Los Huascoaltinos” against Chile due to alleged violations of the rights to property, to access to justice, and to participation.¹¹⁴ Interestingly, since 1903 the Diaguita Huascoaltinos have had a legal title

¹¹³ *ILO Convention No. 169*, *supra* note 26, 1387.

¹¹⁴ *Diaguita Agricultural Communities of the Huascoaltinos*, *supra* note 107. In October 2011, the Inter-American Commission held a special public session about this case (Case 12.741). See M. Hofsommer, ‘Case 12.741 Agricultural Community of Diaguita de los Huascoaltinos, Chile’ (1 November 2011), available at <http://hrbrief.org/2011/11/case-12-741-agricultural-community-of-diaguita-de-los-huascoaltinos-chile/> (last visited 15 June 2013).

to the land in the Andean zone of the Huasco River basin.¹¹⁵ Subsequently, large swaths of these lands (ca. 130,000 out of 377,964 hectares) were illegally usurped and registered at the Property Registration Office by private actors. As a result, different property titles – both indigenous, private non-indigenous, and governmental – existed simultaneously over the same land. One of these property titles was acquired by the *Nevada Mining Company Ltd.* The Pascua Lama mining project is currently under development in the geographic area under this property title.¹¹⁶ In this context, indigenous communities have challenged *Barrick Gold* in regards to the ownership of those lands at the national level.

The Diaguita Peoples intend to protect their cultural and territorial integrity as well as the water resources necessary for their physical and cultural subsistence. The water level of the Huasco River has markedly decreased and State agencies themselves have found pollution even at this early stage of exploration and construction of the mine.¹¹⁷ It may be recalled that the Inter-American Human Rights System provides extensive protection of the right to property, incorporating the collective and cultural dimension of this right and adopting an integrative approach that covers the lands, territories and natural resources of indigenous peoples.¹¹⁸ The Diaguita Peoples argues that the Project – approved without prior consultation with affected communities – encroaches upon the rights set out in the *Indigenous Act*, *Environmental Act* and the *ILO Convention No. 169* ratified by Chile in 2009.

¹¹⁵ Centro de Derechos Humanos, *Chile: Informe Intermediario de las ONG*, *supra* note 56, 8. The Diaguita Peoples' land, known as Estancia Los Huascoaltinos, was registered in 1903 in the property registry at the Property Registration Office in Vallenar (Atacama, Chile). See Ministry of Environment, 'Recurso de Reclamación Ante la Comisión de Evaluación de la Región de Atacama' (17 May 2011), available at <http://seia.sea.gob.cl/archivos/RecursoREIAPAC27-11.PDF> (last visited 15 June 2013), 4.

¹¹⁶ The Pascua Lama Mining Project has been implemented on indigenous ancestral land belonging to the Diaguitas Huascoaltinos community, and affects the glaciers Guanaco, Toro I, Toro II, and Esperanza which provide water to the Estrecho and Chollay Rivers. This hydrological system gives sustainability to the Diaguita Huascoaltino territory. Secondly, this mining project was approved against the will of the affected community. Lastly, the project was approved by the Chilean environmental authorities without a proper impact assessment of the project upon the customs, culture and ways of life of the Diaguita Huascoaltinos. Centro de Derechos Humanos, *Chile: Informe Intermediario de las ONG*, *supra* note 56, 11.

¹¹⁷ Vargas Rojas, *supra* note 105.

¹¹⁸ "[...] access to their ancestral lands and to the use and enjoyment of the natural resources found on them is closely linked to obtaining food and access to clean water." *Yakye Axa Case*, *supra* note 38, 85-86, para. 167. See also UNDRIP, *supra* note 32.

A situation comparable with Pascua Lama led to a complaint submitted to the Inter-American Commission in 2002. The case involved the construction of a huge hydroelectric plant in the Upper Bío-Bío (Bio-Bio Region, South of Chile) known as Ralco.¹¹⁹ The plant was developed at the heart of indigenous lands and territories, which seriously impinged upon indigenous rights and raised grave concerns about the preservation of ecosystems as well as social and environmental sustainability. In the *Ralco* case, a friendly settlement was reached. In the section related to Foster Development and Environmental Conservation in the Upper Bio-Bio sector, the Commission recalled that

“the parties, furthermore, point out the importance to continually seek positive environmental impact in accordance with the terms and conditions of said environmental rating report. Without prejudice to the foregoing, the parties agree on the pertinence of facilitating access for indigenous communities to the follow-up and supervision reports of the external auditors and those issued by the respective public agencies”.¹²⁰

Over the last decade, there has been an increasing number of cases before the Inter-American Human Rights system concerning investment projects and indigenous rights. Some of them are closely connected to natural resources and environmental protection. For instance, in the *Kuna* case before the Inter-American Commission, petitioners argued that the construction of a major Hydroelectric plant violated their rights because the project was implemented without prior consultation with the affected communities. According to the petitioners,

“construction of the Bayano Hydroelectric Dam, which resulted in the flooding of the ancestral territory they used to inhabit, violated the collective rights of the Kuna of Madungandí and Emberá of Bayano peoples”.¹²¹

¹¹⁹ Vargas Rojas, *supra* note 105.

¹²⁰ *Mercedes Julia Huentao et al. v. Chile*, IACHR Petition 4617/02, Report No. 30/04, Friendly Settlement, 11 March, 2004, para. 35 (note 1) (emphasis omitted).

¹²¹ *Kuna of Madungandí and Emberá of Bayano Indigenous Peoples and Their Members*, IACHR Petition 12.354, Report No. 58/09, 21 April, 2009, para. 2. See also *Ngöbe Indigenous Communities and Their Members in the Changuinola River Valley v. Panama*, IACHR Petition 286-08, Report No. 75/09, 5 August, 2009; IACHR, ‘PM 382/10’, available at <http://www.oas.org/en/iachr/indigenous/protection/precautionary.asp> (last visited 15

Thus, in 2009 the Commission concluded that the petition was admissible with respect to the alleged violation of Article 21 of the *American Convention* and in connection with Article 1 (1) thereof. Furthermore, under the principle of *iura novit curia*, the Commission decided to analyze in the stage on merits the possible application of Articles 2, 8, 24, and 25 of the Convention.

The Pascua Lama Project emphasizes the threats and risks that can affect the full enjoyment of indigenous peoples' rights, as a consequence of either the lack or the weakness of state regulatory mechanisms. This mining project also highlights the importance of the need of the State to fully comply with international environmental law and international human rights law, including indigenous peoples' rights.

D. Conclusion

The legal analysis of Pascua Lama, like other megaprojects, should be understood within the more global context of international environmental law, international human rights law, international investment law, and international economic law. Indeed, conflicts concerning water are often related to tensions between economic development on the one hand, and respect and protection of the environment and human rights – particularly the right to water – on the other. This legal analysis is also the right moment to discuss the role of private corporations, particularly transnational enterprises, with respect to the human right to water and sanitation. Concerning freshwater, human rights support the environmental approach and both tend to increasingly penetrate and influence investment law. The emergence of a human right to access drinking water and sanitation is a major step in this dynamic interaction.

The case of Pascua Lama shows the urgent need to make these international standards a reality at the national and local levels. Pascua Lama also clarifies the need to elaborate on and improve the complementarity of domestic and international law. Moreover, Pascua Lama highlights that a proper interaction between both legal orders in the contemporary world, particularly concerning the environment, human rights, and water, would be a key step towards legal coherence and stronger protection to individuals and communities. The Pascua Lama mining project is just an example of what can occur when major investment projects are developed on ancestral lands and territories without the free, prior, and informed consent of affected indigenous communities. The added value of applying international human rights and environmental

standards at the domestic level is to strengthen the protection of right holders that are experiencing human rights and environmental abuses.

“We Will Remain Idle No More”: The Shortcomings of Canada’s ‘Duty to Consult’ Indigenous Peoples

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Abstract¹

Bill C-38, *Jobs, Growth and Long-term Prosperity Act*, and Bill C-45, *Jobs and Growth Act*, both passed in 2012, contain numerous amendments that could affect established and potential Aboriginal rights across Canada. This unilateral action by the Government of Canada came as a great surprise to many Aboriginal people, who indicated that they were not consulted in advance of the legislation's introduction.

However, this then begs the question: What is Canada's 'duty to consult'? What is the content of this 'duty'? Does this 'duty' even exist? If it does, is there a discrepancy between the established 'duty to consult' and the legislative amendments included in Bill C-38 and Bill C-45?

The purpose of this article is to attempt to answer all of these questions. To do this, we will begin by examining contemporary Canadian jurisprudence on the issue, including reviewing the relevant case law in order to gain an insight into the procedural substance of the 'duty to consult'. Following this, in an attempt to enrich and deepen the discussion concerning the recent developments in Canada, we will outline the emergence of consultation norms at the international level, and highlight recent jurisprudence that takes into consideration consultation duties at the Inter-American Court of Human Rights. The article will conclude by juxtaposing the emergence of the international and regional norms regarding consultation duties with current events in Canada, in order to confirm the discrepancy between the recent legislative amendments and domestic jurisprudence, international law, international human rights law, and regional human rights law.

Our hope is that this article will not only inform readers of current events in Canada but also enrich the current discourse on the participatory rights of indigenous peoples in the context of land and natural resource development.

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A. Introduction

I. *Idle No More*: The Beginning of a Grassroots Movement

The *Idle No More* movement in Canada has humble beginnings²: four indigenous³ and non-indigenous women from the province of Saskatchewan felt it was necessary to act on proposed federal legislation that they saw as negatively impacting First Nations people and their lands, as well as the lands and waters which all Canadians share.

With the passage of Bill C-38, *Jobs, Growth and Long-term Prosperity Act*,⁴ and Bill C-45, *Jobs and Growth Act*,⁵ imminent, and many people unaware of their consequences, Nina Wilson, Sylvia McAdam, Jessica Gordon, and Sheelah MacLean resorted to holding rallies and teach-ins in an effort to transfer as much information as possible to the maximum number of people in the shortest amount of time. As information sessions concerning the far-reaching and long-term effects of the legislation spread from Saskatchewan to other provinces, First Nations leaders descended upon the Parliament of Canada to express their dismay and discontent.

However, even after receiving an invitation from the New Democratic Party (the official opposition to the governing Conservative Party of Canada (CPC)), the First Nations leaders were refused entry to Parliament. With this refusal of entry to First Nations leaders and the voices of the communities they represent, the Government of Canada made it clear that it considered itself not

² J. Gordon, 'History of Idle No More Grassroots Movement' (31 December 2012), available at <http://idlenomore.ca/about-us/item/1-history-of-idle-no-more-grassroots-movement> (last visited 15 June 2013).

³ For the purpose of this paper the term 'indigenous peoples' will be understood as follows: "Indigenous communities, peoples and nations are those which, having a historical continuity with pre-invasion and pre-colonial societies that developed on their territories, consider themselves distinct from other sectors of the societies now prevailing in those territories, or parts of them. They form at present non-dominant sectors of society and are determined to preserve, develop and transmit to future generations their ancestral territories, and their ethnic identity, as the basis of their continued existence as peoples, in accordance with their own cultural patterns, social institutions and legal systems." Special Rapporteur to the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities, *Study on the Problem of Discrimination Against Indigenous Populations*, Vol. V (1987), UN Doc E/CN. 4/Sub. 2/1986/7/Add. 4, 29, para. 379. Throughout this paper the terms 'Aboriginal', 'First Nations', and 'indigenous' will be used interchangeably.

⁴ Bill C-38, *Jobs, Growth and Long-term Prosperity Act* (SC 2012, ch. 19).

⁵ Bill C-45, *Jobs and Growth Act* (SC 2012, ch. 31).

obliged to consult with the Aboriginal peoples of Canada over the proposed legislation.

The *Idle No More* movement quickly cemented itself as a national grassroots movement through its first day of action, which took place on 10 December 2012 in over 13 Canadian cities and became the platform through which the voice of the Aboriginal peoples' discontent over being ignored could be heard⁶ Since then, *Idle No More* and actions in support of the movement have grown exponentially to include mass demonstrations, hunger strikes, and cross-country walks in which Aboriginal youths have walked from their reserve lands in remote, distant communities all the way to the capital city, Ottawa.

II. Jobs, Growth and Long-term Prosperity Act: Bill C-38 and Beyond

The purpose of this article is to expand upon the duty of States to consult with indigenous populations prior to action that would, directly or indirectly, impact them or their lands. As previously noted, the *Idle No More* movement began in response to proposed government-sponsored legislation. While it is beyond the scope of this article to provide a detailed analysis of the proposed amendments,⁷ it is worthwhile to provide a brief overview of the changes that would have immediate consequences for the Aboriginal population of Canada.

On 29 March 2012, the Government of Canada, led by the CPC, tabled its budget, titled *Economic Action Plan 2012: Jobs, Growth and Long-term Prosperity*. It was followed by the introduction of legislation designed to put into effect its constituent elements. Those bills included C-38 and C-45, which have now received *Royal Assent*.

Bill C-38 completely overhauled existing environmental assessment procedures, replacing them with the *Canadian Environmental Assessment Act, 2012*⁸ (CEAA). Environmental impact assessments (EIA) have been recognized by the federal government as a viable way for indigenous peoples to participate

⁶ Gordon, *supra* note 2.

⁷ The Assembly of First Nations has noted that Bill-C-38 introduces, amends, or repeals nearly 70 laws that can have significant implications for First Nations. See Assembly of First Nations, 'Technical Bulletin – Update on Bill C-38: Jobs, Growth and Long-term Prosperity Act', available at <http://www.afn.ca/index.php/en/news-media/latest-news/Technical-Bulletin-Update-on-Bill-C-38-Jobs-Growth-and-Long-term-Pros> (last visited 15 June 2013).

⁸ *Canadian Environmental Assessment Act, 2012* (SC 2012, ch. 19, s. 52).

in the protection of their lands.⁹ They have also been referenced in Supreme Court of Canada (SCC) jurisprudence¹⁰ as an example of fulfilling a duty of consultation owed by the government to indigenous peoples.

The CEAA imposes time limits of 12 months on EIAs, with major resource development projects being approved or rejected in no longer than 24 months.¹¹ Under the previous guidelines, similar-scale resource projects could have taken up to 6 years to receive approval.¹² Minor projects no longer need EIAs, and provincial EIAs can now substitute for federal EIAs or be deemed equivalent.¹³ This latter change can be detrimental to First Nations rights as the provincial environment assessment process is often viewed as less stringent than the federal process: examples exist of resource development being stopped at the federal level, even after receiving approval at the provincial level.¹⁴

Another environmental measure included in the above-mentioned bills was the replacement of the *Navigable Waters Protection Act*¹⁵ (NWPA) with the *Navigation Protection Act*¹⁶ (NPA). When enacted in 1882, the NWPA was principally designed to protect the public right to navigate inland and territorial waters, but proved to have the salutary benefit of protecting Canada's waterways from obstruction and pollution.¹⁷ Additionally, its threshold for application was low, as "no one could block, alter or destroy any water deep enough to float a

⁹ Amnesty International Canada, 'Indigenous Peoples in Canada', available at <http://www.amnesty.ca/our-work/issues/indigenous-peoples/indigenous-peoples-in-canada> (last visited 15 June 2013).

¹⁰ See *Haida Nation v. British Columbia (Minister of Forests)*, Supreme Court of Canada, 2004 SCC 73, [2004] 3 SCR 511, 537, para. 53 [Haida Case]. See also *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, Supreme Court of Canada, 2004 SCC 74, [2004] 3 SCR 550, 554-555, para. 2 [Taku River Case].

¹¹ M. Paris, 'Budget Shortens Environmental Review Process' (29 March 2012), available at <http://www.cbc.ca/news/politics/story/2012/03/29/federalbudget-flaherty-environment.html> (last visited 15 June 2013).

¹² *Ibid.*

¹³ Assembly of First Nations National Chief S. Atleo, 'Presentation to the Sub-Committee on Bill C-38 (Part III) of the House of Commons Standing Committee on Finance' (29 May 2012), available at <http://www.afn.ca/uploads/files/parliamentary/c-38.pdf> (last visited 15 June 2013).

¹⁴ An example of this is the Prosperity Mine Project. See *ibid.*

¹⁵ *Navigable Waters Protection Act* (RSC 1985, ch. N-22).

¹⁶ *Navigation Protection Act* (SC 2012, ch. 31).

¹⁷ EcoJustice, 'Bill C-45 and the *Navigable Waters Protection Act*' (October 2012), available at http://www.ecojustice.ca/files/nwpa_legal_backgrounder_october-2012/ (last visited 15 June 2013).

canoe without federal approval”.¹⁸ With the introduction of the NPA, however, the number of protected water bodies has been greatly reduced, with the NPA covering 3 oceans, 97 lakes, and portions of 62 rivers. By comparison, it is estimated that Canada contains 32,000 major lakes and 2.25 million rivers: meaning the NPA excludes 99.7% of Canada’s lakes and 99.9% of Canada’s rivers from federal oversight and regulation.¹⁹ Accordingly, waterways that were once protected have been opened up for development with major pipeline and power line projects being exempt from having to prove that they would not destroy or damage them.²⁰

Another major change comes with an amendment to the *Indian Act*,²¹ which, according to government officials, was designed to enhance and to facilitate First Nations’ ability to take advantage of economic opportunities.²² However, the amendment drastically changes the decision-making process of how First Nations allocate their reserve land, allowing First Nations communities to lease reserve lands based on a majority of votes from those in attendance at a meeting or referendum. Previously, such votes were based on a majority of votes from all eligible voters.²³ Thus, the burden is on First Nation members to make themselves available for the meetings assuming they are duly informed.

Furthermore, the Minister of Aboriginal Affairs is given the authority to call a meeting or referendum for the purpose of land surrender from the band’s territory.²⁴ The Minister of Aboriginal Affairs is also given the authority to accept or refuse a land designation after receiving a proposal from the band council or the body governing the band.²⁵ Both of these authorities did not exist previously and now allow ministerial interference in band decisions.

As previously mentioned, Bill C-38 and Bill C-45 contain numerous amendments that could affect established and potential Aboriginal rights across Canada, and the above examples are meant to be illustrative only. Following

¹⁸ M. McDiarmid, ‘Waterways Changes in Budget Bill Seen as Eroding Protections’ (18 October 2012), available at <http://www.cbc.ca/news/politics/story/2012/10/18/pol-navigable-waters-protection-budget-bill.html> (last visited 15 June 2013).

¹⁹ EcoJustice, *supra* note 17.

²⁰ McDiarmid, *supra* note 18.

²¹ *Indian Act* (RSC 1985, ch. I-5).

²² J. McGregor, ‘22 Changes in Budget Bill Fine Print’ (26 October 2012), available at <http://www.cbc.ca/news/politics/story/2012/10/19/pol-list-2nd-omnibus-bill.html> (last visited 15 June 2013).

²³ *Ibid.*

²⁴ Atleo, *supra* note 13.

²⁵ McGregor, *supra* note 22.

the trajectory of the *Idle No More* movement, what one observes is that this unilateral action by the Government of Canada came as a great surprise to many Aboriginal people, who indicated that they were not consulted in advance of the legislation's introduction. As the Assembly of First Nations made clear throughout their submission to the Sub-Committee reviewing Bill C-38,²⁶ the adoption of these bills runs counter to Canada's duty to consult, a concept which has emerged both at the domestic and international level.²⁷ This same view has been brought forward by a collaboration of indigenous groups in a *Joint Submission to the United Nations Human Rights Council in Regard to the Universal Periodic Review Concerning Canada*.²⁸

However, this then begs the question: What is Canada's 'duty to consult'? What is the content of this 'duty'? Does this 'duty' even exist? If it does, is there a discrepancy between the established 'duty to consult' and the legislative amendments included in Bill C-38 and Bill C-45? The purpose of this article is to attempt to answer all of these questions. To do this, we will begin by examining contemporary Canadian jurisprudence on the issue, including reviewing the relevant case law in order to gain an insight into the procedural substance of the 'duty to consult'. Following this, in an attempt to enrich and deepen the discussion concerning the recent developments in Canada, we will outline the emergence of consultation norms at the international level, and highlight recent jurisprudence that takes into consideration consultation duties at the Inter-American Court of Human Rights (IACtHR). The article will conclude by juxtaposing the emergence of the international and regional norms regarding consultation duties with current events in Canada, in order to confirm the discrepancy between the recent legislative amendments and domestic jurisprudence, international law, international human rights law, and regional human rights law.

Our hope is that this article will not only inform readers of current events in Canada but also enrich the current discourse on the participatory rights of indigenous peoples in the context of land and natural resource development.

²⁶ Atleo, *supra* note 13.

²⁷ See S. Matiation & J. Boudreau, 'Making a Difference: The Canadian Duty to Consult and Emerging International Norms Respecting Consultation with Indigenous Peoples', in O. E. Fitzgerald (ed.), *The Globalized Rule of Law: Relationships Between International and Domestic Law* (2006), 397.

²⁸ Grand Council of the Crees (Eeyou Istchee) *et al.*, 'Joint Submission to the United Nations Human Rights Council in Regard to the Universal Periodic Review Concerning Canada (Second Cycle)' (October 2012), available at http://www.ubcic.bc.ca/files/PDF/UPR_Canada_JointSubmission.pdf (last visited 15 June 2013).

B. Developing Jurisprudence on the ‘Duty to Consult’ by the Supreme Court of Canada

I. Setting the Stage

Before delving into Canadian jurisprudence, it would be useful to begin with a definition of a variety of the terms used throughout judgments of the SCC, as they might be new to several readers.

‘Aboriginal title’ refers to the inherent Aboriginal right to a land or a territory, meaning that this right stems from Aboriginal peoples’ longstanding use, and prior occupancy, of the land or territory in question. The Canadian legal system recognizes Aboriginal title as a right *sui generis*, or “as a unique collective right to the use of, and jurisdiction over, a group’s ancestral territories”.²⁹

‘Treaty rights’ refer to Aboriginal rights that are set out in a treaty. Starting in 1701, the Crown³⁰ entered into treaties in an effort to encourage peaceful relations with the First Nations.³¹ Some treaties were designed to provide a strategic alliance and others involved the ceding or surrendering of rights to land in exchange for treaty rights. While all treaties are different, some treaty rights have included reserve lands, annual payments, clothing, ammunition, farming equipment and some rights to hunt and fish.³² *Treaty 8*, for example, promises several types of rights, such as the right to fish, hunt, and trap.³³

Finally, regarding the usage of the term ‘Aboriginal rights,’ it is important to note that it is not possible to provide an exhaustive list of all of the rights

²⁹ Indigenous Foundations (University of British Columbia), ‘Aboriginal Title’, available at <http://indigenousfoundations.arts.ubc.ca/home/land-rights/aboriginal-title.html> (last visited 15 June 2013).

³⁰ The Crown in this instance refers to the British Crown, as Canada was not yet established. However, throughout this paper, any reference to the Crown refers to Government of Canada, as the Crown is the legal embodiment of all levels of governance. In the courts, the Crown acts as the prosecuting part, and is represented by *R*, as in *R v. XX* (*R* stands for *Rex* or *Regina* depending on the sex of the monarch).

³¹ For further information concerning the historic treaties between the Crown and the First Nations see the Aboriginal Affairs and Northern Development Canada website: <http://www.aandc-aadnc.gc.ca> (last visited 15 June 2013).

³² Aboriginal Affairs and Northern Development Canada, ‘Treaty Rights’, available at <http://www.aadnc-aandc.gc.ca/eng/1100100028602/1100100028603> (last visited 15 June 2013).

³³ ‘Treaty No. 8’ (21 June 1899), available at <http://www.aadnc-aandc.gc.ca/eng/1100100028813/1100100028853#chp4> (last visited 15 June 2013).

contained within this term. One of the major reasons for this is that Aboriginal peoples and the Government of Canada may have different perspectives as to what constitutes an Aboriginal right: certain rights that Aboriginal peoples recognize and practice for themselves might not be considered as a right by the Canadian government.³⁴ Moreover, since Canada has a federal system of parliamentary government, the federal, provincial, and territorial governments have, separately, attempted to define, legislate, or expand upon Aboriginal rights, such as the hunting and fishing rights, contained within treaties.³⁵

In an effort to address the gap in understanding what constitutes Aboriginal 'rights', the crafters of the *Constitution Act*, 1982 included Section 35 (1), which reads: "[t]he existing Aboriginal and treaty rights of the Aboriginal peoples of Canada are hereby recognized and affirmed".³⁶ Prior to this, Aboriginal rights were not constitutionally recognized and could be unilaterally extinguished or limited by the Government of Canada.³⁷ In fact, until *Calder*,³⁸ Aboriginal land rights were guided by a decision from 1888, *St. Catherine's Milling & Lumber v. The Queen*,³⁹ which held that Aboriginal land interests were "merely interests created through grant by the Crown".⁴⁰ After the *Calder* decision in 1973, Aboriginal land interests were seen as pre-existing interests, meaning that they were rooted in historical land occupancy by Aboriginal peoples, pre-dating the arrival of the Crown.⁴¹

However, it is important to note that the *Calder* decision did not usher in a new era of Aboriginal and government relations. Strangely enough, firmly entrenched in the *Calder* decision, and later the *Guerin*⁴² decision, Aboriginal land interests existed only as burdens that underlie Crown title and that on surrender

³⁴ Indigenous Foundations, *supra* note 29.

³⁵ K. McNeil, 'The Constitutional Rights of the Aboriginal Peoples of Canada', 4 *Supreme Court Law Review* (1982), 255, 257.

³⁶ *Constitution Act*, 1982, Art. 35 (1) (Schedule B to the *Canada Act*, 1982 (UK), 1982, ch. 11).

³⁷ Matiation & Boudreau, *supra* note 27, 429.

³⁸ *Calder et al. v. Attorney-General of British Columbia*, Supreme Court of Canada, [1973] SCR 313 [Calder Case].

³⁹ *St. Catherine's Milling and Lumber Co. v. R.*, Supreme Court of Canada, [1887] 13 SCR 577.

⁴⁰ G. Christie, 'Developing Case Law: The Future of Consultation and Accommodation', 39 *U.B.C. Law Review* (2006) 1, 139, 142.

⁴¹ *Calder Case*, *supra* note 38, 328. See Christie, *supra* note 40, 142.

⁴² *Guerin v. The Queen*, Supreme Court of Canada, [1984] 2 SCR 335.

to the Crown, Aboriginal land interests disappear, as the underlying Crown title is 'perfected'.⁴³

Calder and *Guerin* were progressive in that they recognized the special status of Aboriginal peoples being afforded unique rights, resulting from their original occupation of Canada.⁴⁴ However, the legal protections afforded Aboriginal land, and Aboriginal rights more generally, were limited and tenuous. Obtaining constitutional protection for Aboriginal rights brought about fundamental changes to the legal landscape, as the court system in Canada was then tasked with addressing the uncertainty regarding the content of Aboriginal rights.⁴⁵

Rights enumerated in constitutions are, on the one hand, protected by the State and meant to temper the power given to the State by its citizens. On the other hand, however, some rights are said not to be absolute: they can be infringed upon, but only if the State satisfies a strict justification framework. In the case of Aboriginal peoples, the function of constitutionally recognized Aboriginal rights in Section 35 (1) of the *Canadian Constitution* is to temper the power of unquestioned sovereignty by the Crown; but no legal test exists for the State to articulate a justifiable infringement upon protected Aboriginal rights.⁴⁶ The *Sparrow*⁴⁷ case was the first opportunity for the SCC to examine Section 35 (1) of the *Constitution Act*, interpret its applicability, and in the case of an infringement upon a constitutional right, elaborate upon a justification framework. It is within this context that the duty to consult emerged.

II. *Sparrow* and the Development of Canada's Duty to Consult

In *Sparrow*, the SCC was asked to determine the constitutionality of federal fishing regulations that impose a permit requirement, and prohibit certain methods of fishing. For the Musqueam First Nation, living in the province of British Columbia, fishing for salmon in the Canoe Passage was not only required for subsistence but also played a central role in their cultural identity.⁴⁸ The Musqueam First Nation held that the recently enacted natural

⁴³ Christie, *supra* note 40, 142.

⁴⁴ McNeil, *supra* note 35, 255.

⁴⁵ Matiation & Bourdreau, *supra* note 27, 429.

⁴⁶ Christie, *supra* note 40, 145-146.

⁴⁷ *R v. Sparrow*, Supreme Court of Canada, [1990] 1 SCR 1075 [Sparrow Case].

⁴⁸ S. Lawrence & P. Macklem, 'From Consultation to Reconciliation: Aboriginal Rights and the Crown's Duty to Consult', 79 *Canadian Bar Review* (2000), 255, 255.

resource conservation measures interfered with their right to fish, which, in turn, negatively impacted their community in a variety of ways.⁴⁹

In this landmark decision, the SCC ruled in favor of the Musqueam First Nation, explaining primarily that Aboriginal rights affirmed and recognized by Section 35 (1) include practices that are integral to an Aboriginal community's distinctive culture, and, in the case of the Musqueam First Nation, this meant their right to fish for salmon around the Fraser River estuary.⁵⁰ The judgment explained further that if any policies or legislation are implemented by the government that restrict, or infringe upon, the exercise of recognized and affirmed Aboriginal rights, then the Crown bears the burden of meeting strict justificatory requirements: one such requirement is that the Crown has the duty to provide adequate consultation with the affected Aboriginal group.⁵¹

Following the *Sparrow* case, the SCC also attached justificatory requirements to the violation of Aboriginal treaty rights, in the case *R v. Badger*,⁵² and to the infringement upon Aboriginal title, in *Delgamuukw v. British Columbia*.⁵³

Badger dealt with *Treaty 8*, a historical treaty providing for the right to hunt, and the implementation of legislation in Alberta which prohibited hunting out-of-season or without a license. The SCC decision held that, similar to Aboriginal rights, treaty rights are not absolute and can be abridged by the Crown.⁵⁴ However, any infringements must satisfy the justification framework elaborated in *Sparrow*, consultation being one of the factors to be considered.⁵⁵

Delgamuukw concerned an Aboriginal title claim made by the hereditary chiefs of the Gitksan and Wet'suwet'en nations, to a territory located in the interior of British Columbia. In this case the SCC affirmed that in the context of Aboriginal title, the Crown always has a duty to consult, and that "consultation is required in order for the Government of Canada to justify infringements of Aboriginal title."⁵⁶ As written by Lamer C.J. for the majority:

⁴⁹ *Ibid.*, 255-256.

⁵⁰ *Sparrow Case*, *supra* note 47, 1099.

⁵¹ *Ibid.*, 1111-1119. See also Lawrence & Macklem, *supra* note 48, 255 and Matiation & Boudreau, *supra* note 27, 430.

⁵² *R v. Badger*, Supreme Court of Canada, [1996] 1 SCR 771 [Badger Case].

⁵³ *Delgamuukw v. British Columbia*, Supreme Court of Canada, [1997] 3 SCR 1010 [Delgamuukw Case].

⁵⁴ *Badger Case*, *supra* note 52, 793-814. See also Lawrence & Macklem, *supra* note 48, 257.

⁵⁵ *Badger Case*, *supra* note 52, 793-814. See also Matiation & Boudreau, *supra* note 27, 431.

⁵⁶ Matiation & Boudreau, *supra* note 27, 432.

“[...] There is always a duty of consultation. Whether the aboriginal group has been consulted is relevant to determining whether the infringement of aboriginal title is justified [...]. The nature and scope of the duty of consultation will vary with the circumstances. In occasional cases, when the breach is less serious or relatively minor, it will be no more than a duty to discuss important decisions that will be taken with respect to lands held pursuant to aboriginal title. Of course, even in these rare cases when the minimum acceptable standard is consultation, this consultation must be in good faith, and with the intention of substantially addressing the concerns of the aboriginal peoples whose lands are at issue. In most cases, it will be significantly deeper than mere consultation. Some cases may even require the full consent of an aboriginal nation, particularly when provinces enact hunting and fishing regulations in relation to aboriginal lands.”⁵⁷

The above-mentioned cases were positive developments in that they introduced the duty to consult within the justification framework. However, the dilemma arising from these cases is that they only discussed consultation in the context of ‘proven’ or ‘established’ rights under Section 35 (1) of the Constitution.⁵⁸ Aboriginal groups were concerned that the legal obligation to consult only arose after the existence of a right was determined and a *prima facie* case was made regarding its infringement.⁵⁹ The Crown was not legally required to consult prior to engaging in measures that could have a negative impact upon potential rights, forcing Aboriginal groups to protect their interests in anticipation of Crown activity that could infringe upon claimed, but unproven, rights.⁶⁰ This gap in Canadian jurisprudence was addressed in two decisions: *Haida Nation v. British Columbia (Minister of Forests)*⁶¹ and *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*.⁶²

In the *Haida* case, the Haida Nation challenged the renewal of a tree farm license by the provincial government of British Columbia, and also challenged the transfer of said tree farm license to a private company (*Weyerhausen Co.*

⁵⁷ *Delgamuukw Case*, *supra* note 53, 1112-1113, para 168.

⁵⁸ *Matiation & Bourdreau*, *supra* note 27, 433.

⁵⁹ *Ibid.*

⁶⁰ *Ibid.*

⁶¹ *Haida Case*, *supra* note 10.

⁶² *Taku River Case*, *supra* note 10.

Ltd.) on land that was subject to their Aboriginal title claim. In *Taku River*, an Aboriginal community challenged a proposed mining road, resulting from the reopening of a mine by *Redfern Resources Ltd.*, that would pass through contested territory. The SCC was unanimous in rejecting the view that the government did not have a legally enforceable duty to consult prior to establishing Aboriginal rights under Section 35 of the Constitution.⁶³ Furthermore, the Crown had a legal duty to consult when it had knowledge of the potential existence of an Aboriginal right or title and when considering activities that infringed upon these potential rights or title.⁶⁴ As McLachlin C.J. wrote for the majority:

“[...] The potential rights embedded in these claims are protected by s. 35 of the *Constitution Act, 1982*. The honour of the Crown requires that these rights be determined, recognized and respected. This, in turn, requires the Crown, acting honourably, to participate in the processes of negotiation. While this process continues, the honour of the Crown may require it to consult and, where indicated, accommodate Aboriginal interests.⁶⁵ [...] Where a strong *prima facie* case exists for the claim, and the consequences of the government's proposed decision may adversely affect it in a significant way, addressing the Aboriginal concerns may require taking steps to avoid irreparable harm or to minimize the effects of infringement, pending final resolution of the underlying claim.”⁶⁶

Where treaty rights are at issue, the SCC expanded upon the duty to consult framework established in *Badger*, in the *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*.⁶⁷ In *Mikisew*, the issue was approval of road construction through Wood Buffalo National Park. The Minister of Canadian Heritage believed that the Crown was permitted to do this, and to do it without consultation, based on an interpretation of *Treaty 8*, which states:

⁶³ *Matiation & Boudreau*, *supra* note 27, 434.

⁶⁴ *Haida Case*, *supra* note 10, 529, para. 35. *Taku River Case*, *supra* note 10, 562, para. 21. See also L. Sossin, 'The Duty to Consult and Accommodate: Procedural Justice as Aboriginal Rights', 23 *Canadian Journal of Administrative Law and Practice* (2009), 93, 100.

⁶⁵ *Haida Case*, *supra* note 10, 525, para. 25.

⁶⁶ *Ibid.*, 534-535, para. 47.

⁶⁷ *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, Supreme Court of Canada, 2005 SCC 69, [2005] 3 SCR 388 [Mikisew Case].

“And Her Majesty the Queen HEREBY AGREES with the said Indians that they shall have right to pursue their usual vocations of hunting, trapping and fishing throughout the tract surrendered as heretofore described, subject to such regulations as may from time to time be made by the Government of the country, acting under the authority of Her Majesty, and saving and excepting such tracts as may be required or taken up from time to time for settlement, mining, lumbering, trading or other purposes.”⁶⁸

The Mikisew Cree, on the other hand, claimed that the construction and operation of the road would have a negative impact on their hunting and trapping rights. The SCC decided in favor of the Mikisew Cree, confirming that the duty to consult extended itself to Treaty situations, stating that the Minister had not adequately consulted with the Mikisew Cree.⁶⁹

Since *Sparrow*, the SCC has made it clear that there is a duty to consult and that this duty arises “when the Crown has knowledge, real or constructive, of the potential existence of the right or title and contemplates conduct that might adversely affect”.⁷⁰ The content and scope of the duty to consult varies, but encapsulates a wide spectrum of duties governed by context.⁷¹ In all cases, the Crown must act in good faith and undertake meaningful consultation.⁷²

In relation to the omnibus budget bills discussed above, the SCC delayed “the question of whether government conduct includes legislative action”.⁷³ One can only assume that one will obtain clarification on this point shortly as the Misikew Cree First Nation and the Frog Lake First Nation have filed documents with the Federal Court claiming the effects of Bill C-38 and Bill C-45 violate the Crown’s treaty obligations to protect traditional Aboriginal territory.⁷⁴

⁶⁸ ‘Treaty No. 8’, *supra* note 33.

⁶⁹ G. McDade, & M. Giltrow, ‘Federal Court Judicial Review and Aboriginal Consultation Cases’ (June 2007), available at http://www.cle.bc.ca/PracticePoints/AB_OR/Fed%20Ct%20Judicial%20Review%20and%20Aboriginal%20Consultation.pdf (last visited 15 June 2013), 5.

⁷⁰ *Haida Case*, *supra* note 10, 529, para. 35; *Taku River Case*, *supra* note 10, 564-565, para. 25.

⁷¹ *Mikisew Case*, *supra* note 67, 419-421, paras 62-63.

⁷² *Matiation & Boudreau*, *supra* note 27, 436.

⁷³ *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*, Supreme Court of Canada, 2010 SCC 43, [2010] 2 SCR 650, 673, para. 44.

⁷⁴ G. Galloway, ‘First Nations Take Treaty Rights Conflict to Courts’ (07 January 2013), available at <http://www.theglobeandmail.com/news/politics/alberta-first-nations-launch-court-battle-over-omnibus-bills/article7013228/> (last visited 15 June 2013).

However, in reviewing the jurisprudence that developed the concept of 'duty to consult', one can posit that a constitutional challenge of Bill C-38 and Bill C-45

is analogous to the challenges brought forth in *Sparrow*, *Delgamuukw*, *Haida*, *Taiku River*, and *Mikisew*.⁷⁵

Canada is not alone in addressing the topic of consultation with indigenous communities but its influence has been extended to decisions internationally.⁷⁶ Conversely, developments at the international level, through the treaty bodies and relevant commentaries, and developments in regional human rights systems, can be drawn upon for Canada's own domestic law and policy making.⁷⁷ In understanding the dynamic relationship between indigenous rights in Canada and internationally, the following two sections are dedicated to exploring how the United Nations (UN), the International Labour Organization (ILO) and the Inter-American System are approaching the duty to consult.

C. The Emerging International Norm of 'Duty to Consult'

The cause of indigenous peoples has come under the scrutiny of the international community during the last decades.⁷⁸ It was for long an issue that only sporadically attracted attention within the community of States, mainly in the context of the fight against discrimination, and the endeavor to assimilate 'tribal' and 'subordinated' communities to the modernized majority.⁷⁹ Today, the

⁷⁵ Similar comparisons have also been made by Professor Kent McNeil of Osgoode Hall Law School (Toronto, Canada), available at <http://canadianlegalease.com/2013/01/17/idle-no-more/> (last visited 15 June 2013.)

⁷⁶ For example, Supreme Court of Canada decisions respecting indigenous rights have been referenced in *Mabo v. Queensland (No. 2)*, High Court of Australia, [1992] 175 CLR 1 and *Adong bin Kuwau & Ors v. Kerajaan Negeri Johor & Anor*, Madras High Court, [1997] 1 MLJ 418. See Matiation & Boudreau, *supra* note 27, note 161.

⁷⁷ Matiation & Boudreau, *supra* note 27, 447.

⁷⁸ J. Burger & P. Hunt, 'Towards the International Protection of Indigenous Peoples' Rights,' 12 *Netherlands Quarterly of Human Rights* (1994) 4, 405, 406. The famous lectures of Professor Francisco de Vitória (1482-1546) of the University of Salamanca and the works of the other famous sixteenth century Spanish scholar Bartolome de las Casas prove that this is not totally true. See, for example, G. C. Marks, 'Indigenous Peoples in International Law: The Significance of Francisco de Vitoria and Bartolome de las Casas,' 13 *Australian Yearbook of International Law* (1992), 1.

⁷⁹ The International Labour Organization (ILO) showed interest in the situation of indigenous peoples already in the early 1920s. It then undertook a number of studies and

adoption of specific instruments addressing the rights of indigenous peoples, and the reinterpretation of older, more general human rights instruments through the lenses of indigenous peoples' demands, have led to the development of an increasingly sophisticated body of international law addressing the plight of indigenous peoples in a more comprehensive manner. Indigenous peoples have recently been recognized as holders of a whole range of collective rights, from cultural and identity rights to self-government and self-determination. The right of indigenous peoples to exist as distinct communities has been confirmed and, as such, they ought to participate in the decision-making process of both state and society. More importantly, they have the right to be involved in matters that concern them. S. James Anaya, the UN Special Rapporteur on the Rights of Indigenous Peoples, considers this a novel contribution to notions such as self-government. For him

“[i]n the particular context of indigenous peoples, notions of democracy (including decentralized government) and of cultural integrity join to create a sui generis self-government norm. The norm included two distinct but interrelated strains. One upholds spheres of governmental or administrative autonomy for indigenous communities; the other seeks to ensure the effective participation of those communities in all decisions affecting them that are left to the larger institutions of decision making.”⁸⁰

Under these participatory rights a new standard for effective and meaningful indigenous participation in decision-making has emerged, known as the right to free, prior, and informed consent (FPIC)⁸¹ deriving from a revisited and broader right to self-determination and self-government.⁸²

in 1926 established the Committee of Experts on Native Labour to agree on standards for the protection of indigenous workers.

⁸⁰ S. J. Anaya, *Indigenous Peoples in International Law*, 2nd ed. (2004), 151 [Anaya, Indigenous People in International Law].

⁸¹ M. Trask, 'Indigenous Peoples Participation in Decision-Making – A Paper Prepared for the UN Expert Mechanism on the Rights of Indigenous Peoples' (January 2010), available at www2.ohchr.org/english/issues/indigenous/ExpertMechanism/3rd/docs/contributions/MililaniTrask.doc (last visited 15 June 2013), 1.

⁸² T. Ward, 'The Right to Free Prior, and Informed Consent: Indigenous Peoples' Participation Rights Within International Law', 10 *Northwestern Journal of International Human Rights* (2011) 2, 54, 55.

Basic human rights instruments such as the *International Covenant on Civil and Political Rights* (ICCPR) and the *International Covenant on Economic, Social, and Cultural Rights* (ICESCR) had already recognized in their common Article 1 that "all peoples have a right to self-determination".⁸³ To possess a right to self-determination has always been one of the main demands of indigenous peoples and although they have now been recognized as possessing that right, it remains controversial as to whether they can benefit from the same right to self-determination as other peoples.⁸⁴ The bulk of UN practice on self-determination has mainly focused on the political dimension of this right and in particular granted colonial peoples and peoples living under foreign and military occupation a right to freely decide upon their future international status, often implemented as a right to become independent.⁸⁵

Indigenous peoples are, however, generally not claiming independent statehood when invoking self-determination but the possibility to keep and develop their distinctness. For indigenous peoples, self-determination does not only refer to political rights but also to economic, social, and cultural rights. Even though the basic human rights instruments referring to self-determination also include the right to freely pursue one's own economic development and 'economic self-determination' constituting the natural counterpart of the political aspect of self-determination, it has never received the same attention in the UN and other circles.⁸⁶ It is "as if self-determination has been shorn of all its

⁸³ *International Covenant on Civil and Political Rights*, 16 December 1966, Art. 1, 999 UNTS 171, 173; *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, 993 UNTS 3, 5.

⁸⁴ P. J. Magnarella, 'The Evolving Right of Self-Determination of Indigenous Peoples', 14 *St. Thomas Law Review* (2001) 2, 425; A. Huff, 'Indigenous Land Rights and the New Self-Determination', 16 *Colorado Journal of International Environmental Law and Policy* (2005) 2, 295; M. A. Murphy, 'Representing Indigenous Self-Determination', 58 *University of Toronto Law Journal* (2008) 2, 185; S. Wiessner, 'Indigenous Sovereignty: A Reassessment in Light of the UN Declaration on the Rights of Indigenous Peoples', 41 *Vanderbilt Journal of Transnational Law* (2008) 4, 1141.

⁸⁵ From the practice of the HRC, one can conclude that self-determination is not only a right limited to peoples living under foreign domination but equally a right belonging to all peoples to participate in their governance through democratic processes (Human Rights Committee, *General Comment 12*, UN Doc HRI/GEN/1/Rev. 9 (Vol. I), 27 May 2008, 183 and the various state reports and comments to the State reports by the Committee). This has been confirmed by the Committee supervising the implementation of the *Convention on the Elimination of All Forms of Racial Discrimination* (Committee on the Elimination of Racial Discrimination, *General Recommendation XXI*, HRI/GEN/1/Rev. 9 (Vol. II), 27 May 2008, 282.

⁸⁶ A. Farmer, 'Towards a Meaningful Rebirth of Economic Self-Determination: Human

economic elements and [has] become solely concerned with borders, territory, and nationalism".⁸⁷ Economic self-determination has mainly been approached from a State-centric perspective considering the State as the right holder rather than the people.⁸⁸ The indigenous claims to self-determination and its deriving right to effective and meaningful participation are closely linked to the economic aspect of self-determination because without control of their traditional lands and natural resources, efforts to preserve indigenous distinctness are often meaningless.⁸⁹

In order to support and protect these essential rights, consultation rights have evolved from a mere reference to a right to be consulted in the first instruments on indigenous peoples to a full-fledged right to 'free, prior, and informed consent' standing on its own, in the more recent instruments. What this right to free, prior and informed consent really means remains a debatable issue, but what is certain is that indigenous peoples have more and more rights on matters that concern them.

I. International Labour Organization

The first instrument to have addressed the question of indigenous rights in a comprehensive manner is the 1957 *ILO Convention Concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries* (ILO Convention No. 107).⁹⁰ Its objective was to address, as a binding legal instrument, the marginalization and discrimination of indigenous and tribal populations by recognizing a number of rights and freedoms.⁹¹ Having placed the question of indigenous and tribal populations on

Rights Realization in Resources-Rich Countries', 39 *New York University Journal of International Law and Politics* (2006) 2, 417.

⁸⁷ J. Oloka-Onyango, 'Heretical Reflexion on the Right to Self-Determination: Prospects and Problems for a Democratic Global Future in the New Millennium', 15 *American University International Law Review* (1999) 1, 151.

⁸⁸ See generally Farmer, *supra* note 86 and S. Smis, D. Cambou & G. Ngende, 'The Questions of Land Grab in Africa and the Indigenous Peoples' Right to Traditional Lands, Territories and Resources', 35 *Loyola of Los Angeles International and Comparative Law Review* (2013) (forthcoming).

⁸⁹ *Ibid.*

⁹⁰ ILO, *Convention Concerning the Protection and Integration of Indigenous and other Tribal and Semi-Tribal Populations in Independent Countries*, 26 June 1957, 328 UNTS 247 [ILO Convention No. 107]. The convention is no longer open for ratification but remains in force for 18 States.

⁹¹ Examples are the prohibition from compulsory service, the right not to be discriminated,

the international agenda, *ILO Convention No. 107* was, however, criticized for its 'assimilationist' and paternalistic approach.⁹² Its underlying assumption was that traditional customs and culture were considered an impediment to social and economic development of the communities concerned as well as the States in which they were living.⁹³

In its paternalistic view, *ILO Convention No. 107* devoted only one provision to indigenous peoples' participatory rights. Article 12 protected indigenous and tribal populations against removal from their lands without their free consent. However, for reasons of national security, national economic development, or indigenous health, broad exceptions were provided allowing States parties to significantly curtail the right to land and the linked right to free consent.

The critique on the State-centric leaning of *ILO Convention No. 107* resulted in the drafting of a more up-to-date legal instrument: *ILO Convention Concerning Indigenous and Tribal Peoples in Independent Countries* (ILO Convention No. 169),⁹⁴ which revised and improved the previous convention.⁹⁵

the right to life, education, social security, land, health and participation.

⁹² The preamble and several provisions of the *ILO Convention No. 107* confirm this statement. The indigenous and tribal populations are referred to as "less advanced" and governments are requested to integrate them progressively into the life of their state society hoping that they would disappear as separate groups once they have integrated into the national society. See L. Swepston, 'A New Step in the International Law on Indigenous and Tribal Peoples: ILO Convention No. 169 of 1989', 15 *Oklahoma City University Law Review* (1990) 3, 677, 696-710 and Anaya, *Indigenous Peoples in International Law*, *supra* note 80, 44-45.

⁹³ In 1986 an ILO meeting of experts concluded that the language of *ILO Convention No. 107* was 'outdated' and 'destructive in the modern world' and unanimously recommended to revise the Convention. ILO, *Partial Revision of the Indigenous and Tribal Populations Convention, 1957 (No. 107)*, International Labour Conference (75th Session), Report VI (1) (1988), 18. See R. L. Barsh, 'Revision of ILO Convention No. 107', 81 *American Journal of International Law* (1987) 3, 756.

⁹⁴ ILO, *Convention Concerning Indigenous and Tribal Peoples in Independent Countries*, 27 June 1989, 28 ILM 1382 [ILO Convention No. 169]. See A. Yupsanis, 'ILO Convention No. 169 Concerning Indigenous and Tribal Peoples in Independent Countries 1989-2009: An Overview', 79 *Nordic Journal of International Law* (2010) 3, 433; Swepston, *supra* note 92; ILO, 'Indigenous & Tribal People's Rights in Practice - A Guide to ILO Convention No. 169' (10 May 2009), available at http://www.ilo.org/indigenous/Resources/Guidelinesandmanuals/WCMS_106474/lang-en/in dex.htm (last visited 15 June 2013).

⁹⁵ The Convention has been ratified by 22 States. See ILO, 'Ratifications of C169 - Indigenous and Tribal Peoples Convention, 1989 (No. 169)', available at http://www.ilo.org/dyn/normlex/en/?p=1000:11300:0::NO:11300:P11300_INSTRUMENT_ID:312314 (last

Responding to the critique, it recognized a right of indigenous and tribal peoples to live and develop as distinct communities.⁹⁶ A more elaborated catalogue of rights was the result. The provisions on land rights of the previous convention which were highly criticized,⁹⁷ now better protect indigenous peoples *inter alia* via procedural mechanisms.

Moreover, participation rights received additional attention and were elevated to being a key principle applying to the whole Convention. Article 6 requires that States consult indigenous peoples in good faith regarding legislative or administrative measures that directly affect them, and that these consultations should be done through appropriate procedures and through their representative institutions. This does not, however, mean that the consultations must result in agreements with indigenous peoples.⁹⁸ Article 7 recognizes their right to decide their own priorities and to participate in the formulation, implementation, and evaluation of national and regional development plans which may affect them directly.

ILO Convention No. 169 also explicitly refers to a right of prior consultation when it comes to exploration and exploitation of resources (Art. 15 (2)), a right for free informed consent prior to any relocation (Art. 16 (2)), and the requirement to be consulted prior to transfers of land rights outside of their communities (Art. 17 (2)). Through participation rights, indigenous peoples have thus received additional means to exercise control over their own economic, social, and cultural development. For the Committee of Experts, which issues annual reports containing observations on the implementation of ILO Conventions, consultation has to grow into an instrument of genuine dialogue and social cohesion resulting in the prevention and resolution of conflict.⁹⁹

In supervising the implementation of the Convention, ILO bodies are increasingly confronted with violations of the consultation rights of indigenous

visited 15 June 2013).

⁹⁶ See S. Venne, 'The New Language of Assimilation: A Brief Analysis of ILO Convention 169', 2 *Without Prejudice* (1990) 2, 53.

⁹⁷ See A. Xanthaki, *Indigenous Rights and United Nations Standards: Self-Determination, Culture and Land* (2007), 80. Prof. Xanthaki asserts that the outdated land rights provisions of *ILO Convention No. 107* were one of the main reasons why the Convention had to be revised.

⁹⁸ See Statement of the International Labour Office, in ILO, *Provisional Record No. 25*, International Labour Conference (76th Session) (1989), 25/01, 25/12, para. 74.

⁹⁹ Committee of Experts on the Application of Conventions and Recommendations [CEACR], *General Observation on Convention No. 169*, International Labour Conference (79th Session) (2008).

peoples, and have in their responses, sought to give content to the right.

In 2001, a complaint was brought to the ILO, alleging that Mexico had violated Article 6 of the *ILO Convention No. 169* in the legislative procedure leading to the approval of the *Decree on Constitutional Reform in the Areas of Indigenous Rights and Culture* without taking into account the consultation process laid down in the Convention. The Governing Body noted that "if an appropriate consultation process is not developed with the indigenous and tribal institutions or organizations that are truly representative of the communities affected, the resulting consultations will not comply with the requirements of the Convention".¹⁰⁰ However, as the Committee confirmed, "consultation does not necessarily imply that an agreement will be reached in the way the indigenous peoples prefer".¹⁰¹

In 2005, a report submitted to the Committee of Experts on the Application of Conventions and Recommendations by a Guatemalan indigenous organization, referred to "symbolic" participation because "there is no specific institutional machinery for consultation", such that "31 concessions were granted for the exploitation of mineral resources and 135 for exploration, with no prior consultation with the indigenous peoples as to the viability of such activities or their environmental impact".¹⁰² The Committee of Experts emphasized that

"the provisions on consultation, particularly Article 6, are the core provisions of the Convention and the basis for applying all the others. Consultation is the instrument that the Convention prescribes as an institutional basis for dialogue, with a view to ensuring inclusive development processes and preventing and settling disputes. The aim of consultation as prescribed by the Convention is to reconcile often conflicting interests by means of suitable procedures."¹⁰³

Similarly, in 1997, the Committee of Experts observed that, in making decisions involving legislative measures that may impact land ownership of indigenous peoples, the Peruvian government should have had consultations

¹⁰⁰ Governing Body, *Representation Alleging Non-Observance by Mexico of the Indigenous and Tribal Peoples Convention, 1989 (No. 169)*, GB.289/17/3 (2004).

¹⁰¹ *Ibid.*

¹⁰² CEACR, '*Individual Observation Concerning Indigenous and Tribal Peoples Convention, 1989 (No. 169)*' (2005), available at http://www.ilo.org/dyn/normlex/en/f?p=1000:13100:0:0::NO:13100:P13100_COMMENT_ID:2261253 (last visited 15 June 2013), para. 4.

¹⁰³ *Ibid.*, para. 6.

with them.¹⁰⁴ In 1998, the Committee of Experts came to similar conclusions *vis-à-vis* Bolivia, when they requested the government to conduct consultations and impact studies with indigenous communities prior to granting logging concessions.¹⁰⁵

Canada has not ratified *ILO Convention No. 169*, and is therefore not bound by, or subject to, its compliance mechanisms. However, *ILO Convention No. 169* has informed domestic¹⁰⁶ and international approaches to indigenous rights,¹⁰⁷ and has also been referred to in reports prepared by UN treaty bodies¹⁰⁸ and the Inter-American Commission on Human Rights (Inter-American Commission),¹⁰⁹ suggesting that *ILO Convention No. 169* is an expression of customary international law.

II. United Nations: Treaty Bodies

Although the ICCPR does not refer explicitly to indigenous peoples' rights, the question has been addressed by the Human Rights Committee (HRC) in the context of its interpretation of Article 27, which recognizes the rights of ethnic, religious, or linguistic minorities "to enjoy their own culture, to profess and practice their own religion, or to use their own language".¹¹⁰ In *General Comment No. 23*, the HRC observed that "culture manifests itself in many forms, including a particular way of life associated with the use of land resources, especially in the case of indigenous peoples".¹¹¹ Furthermore, the HRC stated that "the enjoyment of those rights may require positive legal measures of protection and measures to ensure the effective participation of members of minority communities in decisions which affect them".¹¹²

In examining complaints by indigenous individuals claiming a violation of Article 27, the HRC has determined that not every impact on land-based

¹⁰⁴ Matiation & Boudreau, *supra* note 27, 406.

¹⁰⁵ *Ibid.*, 406-407.

¹⁰⁶ See *Indigenous Peoples Rights Act*, 29 October 1997, Republic Act 8371 (Philippines).

¹⁰⁷ *United Nations Declaration on the Rights of Indigenous Peoples* provisions deal with all areas covered by *ILO Convention No. 169*.

¹⁰⁸ See CERD, *Consideration of Reports Submitted by States Parties Under Article 9 of the Convention: Concluding Observations of the Committee on the Elimination of Racial Discrimination: Finland*, UN Doc CERD/C/63/CO/5, 10 December 2003, 2-3, para. 12.

¹⁰⁹ Matiation & Boudreau, *supra* note 27, 408.

¹¹⁰ *International Covenant on Civil and Political Rights*, Art. 27, *supra* note 83, 179.

¹¹¹ Human Rights Committee, *General Comment No. 23*, UN Doc CCPR/C/21/Rev.1/Add.5, 26 April 1994, 1, 4, para. 7.

¹¹² *Ibid.*

activities will constitute a violation, but a critical issue is that the State must show that it engaged in effective consultations and that measures were taken to involve indigenous peoples in decisions impacting the right to enjoy one's culture.¹¹³ Moreover, when commenting on State reports, the HRC has consistently urged States to respect their duty to consult with indigenous peoples prior to any resource development projects within their traditional lands or territories.¹¹⁴

Similar to the HRC, the supervisory body of the ICESCR has understood that in order to fulfill the right to enjoy and maintain one's culture, indigenous peoples must participate in any decisions that would affect their collective right to lands and resources.¹¹⁵ Moreover, the goal of States should be to acquire consent prior to using lands, territories, and resources traditionally used and enjoyed by indigenous communities.¹¹⁶ As stated in the *General Comment No. 21*, which provides an authoritative interpretation of Article 15 of ICESCR:

“Indigenous peoples’ cultural values and rights associated with their ancestral lands and their relationship with nature should be regarded with respect and protected, in order to prevent the degradation of their particular way of life, including their means of subsistence, the

¹¹³ See Human Rights Committee, *Länsman et al. v. Finland*, Communication No. 511/1992, UN Doc CCPR/C/52/D/511/1992, 26 October 1994; Human Rights Committee, *Anni Äärelä and Jouni Näkkäläjärvi v. Finland*, Communication No. 779/1997, UN Doc CCPR/C/73/D/779/1997, 4 November 1997; and Human Rights Committee, *Apirana Mahuika et al. v. New Zealand*, Communication No. 547/1993, UN Doc CCPR/C/70/D/547/1993, 27 October 2000.

¹¹⁴ Ward, *supra* note 82, 56. See also Human Rights Committee, *Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant: Concluding Observations of the Human Rights Committee: Chile*, UN Doc CCPR/C/CHL/CO/5, 18 May 2007, 5-6, para. 19; Human Rights Committee, *Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant: Concluding Observations of the Human Rights Committee: Panama*, UN Doc CCPR/C/PAN/CO/3, 17 April 2008, 5, para 21; Human Rights Committee, *Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant: Concluding Observations of the Human Rights Committee: Nicaragua*, UN Doc CCPR/C/NIC/CO/3, 12 December 2008, 5-6, para. 21.

¹¹⁵ Ward, *supra* note 82, 56-57; Matiation & Boudreau, *supra* note 27, 416-418.

¹¹⁶ See Committee on Economic, Social and Cultural Rights [CESCR], *Consideration of Reports Submitted by States Parties Under Article 16 and 17 of the Covenant: Concluding Observations of the Committee on Economic, Social and Cultural Rights: Colombia*, UN Doc E/C.12/1/Add.74, 6 December 2001, 3 & 5, paras 12 & 33 and CESCR, *Consideration of Reports Submitted by States Parties Under Article 16 and 17 of the Covenant: Concluding Observations of the Committee on Economic, Social and Cultural Rights: Ecuador*, UN Doc E/C.12/1/Add.100, 7 June 2004, 3 & 5, paras 12 & 35.

loss of their natural resources and, ultimately, their cultural identity. [...] States parties must therefore take measures to recognize and protect the rights of indigenous peoples to own, develop, control and use their communal lands, territories and resources, and, where they have been otherwise inhabited or used without their free and informed consent, take steps to return these lands and territories.”¹¹⁷

Giving guidelines on how to apply the *International Convention on the Elimination of All Forms of Racial Discrimination*¹¹⁸ when it comes to indigenous peoples, the Committee on the Elimination of Racial Discrimination (CERD) called for consultation but also referred to the more stringent notion of ‘informed consent.’¹¹⁹ In General Recommendation XXIII, CERD calls upon all States to “ensure that members of indigenous peoples have equal rights in respect of effective participation in public life and that no decisions directly relating to their rights and interests are taken without their informed consent”.¹²⁰ CERD then refers to informed consent again in the context of the rights of indigenous peoples to own, develop, control, and use their communal lands, territories, and resources.¹²¹ In effect, CERD has used the given framework of protecting indigenous peoples from discrimination, and of upholding equality, in order to advocate for indigenous peoples’ right to participate and to be consulted.¹²²

III. United Nations Declaration on the Rights of Indigenous Peoples

To date, the most significant contribution to indigenous rights has been the drafting of the *United Nations Declaration on the Rights of Indigenous Peoples* (UNDRIP).¹²³ Adopted by the UN General Assembly on 13 September 2007 by a vote of 143 in favor, 11 abstentions and four against (Australia, Canada, New Zealand, and the United States of America), it has been welcomed as a major

¹¹⁷ CESCR, *General Comment 21*, UN Doc E/C.12/GC/21, 21 December 2009, 9, para 36.

¹¹⁸ *International Convention on the Elimination of All Forms of Racial Discrimination*, 21 December 1965, 660 UNTS 195.

¹¹⁹ CERD, *General Recommendation XXIII*, UN Doc HRI/GEN/1/Rev.9, 285, 286, para. 4 (d).

¹²⁰ *Ibid.*

¹²¹ *Ibid.*, 286, para. 5.

¹²² Ward, *supra* note 82, 57.

¹²³ *United Nations Declaration on the Rights of Indigenous Peoples*, 13 September 2007, GA Res. 61/295 annex, UN Doc A/RES/61/295, 1.

step forward in the protection of indigenous peoples' rights and a significant contribution in the broader area of the protection of human rights. The Declaration is imbued with a self-determination logic, and refers several times, explicitly and implicitly, to the right and its many ramifications at the political, economic, social, and cultural level. In the belief that indigenous peoples should freely pursue their right to political, economic, and social development, the UNDRIP articulates clear consultation and participation rights and further establishes the purpose of FPIC:

“Article 5

Indigenous peoples have the right to maintain and strengthen their distinct political, legal, economic, social and cultural institutions, while retaining their right to participate fully, if they so choose, in the political, economic, social and cultural life of the State.

[...]

Article 10

Indigenous peoples shall not be forcibly removed from their lands or territories. No relocation shall take place without the free, prior and informed consent of the indigenous peoples concerned and after agreement on just and fair compensation and, where possible, with the option of return.

[...]

Article 18

Indigenous peoples have the right to participate in decision-making in matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own indigenous decision-making institutions.

[...]

Article 19

States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.

[...]

Article 23

Indigenous peoples have the right to determine and develop priorities and strategies for exercising their right to development. In particular, indigenous peoples have the right to be actively involved in developing and determining health, housing and other economic and social programmes affecting them and, as far as possible, to administer such programmes through their own institutions.

[...]

Article 32

1. Indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands or territories and other resources.

2. States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.

3. States shall provide effective mechanisms for just and fair redress for any such activities, and appropriate measures shall be taken to mitigate adverse environmental, economic, social, cultural or spiritual impact.”¹²⁴

The UNDRIP establishes indigenous peoples right to FPIC. In several provisions, the document calls explicitly for the exercise of the right by indigenous communities, especially in matters affecting their lands and natural resources. However, many controversies subsist on the legal status of the norm.¹²⁵ For some FPIC is seen as a right for indigenous peoples to veto any project that may interfere with their livelihood, whereas for the others, FPIC is mainly a way of guaranteeing indigenous participation in decision-making processes that concern them.¹²⁶ From the view of the Expert mechanism

¹²⁴ *Ibid.*, Arts 5, 10, 18, 19, 23 & 32, 4, 5, 6, 7, 9.

¹²⁵ L. Heinamaki, ‘Indigenous Peoples in International law’, in H. Leena *et al.*, *Addressing the Climate Vulnerability of Marginalized Groups Through Finnish Foreign Policy* (forthcoming 2013).

¹²⁶ Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People, *Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development*, UN Doc A/HRC/12/34, 15 July 2009, 17, para. 48; M. Davis, ‘Indigenous Struggles in Standard-Setting: The

“[t]he duty to obtain the free, prior and informed consent of indigenous peoples presupposes a mechanism and process whereby indigenous peoples make their own independent and collective decisions on matters that affect them. The process is to be undertaken in good faith to ensure mutual respect. The State's duty to obtain free, prior and informed consent affirms the prerogative of indigenous peoples to withhold consent and to establish terms and conditions for their consent.”¹²⁷

In practice, doubts remain on the meaning of the right, and especially on what consent implies. While actual consent is required in case of relocation (Art. 10) as well as storage and disposal of hazardous materials on their lands (Art. 29), only consultation and cooperation to obtain indigenous FPIC is called for in case of approval of projects affecting them (Art. 32). Both the HRC and the IACtHR emphasize that consultation is however not sufficient in cases of large scale development projects, instead FPIC, is required.¹²⁸ In addition, the IACtHR stipulates that the State may be required to obtain full consent if a large-scale project affects the survival of a community. Thus, although the interpretation of the right to FPIC is not strictly determined yet, the development of the norm at the international and regional level already demonstrates its powerful effect on the protection of indigenous peoples' interests.

The UNDRIP was adopted as a resolution of the UN General Assembly and is legally speaking, therefore, a non-binding instrument, or, a recommendation. There are, however, convincing arguments that can be advanced to attribute a binding status to its content. First, because there is a growing acceptance that the Declaration (if not all provisions, at least some of them) can be considered as an expression of customary international law¹²⁹ and second because it has been considered “an authoritative statement of norms concerning indigenous peoples on the basis of generally applicable human rights principles”.¹³⁰ A significant

United Nations Declaration on the Rights of Indigenous Peoples', 9 *Melbourne Journal of International Law* (2008) 2, 439, 464-465.

¹²⁷ Human Rights Council (Expert Mechanism on the Rights of Indigenous Peoples), *Final Study on Indigenous Peoples and the Right to Participate in Decision-Making*, A/HRC/EMRIP/2011/2, 26 May 2011, 20-21, para. 24.

¹²⁸ See Human Rights Committee, *Ángela Poma Poma v. Peru*, Communication No. 1457/2006, UN Doc CCPR/C/95/D/1457/2006, 24 April 2009 and *Saramaka People v. Suriname*, Judgment of 28 November 2007, IACtHR Series C, No. 172 [Saramaka Case].

¹²⁹ Wiessner, *supra* note 84, 1176.

¹³⁰ Anaya, *Indigenous Peoples in International Law*, *supra* note 80, 65.

majority of States voted for the Declaration¹³¹ and even those which voted against it have recently endorsed the Declaration.¹³² Moreover, regional organizations such as the *Organization of American States* (OAS) and the *African Union* have become involved in the domain of indigenous peoples' rights. Many States have also recently adopted legislation recognizing rights for indigenous peoples at the national level, and have made statements attributing a legal value to the Declaration. This has prompted the International Law Association to conclude that it can now be considered as a reflection of customary international law.¹³³

IV. Inter-American Human Rights System

The Inter-American Human Rights System has contributed greatly to the development of indigenous peoples' rights. Its jurisprudence also has major implications for the strengthening of the right to consultation within the Inter-American System and even beyond.¹³⁴ In 1985, the Inter-American Commission had already issued its first resolution on the protection of indigenous rights to collective property. Due to the failure of the Brazilian government to adopt necessary measures to protect the well-being of the Yanomami community against the effect of industrial activities carried on in their territories, the Inter-American Commission decided that the government had violated the right to life and several other provisions recognized in the *American Declaration of the Rights and Duties of Man* (American Declaration).¹³⁵ As a result, the Commission recommended that the government of Brazil set and demarcate the boundaries of the Yanomami territory. This case marked the beginning of the normative

¹³¹ The Resolution was adopted by a majority of 143 against 4 and with 11 abstentions.

¹³² Australia, Canada and New Zealand have since reconsidered their position and have officially endorsed the UN Declaration. US President Obama has also declared that the US supports the Declaration.

¹³³ International Law Association, *Conclusion and Recommendations of the Committee on the Rights of Indigenous Peoples*, Resolution No. 5/2012 (adopted during 75th Conference on International Law, 26-30 August 2012) [ILA, Conclusion and Recommendations of the Committee on the Rights of Indigenous Peoples].

¹³⁴ S. J. Anaya & R. A. Williams, Jr., 'The Protection of Indigenous Peoples' Rights Over Lands and Natural Resources Under the Inter-American Human Rights System', 14 *Harvard Human Rights Journal* (2001), 33; E. Tramontana, 'The Contribution of the Inter-American Human Rights Bodies to Evolving International Law on Indigenous Rights over Lands and Natural Resources', 17 *International Journal on Minority and Group Rights* (2010) 2, 241.

¹³⁵ *Yanomami Community v. Brazil*, IACHR Case 7615, 5 March 1985, Report No. 12/85.

involvement of the Inter-American system in the field of indigenous peoples' rights protection.¹³⁶

For the first time in 2001, the IACtHR recognized the communal property rights of indigenous peoples in the landmark case *Awas Tingi Case v. Nicaragua*.¹³⁷ This judgment set a precedent for the protection of indigenous peoples' distinctive relationships with their land and natural resources. Adopting an evolutionary interpretation of the right to property as defined in Article 21 of the *American Convention on Human Rights*, in its meaning autonomous of domestic law, the Court examined relevant international law instruments so as to recognize indigenous rights to communal property.¹³⁸ In its decision, the Court acknowledged that indigenous rights to property derived from their traditional use and occupancy patterns and did not depend on State recognition.¹³⁹ Because the judgment established the existence of indigenous peoples' rights to communal property and described circumstances in which they may be violated, it significantly contributed to improving the Inter-American System and the international regime of human rights dealing with indigenous issues.¹⁴⁰ In particular, the Court held that the failure to demarcate indigenous lands, and the granting of a concession for logging within the lands traditionally belonging to the community, represented a violation of indigenous rights to property.

One year later, a similar approach was adopted by the Inter-American Commission in the case *Mary and Carrie Dann*.¹⁴¹ On the basis of the *American Declaration*, the Commission found a violation of the rights to equality and property of the Western Shoshone people whose title to their ancestral lands had been ignored by the US government to pursue agricultural developments.¹⁴² In its decision, the Commission further stipulated the rights of indigenous peoples not to be deprived of their interest in the occupation and use of their traditional lands and natural resources except with fully informed consent.¹⁴³ Although

¹³⁶ Tramontana, *supra* note 134, 249.

¹³⁷ *Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, Judgment of 31 August 2001, IACtHR Series C, No. 79.

¹³⁸ *Ibid.*, 74, para. 148.

¹³⁹ *Ibid.*, 71, 74 & 75, paras 140, 148-153.

¹⁴⁰ L. J. Alvarado, 'Prospects and Challenges in the Implementation of Indigenous Peoples' Human Rights in International Law: Lessons From the Case of Awas Tingni v. Nicaragua', *24 Arizona Journal of International & Comparative Law* (2007) 3, 609, 617.

¹⁴¹ *Mary and Carrie Dann v. United States*, IACHR Case 11.140, 27 December 2002, Report No. 75/02 [Dann Case].

¹⁴² *Ibid.*, para. 144.

¹⁴³ *Ibid.*, para. 131.

the Commission did not specify what it meant by fully informed consent, it nevertheless asserted the specific relevance of indigenous peoples' consent to land use, occupation and expropriation.

The question of indigenous right to consultation and consent surfaced again in the landmark case *Saramaka v. Suriname*¹⁴⁴ where the IACtHR held for the first time that "indigenous communities have the right to own the natural resources they have traditionally used within their territory".¹⁴⁵ The decision was also significant because it clarified whether and to what extent the State may interfere with indigenous property rights in the exploration and extraction of natural resources located on their territory. According to the judgment, the right to property is not an absolute right.¹⁴⁶ In this respect, the Court carefully described the circumstances in which the right to property may legitimately be limited.¹⁴⁷ Beyond conventional factors, the Court was specifically required to take into consideration whether any restriction "amounts to a denial of traditions and customs in a way that endangers the very survival".¹⁴⁸ In this regard, the Court established three safeguards to identify whether any restriction would threaten survival of the indigenous communities. First, the State must ensure the right of indigenous communities to effective participation in conformity with their customs and traditions in the context of proposed development plans. Then, it must guarantee that the indigenous community shares in the benefits of the development plan. Finally, an environmental assessment must be performed.¹⁴⁹ Only when those factors are respected can the State legitimately curtail indigenous peoples' rights to property.

The *Saramaka* case is noteworthy because it helped to qualify the meaning of participatory rights while defining the right to consultation and, where applicable, the duty to obtain consent.¹⁵⁰ According to the decision, to be adequate, consultation with the indigenous community must be actively conducted with due regard to its traditional methods of decision-making. In addition, the consultation should occur at the beginning of the development project, in good

¹⁴⁴ *Saramaka Case*, *supra* note 128.

¹⁴⁵ *Ibid.*, 36, para. 121.

¹⁴⁶ *Ibid.*, 37-38, para. 127.

¹⁴⁷ The right to property can be limited where the restrictions are: a) previously established by law; b) necessary; c) proportional; and d) with the aim of achieving a legitimate objective in a democratic society. *Ibid.*

¹⁴⁸ *Ibid.*, 38, para. 128.

¹⁴⁹ *Ibid.*, 38, para. 129.

¹⁵⁰ *Ibid.*, 40, para. 133.

faith and performed with the objective of reaching an agreement.¹⁵¹ With respect to the right to consent, the Court further stipulated that “when dealing with any major development [...] that may have a profound impact on the property rights of the members of the Samaraka people”.¹⁵² The State is additionally required to obtain “the free, prior, and informed consent of the Samarakas in accordance with their traditions and customs”.¹⁵³ Although this safeguard goes beyond the requirement defined in the *ILO Convention* which refers only to an obligation to consult,¹⁵⁴ it does not coincide with the protection afforded by the UNDRIP which requires FPIC in any development project affecting the lands and natural resources of indigenous communities.¹⁵⁵ Nonetheless, the jurisprudence of the Court in *Saramaka* constitutes a significant step forward in the development of indigenous peoples' right to lands and natural resources.

The jurisprudence developed in the *Saramaka* case has recently been upheld and strengthened by the IACtHR in the case of *Sarayaku v. Ecuador*.¹⁵⁶ In particular, the application of the effective participatory rights standards helped the Court to decide whether the authorization given by the State of Ecuador to explore and exploit oil resources on the territory of the Sarayaku community without consultation would violate their rights. The Court noted that Ecuador is party to *ILO Convention No. 169* and should in this respect be held responsible at least from the day the convention had been ratified.¹⁵⁷ The Court additionally emphasized that the right to consultation constitutes a general principle of international law.¹⁵⁸ This statement has broad implications. It suggests that the State may be held liable for violation of the right to consult independent of its obligations under the ILO Convention.¹⁵⁹ Seen from this angle, *Sarayaku v. Ecuador* reinforces the right to consultation as a rule of customary international law.

¹⁵¹ *Ibid.*

¹⁵² *Ibid.*, 41, 137.

¹⁵³ *Ibid.*

¹⁵⁴ *Convention No. 169*, *supra* note 94. See also Tramontana, *supra* note 134, 259.

¹⁵⁵ J. M. Pasqualucci, 'International Indigenous Land Rights: A Critique of the Jurisprudence of the Inter-American Court of Human Rights in Light of the United Nations Declaration on the Rights of Indigenous Peoples', 27 *Wisconsin International Law Journal* (2009) 1, 51, 66.

¹⁵⁶ *Kichwa Indigenous People of Sarayaku v. Ecuador*, Judgment of 27 June 2012, IACtHR Series C, No. 245 [Sarayaku Case].

¹⁵⁷ *Ibid.*, 20, para. 70.

¹⁵⁸ *Ibid.*, 44-45, para. 164.

¹⁵⁹ L. Brunner & K. Quintana, *The Duty to Consult in the Inter-American System: Legal Standards After Sarayaku*, 16 *ASIL Insights No. 35* (2012), 4.

In order to verify whether the right to consultation was adequately ensured, the Court reiterated the jurisprudence established in *Saramaka* while slightly adjusting it.¹⁶⁰ Notably, it specified that the duty to consult is a State responsibility that cannot be delegated to a third party and also redefined the purpose of the EIA. Whereas in *Saramaka*, EIA was considered as a distinctive safeguard to verify whether the community survival had been endangered, in *Sarayaku*, the Court emphasized the importance of EIA for applying the right to consultation. In other words, EIA constituted a distinctive element, not only to check whether the community survival was at stake, but also to verify whether the right to consultation had been violated.¹⁶¹ In brief, *Sarayaku v. Ecuador* confirms the standards established in *Saramaka* and provides a better understanding of the content and scope of the right to prior, free and informed consultation. However, in its judgment, the Court did not address the issue of the right to consent. From the decision's conclusions, it can nevertheless be implied that without proper consultation there is no possibility to secure the right to consent.

D. Conclusions

This comparative analysis clarifies the enormous gap between the norms being developed at the international level, and certain State practice especially in the case of Canada.¹⁶² In the decisions delivered by the SCC, the 'duty to consult' with Aboriginal peoples appears to flow from the honor of the Crown in an attempt to accommodate and reconcile past injustices.¹⁶³ However, while these developments are a welcome attempt to refine State practice in terms of the Crown's relationship with the Aboriginal communities, they should not be seen as a replacement for Canada's human rights obligations regarding consultation with indigenous peoples.¹⁶⁴

¹⁶⁰ The following order was presented by the Court: a) the prior nature of the consultation; b) good faith and attempts at reaching an agreement; c) appropriate and accessible consultation; d) environmental impact assessment; and e) informed consultation. *Sarayaku Case*, *supra* note 156, 50, para. 178.

¹⁶¹ Brunner & Quintana, *supra* note 159, 4.

¹⁶² Ward, *supra* note 82, 83.

¹⁶³ N. Bankes, 'International Human Rights Law and Natural Resources Projects Within Traditional Territories of Indigenous Peoples', 47 *Alberta Law Review* (2010) 2, 457, 459.

¹⁶⁴ Ward, *supra* note 82, 71.

Canada is a signatory to various international human rights treaties, including the ICCPR,¹⁶⁵ the ICESCR¹⁶⁶ and the *International Convention on the Elimination of Forms of Racial Discrimination*.¹⁶⁷ Accession and ratification to the above-mentioned human rights treaties create minimum legal obligations for Canada. In the case of consultation duties, if the authoritative interpretations of the UN treaties are considered, Canada is required to consult with Aboriginal peoples in good faith, or run the risk of violating international law.

Moreover, Canada is a member of the OAS and signed the *OAS Charter* in 1989. Although Canada is not a signatory to the *American Convention on Human Rights*, and has not accepted the jurisdiction of the IACtHR, the Court and the Commission on Human Rights do consider the *American Declaration* as an expression of the human rights provisions in the OAS Charter, and thus binding on all OAS Member States.¹⁶⁸ Furthermore, the Inter-American Commission has held that there are minimum standards that States Parties to the *American Declaration* have to respect in order to fully comply with the provisions in the Declaration, notably the right to property.¹⁶⁹

The question now becomes whether the development of a 'duty to consult' in Canadian jurisprudence is equivalent to, or meets the standard of, the developing norms in international human rights jurisprudence.¹⁷⁰ We contend that this is not the case.

The Inter-American System has taken huge steps forward in attempting to qualify the meaning of participatory rights, to define consultation duties and, where applicable, to obtain consent. In the *Saramaka* case, safeguards were developed to ensure indigenous survival. In order to shrink the gap between developing international human rights norms and State practice, Canada needs to implement legislation that reflects the above-mentioned developments.¹⁷¹

Moreover, arguably of equal or more importance, Canada needs to recognize that the practice of consultation with Aboriginal peoples is an expression of the Aboriginal's right to self-determination.¹⁷² As mentioned above, the more effective and meaningful right to FPIC is emerging from the broader

¹⁶⁵ Canada acceded to the ICCPR on 19 May 1976.

¹⁶⁶ Canada acceded to the ICESCR on 19 May 1976.

¹⁶⁷ Canada ratified ICERD on 14 October 1970.

¹⁶⁸ Bankes, *supra* note 163, 479. See also Ward, *supra* note 82, 71.

¹⁶⁹ *Mary and Carrie Dann v. United States*, *supra* note 141, para. 140. See also Ward, *supra* note 82, 71.

¹⁷⁰ Ward, *supra* note 82, 71.

¹⁷¹ *Ibid.*, 83.

¹⁷² *Ibid.*, 58.

right to self-determination and self-government. The UNDRIP provides a clear outline of the purpose and content of FPIC, reflecting the wishes of indigenous peoples and the developments in international human rights jurisprudence. Although UNDRIP is a non-binding instrument, it is a reflection of customary international law.¹⁷³ By continuing to observe that the principles enshrined in UNDRIP are evidenced in State practice, and reaffirmed in human rights jurisprudence, the UNDRIP is slowly being cemented in international law.¹⁷⁴ In the future, the UNDRIP, and included in this is FPIC, can provide a best practices guide for State practice and can even challenge State practice that does not fulfill its international legal obligations.¹⁷⁵

Finally, many developments concerning indigenous participatory rights and consultation duties have stemmed from battles over land and resources. Although this article has concerned itself with the implementation of legislation, what is important to observe is the cumulative impact of Bill C-38 and Bill C-45, which can have drastic and long-lasting impacts on Aboriginal land, culture and way of life. This, in itself, makes it analogous to an encroachment on Aboriginal land and resources and Aboriginal peoples affected deserved to be consulted.

Moreover, the objections many Aboriginal peoples have concerning Bill C-38 and Bill C-45, expressed by the *Idle No More* movement, have a sound basis in Canadian constitutional law.¹⁷⁶ As outlined above, the amendments included in Bill C-38 and Bill C-45 could have very significant impacts on Aboriginal and treaty rights across Canada. In *Sparrow*, the SCC made it clear that infringements of Aboriginal rights is permissible but can only be justified by a strict test. Also, the *Sparrow* case made it clear that the Crown has the duty to consult with Aboriginal peoples whose rights are being infringed upon. In *Haida*, the SCC went a step further and decided that the same principles apply to not yet established Aboriginal rights. Following this, the *Mikisew* case demonstrated that the Crown has a duty to consult even when they have the authority to undertake an action that could affect the rights of Aboriginal peoples.

Unfortunately, despite evidence that the duty to consult exists, the SCC has remained very cautious in not providing a detailed outline pertaining to the scope of consultation duties, instead suggesting that this be decided on a

¹⁷³ ILA, *Conclusion and Recommendations of the Committee on the Rights of Indigenous Peoples*, *supra* note 133.

¹⁷⁴ Ward, *supra* note 82, 84.

¹⁷⁵ *Ibid.*

¹⁷⁶ See McNeil, *supra* note 75.

case-by-case basis.¹⁷⁷ By leaving the content of the Crown's duty to consult open one can find it difficult to elaborate on what the Crown could have done prior to introducing Bill C-38 and Bill C-45 in order to satisfy their obligations to consult with Aboriginal peoples. However, in this instance, it is instructive to look to the jurisprudence developed in *Haida* where the SCC determined that insight into meaningful consultation can be garnered from the New Zealand Ministry of Justice's *Guide for Consultation With Maori*. In this guide, meaningful consultation includes "seeking Maori opinion on [policy] proposals", "being prepared to alter the original proposal", and "providing feedback both during the consultation process and after the decision process".¹⁷⁸

There is no evidence to suggest that anything of this nature took place, resulting in a possible violation of Canada's constitutional obligations to Aboriginal peoples. However, in an effort to accommodate Aboriginal peoples, to reconcile past injustices, and to respect the honour of the Crown, the Canadian government should have at least consulted with the Aboriginal peoples prior to rushing through Bill C-38 and Bill C-45. Maybe this is why the Aboriginal peoples of Canada stood up and refused to be *Idle No More*.

¹⁷⁷ See *Sparrow Case*, *supra* note 47. See also *Delgamuukw Case*, *supra* note 53.

¹⁷⁸ *Haida Case*, *supra* note 10, 534, para. 46.

Rights of Indigenous Peoples and the International Drug Control Regime: The Case of Traditional Coca Leaf Chewing

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Abstract¹

This article discusses whether there is a normative conflict between the rights of indigenous peoples and the international drug control regime. Treaty obligations to abolish coca leaf chewing might clash with the indigenous peoples' right to practice their customs and traditions in States of the Andean region where indigenous peoples have practiced coca leaf chewing for centuries. Taking into account the manner with which States have addressed this issue, the article focuses on the case of Bolivia and its recent attempt to amend the 1961 *Single Convention on Narcotic Drugs*. It is argued that the normative conflict can be resolved or at least avoided by applying the methods of treaty interpretation, though only at the expense of indigenous rights. Options to change the international drug control regime to ensure indigenous rights are not only limited by the common interest in preserving its integrity, but also by the negative impact this could have on treaty relations.

A. Introduction

Concerns for the rights of indigenous peoples recently led the Plurinational State of Bolivia² to propose an amendment to and later withdraw from the 1961 *Single Convention on Narcotic Drugs* (1961 Convention), which begs the question of whether there is a normative conflict between the international drug control regime and indigenous rights. This article considers the human rights of indigenous peoples under international law in a situation where coca leaf chewing is part of their customs and traditions and at the same time prohibited under the international drug control regime. It discusses a conflict that seems to exist between relevant rules of the two bodies of law at the conceptual level and offers an interpretation of how it can be resolved. Its focus is the case of Bolivia, the only country that has sought to address this normative conflict by taking action under both domestic and international law.

The arguments presented here are built on the conviction that international law is a system in which rules do not exist in a vacuum but must be seen in relation to each other. Sections B and C of the article outline those provisions under the international drug control regime and international human rights law that appear to be in conflict with each other with regards to the rights of

¹ All views expressed in this article are those of the author and do not necessarily represent the views of, and should not be attributed to, UNODC or the United Nations in general.

² Hereinafter: Bolivia.

indigenous peoples. The following sections D and E consider how the issue of coca leaf chewing as a custom or tradition of indigenous peoples has been addressed by States of the Andean region,³ in particular Bolivia, given their international drug control obligations. Section F discusses how the normative conflict can be resolved by applying the methods of treaty interpretation. It examines the conflicting values and interests that inform the rules in question, and concludes that a solution within existing international law would not be favorable to human rights. Efforts to ensure indigenous rights, on the other hand, would require changes to the international drug control regime, which are not easily achievable and may have far reaching consequences.

With its limited focus on a normative conflict, this article will not address human rights issues resulting from the implementation of the international drug control regime. Such issues have been exhaustively addressed elsewhere and relate to the questions whether domestic enforcement measures meet human rights standards or whether international drug control policy makers give sufficient attention to human rights.⁴

B. Coca Leaf Chewing Under the International Drug Control Regime

The international drug control regime has been treaty-based since its inception in the early 20th century.⁵ Today, there are three main international drug control conventions,⁶ which oblige States parties to exercise control over narcotic drugs and psychotropic substances while ensuring their availability for medical and scientific purposes, and to combat their illicit trafficking. Substances subject to international control are listed in schedules annexed to the conventions, which can be modified according to the procedures foreseen by the

³ Argentina, Bolivia, Chile, Colombia, Ecuador, Peru, and Venezuela.

⁴ See, e.g., D. Barrett *et al.*, 'Recalibrating the Regime: The Need for a Human Rights-Based Approach to International Drug Policy' (1 March 2008), available at <http://www.hrw.org/legacy/pub/2008/hivaids/beckley0308.pdf> (last visited 15 June 2013).

⁵ T. Pietschmann, 'A Century of International Drug Control', 54 *Bulletin on Narcotics* (2007) 1 & 2, 1, 1.

⁶ *Single Convention on Narcotic Drugs*, 30 May 1961, 976 UNTS 105 [1961 Convention]; *Convention on Psychotropic Substances*, 21 February 1971, 1019 UNTS 175; *United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances*, 20 December 1988, 1582 UNTS 95 [1988 Convention].

conventions. However, specific treaty provisions apply to the coca leaf, cannabis and opium,⁷ which can only be modified by amending the conventions.

The *1961 Convention* as amended by the *1972 Protocol Amending the Single Convention on Narcotic Drugs*⁸ defines coca leaf as “the leaf of the coca bush except a leaf from which all ecgonine, cocaine and any other ecgonine alkaloids have been removed” and places it in Schedule I,⁹ together with other drugs like cocaine, heroin, and morphia. The drugs in Schedule I are subject to the measures of control listed in Article 2 (1) of the Convention, which aim at limiting “exclusively to medical and scientific purposes the production, manufacture, export, import, distribution of, trade in, use and possession of drugs”.¹⁰ Among other measures, States parties to the *1961 Convention* are required to provide statistical data on the production and consumption of drugs,¹¹ limit their manufacture and importation,¹² enforce a license system for their trade and distribution,¹³ and prohibit the possession of drugs.¹⁴ In addition, coca leaves are subject to the specific system of controls in Article 26, which requires States parties to establish a national authority responsible to limit and supervise the production of coca leaves for licit medical and scientific purposes and to uproot all coca bushes which grow wild. Article 27 further allows States parties to use coca leaves for the preparation of a flavoring agent, which shall not contain any alkaloids (such as cocaine), and to permit the production, import, export, trade in and possession of such leaves to the extent necessary for such use.

The *1961 Convention*, in Article 49, allowed States parties to reserve the right to temporarily permit coca leaf chewing by providing as follows:

⁷ Additional measures of control for opium are established by Art. 19 (1) (f) and Arts 21 *bis*, 23 & 24 of the *1961 Convention*; for the coca leaf by Arts 26 and 27 and for cannabis by Art. 28 of the *1961 Convention*. The opium poppy, the coca bush, the cannabis plant, poppy straw, and cannabis leaves are subject to the control measures prescribed in Art. 19 (1) (e), Art. 20 (1) (g), Article 21 *bis* and in Arts 22 to 24; 22, 26 and 27; 22 and 28; 25; and 28, respectively.

⁸ *Protocol Amending the Single Convention on Narcotic Drugs, 1961, 25 March 1972, 976 UNTS 3 [1972 Protocol]*.

⁹ *1961 Convention*, Art. 1 (f), *supra* note 6, 107.

¹⁰ *Ibid.*, Art. 4 (c), 111.

¹¹ *Ibid.*, Arts 19 & 20, 117-118.

¹² *Ibid.*, Art. 21, 118-119.

¹³ *Ibid.*, Art. 30, 123-124.

¹⁴ *Ibid.*, Art. 33, 126.

“1. A Party may at the time of signature, ratification or accession reserve the right to permit temporarily in any one of its territories:

[...]

c) Coca leaf chewing;

[...]

e) The production and manufacture of and trade in the drugs referred to under a) to d) for the purposes mentioned therein.

2. The reservations under paragraph 1 shall be subject to the following restrictions:

a) The activities mentioned in paragraph 1 may be authorized only to the extent that they were traditional in the territories in respect of which the reservation is made, and were there permitted on 1 January 1961.

[...]

e) Coca leaf chewing must be abolished within twenty-five years from the coming into force of this Convention.”¹⁵

The *1961 Convention* entered into force on 13 December 1964, and, in line with the transitional period of 25 years foreseen in Article 49 (2) (e), coca leaf chewing had to be prohibited by 12 December 1989.¹⁶ Article 49 was not changed by the *1972 Protocol*.

Article 49 of the *1961 Convention* was also not affected by the provisions of the *United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances* of 1988 (1988 Convention), although the relationship between the provisions of both conventions has been the subject of some controversy concerning the obligation to abolish coca leaf chewing under the *1961 Convention*. In its Article 14 (2), the *1988 Convention* established that the measures adopted by States parties to prevent illicit cultivation and to eradicate plants containing narcotic or psychotropic substances “shall respect fundamental human rights and shall take due account of traditional licit uses, where there is historic evidence of such use”.¹⁷ Despite the clear date established by the *1961 Convention* for the abolition of coca leaf chewing and related production, the provision contained in Article 14 (2) was taken by some States of the Andean

¹⁵ *1961 Convention*, Art. 49, *supra* note 6, 132-133.

¹⁶ UN, *Commentary on the Single Convention on Narcotic Drugs, 1961* (1973), 470, para. 5 [UN Commentary].

¹⁷ *1988 Convention*, Art. 14 (2), *supra* note 6, 194.

region to justify the production of coca for traditional consumption and the legality of traditional consumption in their domestic legal order.¹⁸ However, Article 14 (1) of the *1988 Convention* makes it clear that “[a]ny measures taken pursuant to this Convention by Parties shall not be less stringent than the provisions applicable to the eradication of illicit cultivation of plants containing narcotic [...] substances under the provisions of the 1961 Convention”.¹⁹ The relationship between the relevant provisions of both conventions shall be further analyzed in section F of this article, when the relationship between the prohibition on coca leaf chewing and the rights of indigenous peoples to their customs and traditions is explored.

C. The Right of Indigenous Peoples to Practice Their Customs and Traditions Under International Law

One of the key objectives of the international legal regime of the rights of indigenous peoples is the preservation of their cultural integrity, including the right to maintain and develop their cultural identity, customs and traditions, and their traditional ways of life.²⁰ Certain principles of this legal regime have been said to be part of an emerging customary international law.²¹ According to the International Law Association (ILA), this includes the right of indigenous peoples “to recognition and preservation of their cultural identity” and the obligation of States to “recognize and ensure respect for the laws, traditions and customs of indigenous peoples”.²²

The *United Nations Declaration on the Rights of Indigenous Peoples* (UNDRIP) is the most comprehensive instrument in this regard and was adopted by the General Assembly in 2007.²³ Article 11 of the Declaration sets out the right of indigenous peoples to practice and revitalize their cultural traditions and customs. Under Article 12, indigenous peoples also have the right to manifest,

¹⁸ Pietschmann, *supra* note 5, 103.

¹⁹ *1988 Convention*, Art. 14 (1), *supra* note 6, 194.

²⁰ S. J. Anaya, *Indigenous Peoples in International Law*, 2nd ed. (2004), 131 [Anaya, *Indigenous Peoples in International Law*].

²¹ *Ibid.*, 61; S. Wiessner, ‘Rights and Status of Indigenous Peoples: A Global Comparative and International Legal Analysis’, 12 *Harvard Human Rights Journal* (1999), 57, 127.

²² C. J. Iorns Magallanes, ‘ILA Interim Report on a Commentary on the Declaration of the the Rights of Indigenous Peoples’, *Victoria University of Wellington Legal Research Paper No. 50* (2012), 51 [Iorns Magallanes, *ILA Interim Report*].

²³ *United Nations Declaration on the Rights of Indigenous Peoples*, 13 September 2007, GA Res. 61/295 annex, UN Doc A/RES/61/295, 1 [UNDRIP].

practice or develop their spiritual traditions, customs and ceremonies. Their right to traditional medicines and health practices is enshrined in Article 24, including the conservation of their vital medicinal plants. Article 31 affirms the right of indigenous peoples to maintain, control, protect, and develop their cultural heritage, traditional knowledge, and traditional cultural expressions. These terms are further defined in specific treaties concluded under the auspices of UNESCO. For instance, “‘cultural expressions’ are those expressions that result from the creativity of individuals, groups and societies, and that have cultural content”.²⁴ ‘Cultural heritage’ includes “‘intangible cultural heritage’”, which in turn includes “‘social practices, rituals and festive events’”, as well as “‘knowledge and practices concerning nature and the universe’”.²⁵

While not legally binding, UNDRIP reflects the opinion of the United Nations Member States that indigenous peoples have a set of specific rights and that measures should be taken to protect and fulfill such rights. More importantly, the provisions of UNDRIP related to the preservation of the cultural integrity of indigenous peoples have not caused much controversy during the discussions on the final draft, as opposed to issues like indigenous land rights or the territorial and political integrity of States.²⁶ For example, all States of the Andean region voted in favor, except for Colombia, which abstained because it considered those aspects of the Declaration relating to the use of the land and territories of indigenous peoples to be in direct contradiction with its domestic legal system.²⁷ In 2009, Colombia expressed its unilateral support for the Declaration, its spirit, and its fundamental principles.²⁸ Moreover, all four Member States that voted against the Declaration have now endorsed it.²⁹

²⁴ *Convention on the Protection and Promotion of the Diversity of Cultural Expressions*, 20 October 2005, Art. 4 (3), United Nations Juridical Yearbook (2005), 361, 364-365.

²⁵ *Convention for the Safeguarding of the Intangible Cultural Heritage*, 17 October 2003, Art. 2, 2368 UNTS 3, 36-37.

²⁶ Cf. UN, *General Assembly Official Records* (UNGAOR) 61st Session (107th plenary meeting), UN Doc A/61/PV.107, 13 September 2007; UNGAOR 61st Session (108th plenary meeting), UN Doc A/61/PV.108, 13 September 2007; UNGAOR 61st Session (109th plenary meeting), UN Doc A/61/PV.109, 17 September 2007.

²⁷ See UNGAOR 61st Session (107th plenary meeting), *supra* note 26, 17-18.

²⁸ Statement by the Colombian Vice Minister for Multilateral Affairs, Adriana Mejía Hernández, at the occasion of the Durban Review Conference (21 April 2009), available at <http://www.mij.gov.co/econtent/library/documents/DocNewsNo3345DocumentNo1611.PDF> (last visited 15 June 2013).

²⁹ Australia, Canada, New Zealand, and the United States of America. See S. Wiessner, ‘The Cultural Rights of Indigenous Peoples: Achievements and Continuing Challenges’, 22 *European Journal of International Law* (2011) 1, 121, 129.

The right of indigenous peoples to practice their cultural traditions and customs is also enshrined in *Convention No. 169* of the International Labour Organization (ILO),³⁰ which entered into force in 1991 and has been ratified by the States of the Andean region. States parties to *ILO Convention No. 169* are required to protect “the social, cultural, religious and spiritual values and practices”, as well as “the integrity of the practices of indigenous peoples”.³¹ Moreover, the States parties have the responsibility for developing co-ordinated and systematic action to promote the full realization of the social, economic, and cultural rights of indigenous peoples with respect for their social and cultural identity, their customs and traditions.³²

In line with the *ILO Constitution* (Articles 19 and 22), States parties to *ILO Convention No. 169* are required to report regularly on its implementation. Nevertheless, the observations that have been made by the ILO Committee of Experts on the Application of Conventions and Recommendations so far provide little guidance on the interpretation of the provisions relevant to the right of indigenous peoples to practice their cultural traditions and customs.³³

Other provisions relevant to the protection of the cultural integrity of indigenous peoples can be found in international human rights treaties. These provisions have been interpreted by the respective treaty bodies, whose views can be summarized as follows: Indigenous peoples may constitute a minority and may benefit from the protection of Article 27 of the *International Covenant on Civil and Political Rights* (ICCPR) concerning the right of minorities to enjoy their own culture.³⁴ The right to take part in cultural life, enshrined in Article 15 of the *International Covenant on Economic, Social and Cultural Rights* (ICESCR) also embodies the protection of the ways of life and the cultural identity of indigenous peoples.³⁵ The *Convention on the Elimination of Racial Discrimination* also requires that States parties fight discrimination against indigenous people,

³⁰ ILO, *Convention Concerning Indigenous and Tribal Peoples in Independent Countries*, 27 June 1989, 28 ILM 1382 [ILO Convention No. 169].

³¹ *Ibid.*, Art. 5, 1385.

³² *Ibid.*, Art. 2 (b), 1385.

³³ The annual reports of the Committee of Experts on the Application of Conventions and Recommendations are available at <http://www.ilo.org/public/libdoc/ilo/P/09661> (last visited 15 June 2013).

³⁴ Human Rights Committee (HRC), *General Comment No. 23*, UN Doc CCPR/C/21/Rev.1/Add.5, 26 April 1994, 1, para. 1; HRC, *Kitok v. Sweden*, Communication No. 197/1985, UN Doc CCPR/C/33/D/197/1985, 10 August 1988.

³⁵ Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 21*, UN Doc E/C.12/GC/21, 21 December 2009, 8-9, para. 32.

including by recognizing and respecting their distinct culture and way of life and by ensuring that indigenous communities can exercise their rights to practice and revitalize their cultural customs and traditions.³⁶ Similar considerations apply to the right of indigenous children to enjoy their own culture, which is explicitly affirmed in Article 30 of the *Convention on the Rights of the Child*.³⁷

This overview of relevant international human rights instruments shows that the right of indigenous peoples to practice their customs and traditions is firmly established in international law. As mentioned in the introduction, coca leaf chewing is part of the customs and traditions of several indigenous peoples in some States of the Andean region, where cultivation and use of the coca leaf has been concentrated for millennia.³⁸ In these cultural traditions, the use of coca leaf has important medicinal, social, and spiritual functions.³⁹ The importance of coca leaf chewing in the customs and traditions of the Aymara and Quetchua peoples in Bolivia and Peru has been documented by the UN Commission of Enquiry on the Coca Leaf.⁴⁰ Many of the States of the Andean region have established constitutional provisions aimed at protecting the rights of indigenous peoples, including in some cases their right to practice their customs and traditions. Nevertheless, as parties to the *1961 Convention*, these States are bound by the obligation to abolish coca leaf chewing. The question thus is: how can these States fulfill their human rights obligations towards their indigenous peoples while at the same time honoring their drug control obligations? A look at domestic laws and policies will reveal different approaches in addressing this issue.

³⁶ Committee on the Elimination of Racial Discrimination (CERD), *General Recommendation XXIII*, UN Doc HRI/GEN/1/Rev.6, 27 May 2008, 285, 285, para. 1.

³⁷ Committee on the Rights of the Child, *General Comment No. 11*, UN Doc CRC/C/GC/11, 12 February 2009, 4-5, paras 16-22.

³⁸ Observatoire Géopolitique des Drogues (ed.), *Atlas Mondial des Drogues* (1996), 30.

³⁹ See, e.g., C. J. Allen, 'Coca and Cultural Identity in Andean Communities', in D. Pacini & C. Franquemont, *Coca and Cocaine: Effects on People and Policy in Latin America*, 35; R. T. Martin, 'The Role of Coca in the History, Religion, and Medicine of South American Indians', 24 *Economic Botany* (1970) 4, 422; M. Terán & A. Sandagorda, 'Aspectos Socioculturales del Consumo de la Coca', in F. R. Jeri (ed.), *Cocaína 1980* (1980), 282; F. Cabieses, 'Aspectos Etnológicos de la Coca y la Cocaína', in Jeri, *supra* note 39, 179.

⁴⁰ Economic and Social Council (ECOSOC), *Report of the Commission of Enquiry on the Coca Leaf* (May 1950), available at <http://druglawreform.info/images/stories/documents/coca-inquiry-1950e.pdf> (last visited 15 June 2013), 9-12 [ECOSOC, Report of the Commission of Enquiry on the Coca Leaf].

D. Coca Leaf Chewing and Rights of Indigenous Peoples Under Domestic Law in the Andean Region

In Bolivia, “the rights of indigenous peoples to their cultural identity, spirituality, practices and customs” are protected under the Constitution.⁴¹ Similarly, the constitution of Ecuador recognizes the collective right of indigenous peoples to maintain, develop, and strengthen their traditions and cultural heritage.⁴² In Peru, the State is obliged to respect the cultural identity of indigenous communities.⁴³ The Constitution of Venezuela not only recognizes the right of indigenous peoples to maintain and develop their cultural identity but also obliges the State to foster the diffusion of the manifestations of their culture.⁴⁴ In Argentina, the constitution includes a reference to the ethnic and cultural “pre-existence” of indigenous peoples and the need to guarantee their identity.⁴⁵ In Chile, the right of indigenous peoples to maintain and develop their cultural manifestations is protected by law.⁴⁶ In Colombia, although not explicitly foreseen in the Constitution, the rights of indigenous peoples to cultural integrity and to traditional practices have been reaffirmed in the jurisprudence of the Constitutional Court.⁴⁷

Despite the existence of legislative and constitutional provisions aimed at protecting the right of indigenous peoples to practice their customs and traditions, most States appear to have addressed the issue of traditional coca leaf chewing predominantly, if not exclusively, on the basis of their drug control obligations. In Chile, for example, the national drug strategy 2009-2018 does not address traditional uses of coca leaf by indigenous peoples, but refers to the need for initiatives to reduce the consumption of drugs by such communities.⁴⁸ The law penalizes the possession or cultivation of narcotic drugs,⁴⁹ including

⁴¹ *Constitution of Bolivia* (2009), Art. 30 (II) (2).

⁴² *Constitution of Ecuador* (2008), Art. 57.

⁴³ *Constitution of Peru* (1993), Art. 89.

⁴⁴ *Constitution of Venezuela* (1999), Art. 121.

⁴⁵ *Constitution of Argentina* (1994), Art. 75 (17).

⁴⁶ *Law No. 19253* (28 September 1993), Art. 7.

⁴⁷ See F. Semper, ‘Los Derechos de los Pueblos Indígenas de Colombia en la Jurisprudencia de la Corte Constitucional’, in Konrad Adenauer Stiftung (ed.), *Anuario de Derecho Constitucional Latinoamericano*, Vol. II (2006), 761.

⁴⁸ Chile, Ministry of the Interior, ‘Estrategia Nacional Sobre Drogas 2009-2018’ (2009), available at http://www.cicad.oas.org/Fortalecimiento_Institucional/eng/National%20Plans/Chile%202009-2018.pdf (last visited 15 June 2013), 21.

⁴⁹ *Law No. 20000* (2 February 2005), Arts 4 & 8.

coca leaf, which is also the case in Colombia⁵⁰ and in Ecuador.⁵¹ The drug legislation of Peru refers to coca leaf chewing as a grave social problem and aims at the progressive eradication of all coca cultivation in the country.⁵² Its *National Drug Strategy 2012-2016* does not address coca leaf chewing, but focuses on the strategic objective to foster alternative development in order to reduce the illicit cultivation of the coca leaf.⁵³ Initiatives taken by local governments to legalize traditional uses of coca leaf by indigenous peoples have been successfully suppressed by the national government.⁵⁴ However, traditional coca leaf chewing still continues in Peru.⁵⁵

Few countries have taken a different stance. In Argentina, the law excludes coca leaf chewing (or its use as herbal infusion) from punishable conduct, independently of whether it is part of the traditional use by indigenous peoples or not.⁵⁶ So far, only Bolivia has put in place legislation and policies that aim explicitly at the preservation of coca leaf chewing. It is helpful to consider the case of Bolivia more in depth, in order to better understand the situation of a State bound both by the obligation to abolish coca leaf chewing and by the obligations relating to the right of indigenous peoples to practice their customs and traditions.

E. The Case of Bolivia

The population of Bolivia is composed to a large extent of different indigenous groups. In the last census in 2001, more than 60 per cent of the population over 15 years of age identified themselves as indigenous, mainly as either Aymara or Quechua.⁵⁷ The economic and social situation of Bolivia is

⁵⁰ *Law No. 30* (31 January 1986), Art. 32.

⁵¹ *Law No. 108* (17 September 1990), Arts 59 & 64.

⁵² *Decree Law No. 22095* (21 February 1978).

⁵³ Peru, Council of Ministers, 'Estrategia Nacional De Lucha Contra Las Drogas 2012-2016' (February 2012), available at http://www.cicad.oas.org/fortalecimiento_institucional/planesnacionales/ENLCD-2012-2016.pdf (last visited 15 June 2013), 45.

⁵⁴ International Narcotics Control Board [INCB], *Report of the International Narcotics Control Board for 2008*, UN Doc E/INCB/2008/1, 19 February 2009, 75, para. 496 [INCB, Report for 2008]; INCB, *Report of the International Narcotics Control Board for 2005*, UN Doc E/INCB/2005/1, 1 March 2006, 63, para. 414.

⁵⁵ INCB, *Report of the International Narcotics Control Board for 2010*, UN Doc E/INCB/2010/1, 2 March 2011, 16, para. 90 [INCB, Report for 2010].

⁵⁶ *Law No. 23737* (10 October 1989), Art. 15.

⁵⁷ National Institute for Statistics, 'Autoidentificación con Pueblos Originarios o Indígenas de la Población de 15 Años o Más de Edad Segun Sexo, Area Geografica y Grupo de

characterized by high poverty rates. In 2007, 60 per cent of the population lived below the national poverty line and the gross national income *per capita ratio* has remained below the regional average for the last decade.⁵⁸ The political situation of the country has been influenced by clashes between the interests of indigenous groups and regional economic elites on issues such as the redistribution of revenue, the privatization of natural resources, and the operation of foreign companies in indigenous territories. In this situation, a political crisis erupted in 2003, leading to violent clashes between law enforcement authorities and protesters who rose up against the appropriation of the country's natural gas resources to international companies. The mass protests were spearheaded by a coalition of movements of peasants and miners led by Evo Morales, a trade union leader and member of the Aymara indigenous people, who was eventually elected president in 2005 and is said to be firmly committed to the interests of the coca farmers.⁵⁹ Under the new president, a number of reforms have been implemented, including the nationalization of oil and gas resources and a referendum on regional autonomy. The process of constitutional reform was revived in 2006 with the election of a constitutional assembly, but the different interests prevailing in the country led to political turmoil and violence in 2008, before a new constitution was approved in a referendum on 25 January 2009.⁶⁰

As mentioned above, coca leaf chewing is practiced for traditional and customary reasons by the Aymara and Quechua peoples in Bolivia. However, it is also practiced by larger segments of the population for other purposes, including as a relief for altitude sickness,⁶¹ which is reflected in relevant provisions of the domestic legal regime. The new Constitution of 2009 emphasizes that coca in its natural state is not considered to be a drug and characterizes coca as cultural heritage, a renewable natural resource, and a factor of social cohesion.⁶²

Edad', available at http://www.ine.gob.bo/indice/visualizador.aspx?ah=PC2_0113.HTM (last visited 15 June 2013).

⁵⁸ World Bank, 'World Development Indicators: Bolivia', available at http://data.worldbank.org/country/bolivia#cp_wdi (last visited 15 June 2013).

⁵⁹ See generally the contributions in A. J. Pearce (ed.), *Evo Morales and the Movimiento Al Socialismo in Bolivia: The First Term in Context, 2005-2009* (2011).

⁶⁰ A more detailed account of the recent history of Bolivia and its indigenous peoples is contained in the annual reports of the International Working Group on Indigenous Affairs, available at <http://www.iwgia.org/publications/series/annual-reports> (last visited 15 June 2013).

⁶¹ A. Lorenzo & J. Rodriguez, 'La Hoja de Coca en Bolivia: Un Dilema de la Convención de Viena o la Defensa del Akulliku?', 1 *Revista Andina de Estudios Políticos* (2011) 7, 3, 5.

⁶² *Constitution of Bolivia* (2009), Art. 384.

Detailed rules on the control of coca and other substances are contained in *Law 1008* of 19 July 1988. It distinguishes the coca leaf in its natural state from the processed coca leaf from which the alkaloid cocaine has been extracted through a chemical process and prohibits the use of such processed coca leaf. Under this law, coca leaf production as such is regarded as a legitimate agricultural and cultural activity. Social and cultural practices in their traditional forms, such as chewing, medicinal, and ritual uses of coca leaf are considered as legal consumption and use. Other forms of legal use, not susceptible to cause drug dependence or addiction, as well as legitimate industrial uses are subject to regulatory control. The law also delimits geographical areas in which coca cultivation is allowed, while prohibiting such cultivation in the rest of the country.

Bolivia is bound by the international legal framework concerning the rights of indigenous peoples, including their right to practice their customs and traditions. Bolivia ratified *ILO Convention No. 169* on 11 December 1991.⁶³ It also voted in favor of the adoption of UNDRIP,⁶⁴ which has been conferred the status of national law.⁶⁵ Bolivia is also a party to the ICCPR, the *International Convention on the Elimination of All Forms of Racial Discrimination*, the ICESCR, and the *Convention on the Rights of the Child*.⁶⁶ Human rights treaties ratified by Bolivia prevail in the internal legal order, pursuant to Article 13 (IV) of its Constitution, which also establishes that the rights and obligations set out in the Constitution must be interpreted in conformity with such treaties.

Bolivia is also bound by the international drug control regime. Having acceded to the *1961 Convention* on 23 September 1976,⁶⁷ Bolivia was required to abolish coca leaf chewing as of that date, since it did not make a reservation under Article 49 in order to avail itself of the transitional period for phasing out this practice. However, Bolivia made a reservation to Article 3 (2) of the *1988 Convention*, insofar as it required the country to establish as a criminal offence the use, consumption, possession, purchase or cultivation of the coca leaf for personal consumption. The reservation stated that the Bolivian legal system recognized the traditional licit use of the coca leaf, which was widely used

⁶³ See ILO, 'Ratifications of C169 - Indigenous and Tribal Peoples Convention, 1989 (No. 169)', available at http://www.ilo.org/dyn/normlex/en/f?p=1000:11300:0::NO:11300:P11300_INSTRUMENT_ID:312314 (last visited 15 June 2013).

⁶⁴ See UNGAOR 61st Session (108th plenary meeting), *supra* note 26, 19.

⁶⁵ *Law No. 3879* (26 June 2008).

⁶⁶ See UN, 'Multilateral Treaties Deposited with the Secretary-General', available at <http://treaties.un.org/Pages/ParticipationStatus.aspx> (last visited 15 June 2013).

⁶⁷ *Ibid.*

and consumed in Bolivia, including for traditional medicinal purposes. While Bolivia did not consider coca leaf as a narcotic drug that produced significant psychological or physical changes, it reiterated its commitment to international drug control:

“Bolivia will continue to take all necessary legal measures to control the illicit cultivation of coca for the production of narcotic drugs, as well as the illicit consumption, use and purchase of narcotic drugs and psychotropic substances.”⁶⁸

However, as pointed out by the International Narcotics Control Board (INCB), the independent expert body set up by the *1961 Convention*, this reservation does not absolve Bolivia from fulfilling its obligations under the convention,⁶⁹ including the prohibition on coca leaf chewing.

Before 2005, the drug policy of Bolivia did not explicitly address the lack of implementation of Article 49 of the *1961 Convention*, which requires that coca leaf chewing must be abolished. As noted by the INCB, this provision continued “not to be applied since the production of coca leaf for chewing continued to be considered licit under national law”,⁷⁰ in line with *Law 1008* of 1988. Under the presidency of Mr. Morales, Bolivia changed its drug policy, first outlined in the *National Drug Control Strategy 2007-2010*.⁷¹ On the national level, the new policy aimed at revaluing the coca leaf, while establishing an effective control over its production and preventing its deviation for illicit uses. On the international level, it envisaged a study to be carried out with the support of the World Health Organization (WHO) with a view to opening a discussion on the revision of the provisions of the *1961 Convention* concerning the coca leaf. Bolivia informed the WHO of its desire to study and validate the use of coca leaf as a traditional medicine and its contributions to public health,⁷²

⁶⁸ *1988 Convention*, *supra* note 6, 395.

⁶⁹ INCB, *Report of the International Narcotics Control Board for 2011*, UN Doc E/INCB/2011/1, 28 February 2012, 37, para. 274 [INCB, Report for 2011].

⁷⁰ INCB, *Report of the International Narcotics Control Board for 2001*, UN Doc E/INCB/2001/1, January 2002, 57, para. 368.

⁷¹ Bolivia, National Council Against Illicit Drug Trafficking ‘Estrategia de Lucha Contra el Narcotráfico y Revalorización de la Hoja de Coca 2007-2010’ (2007), available at <http://www.rree.gob.bo/webmre/publicaciones//d134.pdf> (last visited 15 June 2013).

⁷² INCB, *Report for 2011*, *supra* note 69, 36-37, para. 273.

and the WHO Executive Board decided to defer further discussions on this matter until the results of such a study became available.⁷³

In practice, the national drug policy shifted its focus from the eradication of illicit coca crops, to the promotion of the legal coca market, including by increasing the area of licit coca crop cultivation and the implementation of alternative development projects in cooperation with coca farmers.⁷⁴ However, the new policy has come under criticism for creating incentives to increase coca production beyond the limits established by law and thus contributing to drug trafficking.⁷⁵ The INCB repeatedly expressed concern about the effects of the new policy,⁷⁶ stating that Bolivia was in contravention of its obligations under the international drug control conventions. It recommended, *inter alia*, that the government shall “formulate and implement education programmes aimed at eliminating coca leaf chewing, as well as other non-medical uses of coca leaf”.⁷⁷

Bolivia brought the issue to the international fora in 2009. At this first stage, its aim was to change the applicable rules of the international drug control regime. On 12 March 2009, President Morales notified the UN Secretary General (in his capacity as depositary of the *1961 Convention*), that Bolivia proposed to amend the *1961 Convention* by deleting the provisions on coca leaf chewing (i.e. Article 49, paragraphs 1 (c) and 2 (e)). The notification stressed that coca leaf chewing was “one of the sociocultural practices and rituals of the Andean indigenous peoples [...] closely linked to [their] history and cultural identity” and that the prohibition on coca leaf chewing based on the provisions in question violated the human rights of indigenous peoples, enshrined in Article 31 UNDRIP, *ILO Convention No. 169* and other instruments.⁷⁸ It also contained the argument that coca leaf chewing was not harmful to human health

⁷³ WHO Executive Board, *Summary Records*, EB119/2006–EB120/2007/REC/2, 22-29 January 2007 (120th session), 53, 233.

⁷⁴ Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People, *Promotion and Protection of all Human Rights, Civil, Political, Economic, Social, and Cultural Rights, Including the Right to Development: Mission to Bolivia*, UN Doc A/HRC/11/11, 18 February 2009, 15, para. 58.

⁷⁵ Lorenzo & Rodriguez, *supra* note 61, 18.

⁷⁶ INCB, *Report for 2010*, *supra* note 55, 23-24, paras 141-144; *Report of the International Narcotics Control Board for 2009*, UN Doc E/INCB/2009/1, 24 February 2010, 76-77, para. 467; INCB, *Report for 2008*, *supra* note 54, 76, para. 505; INCB, *Report of the International Narcotics Control Board for 2007*, UN Doc E/INCB/2007/1, 5 March 2008, 73-74, para. 476 [INCB, *Report for 2007*].

⁷⁷ INCB, *Report for 2007*, *supra* note 76, 74, para 480.

⁷⁸ See *Letter Dated 12 March 2009 From the President of Bolivia Addressed to the Secretary-General*, UN Doc E/2009/78 enclosure, 15 May 2009, 4, 4.

and that the objective of the *1961 Convention* was not to prohibit practices that do not harm human health, thus implying that the proposed amendment was justified and would not defeat the object and purpose of the *1961 Convention*. The notification further referred to the report of the Commission of Enquiry on the Coca Leaf as the “basis” for the relevant provisions of the *1961 Conventions* and stated that the Report was “loaded with sociocultural prejudices”.⁷⁹ The Bolivian proposal received some media attention when Morales reiterated these arguments and even chewed on a coca leaf at the high-level segment of the fifty-second session of the Commission on Narcotic Drugs.⁸⁰

The amendment procedure established in Article 47 (1) (b) of the *1961 Convention* was initiated by ECOSOC *Decision 2009/250*, pursuant to which the States parties to the convention were requested to indicate, within the following 18 months, whether they accept the proposed amendment and were asked to submit any comments on the proposal. Until the end of February 2011, 25 States parties submitted their responses.⁸¹ Three Latin American States expressed their support⁸² and two referred to the text of declarations made by Heads of State and Government in support of the proposed amendment at summits of the Union of South American Nations⁸³ and of the Bolivarian Alliance for the Peoples of Our America, signed by nine Heads of States.⁸⁴ Taken together, a total of 18 Latin American and Caribbean States supported the proposal. By contrast, a total of 21 States from different regions rejected the proposal,

⁷⁹ *Ibid.*, 5.

⁸⁰ Without mention of author, ‘Coca Leaves are not Cocaine, Evo Morales Insists’, *The Telegraph* (12 March 2009), available at <http://www.telegraph.co.uk/news/worldnews/southamerica/bolivia/4976322/Coca-leaves-are-not-cocaine-Evo-Morales-insists.html> (last visited 15 June 2013).

⁸¹ Bulgaria, Canada, Colombia, Costa Rica, Denmark, Former Yugoslav Republic of Macedonia, France, Ecuador, Egypt, Estonia, Germany, Italy, Japan, Latvia, Malaysia, Mexico, Russian Federation, Singapore, Slovakia, Sweden, Ukraine, United Kingdom of Great Britain and Northern Ireland, United States of America, Uruguay, and Venezuela (Bolivarian Republic of).

⁸² *Note Verbale Dated 27 January 2011 From the Permanent Mission of Costa Rica*, UN Doc E/2011/68 annex, 4 February 2011, 2; *Note Verbale Dated 31 January 2011 From the Permanent Mission of Uruguay*, UN Doc E/2011/65 annex, 1 February 2011, 2; *Note Verbale Dated 31 January 2011 From the Permanent Mission of Ecuador*, UN Doc E/2011/64 annex, 1 February 2011, 2.

⁸³ *Note Verbale Dated 31 January 2011 From the Permanent Mission of Ecuador*, UN Doc E/2011/81, 9 February 2011, 2.

⁸⁴ *Letter Dated 28 January 2011 From the Permanent Representative of the Bolivarian Republic of Venezuela*, UN Doc A/65/714-E/2011/70, 3 February 2011.

although three States withdrew their objections,⁸⁵ following diplomatic efforts by Bolivia to persuade other governments of its arguments. Most of the States that finally rejected the proposal stated that the proposed amendment had to be considered in light of the principles and objectives of the *1961 Convention*, and highlighted the obligation of parties to limit the trade and use of narcotic drugs, including the coca leaf, exclusively to medical and scientific purposes, and the need for coordinated and universal action against the abuse of narcotic drugs,⁸⁶ referred to in the Preamble of the *1961 Convention*. Several States cited political considerations as reasons for their rejection of the proposed amendment,⁸⁷ including the risk of creating a precedent that could be used to undermine the universality of the international drug control regime. A number of objecting States, however, explicitly acknowledged the importance of protecting the cultural identity and traditional customs of indigenous peoples⁸⁸ and some were open to further dialogue in this regard.⁸⁹

By January 2011, it had become obvious that changes to the international drug control regime were unlikely to occur in the near future. At this second stage, Bolivia adjusted its strategy and focused on changing its own legal obligations concerning the rules requiring the abolition of coca leaf chewing. Bolivia denounced the *1961 Convention* and submitted an instrument of accession, containing a reservation to allow

⁸⁵ *Letter Dated 26 January From the Ministry of Foreign Affairs of Colombia*, UN Doc E/2011/59 enclosure, 31 January 2011, 3; *Note Verbale Dated 17 January 2011 From the Permanent Mission of the Former Yugoslav Republic of Macedonia*, UN Doc E/2011/12 annex, 18 January 2011, 2; *Note Verbale Dated 28 January 2010 From the Permanent Mission of Egypt*, UN Doc E/2010/7 annex, 3 February 2010, 2.

⁸⁶ See the following *Notes by the Secretary General on the Proposal of Amendments by the Plurinational State of Bolivia*: UN Docs E/2011/47, 19 January 2011, 1; E/2011/49, 21 January 2011, 1; E/2011/51, 26 January 2011, 1; E/2011/54, 31 January 2011, 1; E/2011/57, 31 January 2011, 1; and E/2011/61, 1 February 2011, 1.

⁸⁷ See the following *Notes by the Secretary General on the Proposal of Amendments by the Plurinational State of Bolivia*: UN Docs E/2011/48, 21 January 2011, 1; E/2011/53, 28 January 2011, 1; E/2011/55, 31 January 2011, 1; E/2011/56, 31 January 2011, 1; and E/2011/58, 31 January 2011, 1.

⁸⁸ See the following *Notes by the Secretary General on the Proposal of Amendments by the Plurinational State of Bolivia*: UN Docs E/2011/53 (*supra* note 87); E/2011/56 (*supra* note 87), E/2011/58 (*supra* note 87); and E/2011/60, 1 February 2011, 1.

⁸⁹ See the following *Notes by the Secretary General on the Proposal of Amendments by the Plurinational State of Bolivia*: UN Docs E/2011/53 (*supra* note 87), E/2011/55 (*supra* note 87), E/2011/56 (*supra* note 87) and E/2011/58 (*supra* note 87).

“traditional coca leaf chewing; the consumption and use of the coca leaf in its natural state for cultural and medicinal purposes; its use in infusions; and also the cultivation, trade and possession of the coca leaf to the extent necessary for these licit purposes.”⁹⁰

In the reservation, Bolivia also stressed its commitment to international drug control, as it had already done in its reservation to the *1988 Convention*:

“Bolivia will continue to take all necessary legal measures to control the illicit cultivation of coca in order to prevent its abuse and the illicit production of the narcotic drugs which may be extracted from the leaf.”⁹¹

At the national level, this was affirmed in *Law 147* of 29 June 2011, which provides that Bolivia will fully comply, within the framework of its constitution, with the provisions of the *1961 Convention* until its re-accession takes effect.

While the denunciation took effect on 1 January 2012, pursuant to Article 46 (2) of the *1961 Convention*, the reservation was subject to a special approval procedure. In accordance with Article 50 (3) of the *1961 Convention*, reservations are deemed to be permitted, unless one third of the States parties object to it within one year. By the end of this period, only 15 of the then 183 States parties had objected to the reservation made by Bolivia.⁹² The objection of 61 States parties would have been necessary to disallow the reservation.

Most objecting States welcomed the commitment of Bolivia to control coca production or recognized the efforts made to reduce its production and trade. Some of them acknowledged the reasons cited by Bolivia for its reservation,⁹³ although only a few explicitly referred to the human rights of indigenous

⁹⁰ UN Secretary General [UNSG], *Depository Notification*, UN Doc C.N.829.2011.TREATIES-28, 10 January 2012, 5.

⁹¹ *Ibid.*

⁹² Canada, Finland, France, Germany, Ireland, Israel, Italy, Japan, Mexico, Netherlands, Portugal, Russian Federation, Sweden, United Kingdom, and United States of America. See UNSG, *Depository Notification*, UN Doc C.N.94.2013.TREATIES-VI.18, 22 January 2013, 1.

⁹³ See UNSG, *Depository Notification*, UN Doc C.N.719.2012.TREATIES-VI.18, 19 December 2012 [Objection by United Kingdom]; UNSG, *Depository Notification*, UN Doc C.N.732.2012.TREATIES-VI.18, 21 December 2012 [Objection by Sweden]; UNSG, *Depository Notification*, UN Doc C.N.84.2013.TREATIES-VI.18, 15 January 2013 [Objection by Japan]; UNSG, *Depository Notification*, UN Doc C.N.93.2013.TREATIES-VI.18, 16 January 2013 [Objection by Portugal].

peoples.⁹⁴ Several objecting States were concerned that the reservation would lead to a greater production and supply of coca, greater availability of cocaine, and increased drug trafficking and related criminal activities, as well as a weaker international response to these challenges.⁹⁵ Such drug law enforcement or political concerns were, however, not the most frequently cited reasons for objection. Most objecting States were concerned about the legal implications of the reservation for the international drug control regime and for the international law of treaties more generally. The view that the reservation was at odds with the international law of treaties was also advanced by an additional State party, which felt it necessary to comment, while not filing a formal objection against the reservation.⁹⁶

With regard to the international drug control regime, objecting States expressed concern that the reservation would undermine this legal framework and the integrity of the *1961 Convention*. As a result, controls over narcotic drugs could be weakened, including if other States parties used this precedent to establish more liberal drug control regimes within their territory.⁹⁷ Similar concerns were also expressed by the INCB, which considered that denunciation and re-accession with reservations was contrary to the object and purpose of the *1961 Convention*, since it could lead other States to adopt the same approach and could ultimately undermine the integrity of the international drug control

⁹⁴ See UNSG, *Depositary Notification*, UN Doc C.N.750.2012.TREATIES-VI.18, 2 January 2013 [Objection by Italy]; UNSG, *Depositary Notification*, UN Doc C.N.19.2013.TREATIES-VI.18, 8 January 2013 [Objection by France]; UNSG, *Depositary Notification*, UN Doc C.N.85.2013.TREATIES-VI.18, 15 January 2013 [Objection by Mexico].

⁹⁵ See UNSG, *Depositary Notification*, UN Doc C.N.361.2012.TREATIES-VI.18, 10 July 2012 [Objection by United States of America]; *Objection by United Kingdom*, *supra* note 93; *Objection by Sweden*, *supra* note 93; UNSG, *Depositary Notification*, UN Doc C.N.751.2012.TREATIES-VI.18, 4 January 2013 [Objection by Canada]; *Objection by France*, *supra* note 94; UNSG, *Depositary Notification*, UN Doc C.N.88.2013.TREATIES-VI.18, 15 January 2013 [Objection by Russian Federation]; UNSG, *Depositary Notification*, UN Doc C.N.89.2013.TREATIES-VI.18, 15 January 2013 [Objection by Israel]; UNSG, *Depositary Notification*, UN Doc C.N.101.2013.TREATIES-VI.18, 18 January 2013 [Objection by Ireland].

⁹⁶ See UNSG, *Depositary Notification*, UN Doc C.N.91.2013.TREATIES-VI.18, 22 January 2013 [Communication by Romania].

⁹⁷ See *Objection by United Kingdom*, *supra* note 93; *Objection by Sweden*, *supra* note 93; *Objection by Italy*, *supra* note 94; *Objection by France*, *supra* note 94; *Objection by Mexico*, *supra* note 94; *Objection by Russian Federation*, *supra* note 95; *Objection by Ireland*, *supra* note 95; UNSG, *Depositary Notification*, UN Doc C.N.102.2013.TREATIES-VI.18, 22 January 2013 [Objection by Netherlands].

system.⁹⁸ In its reply to the INCB,⁹⁹ the Bolivian government defended the legality of its actions and reaffirmed its commitment to the remaining drug control obligations under the *1961 Convention*.

Concerning the law of treaties, most objecting States stated that the procedure under Article 50 (3) of the *1961 Convention* could not be used the way Bolivia had done, albeit on different grounds. While some made reference to basic principles like “*pacta sunt servanda*”,¹⁰⁰ legal certainty¹⁰¹ or good faith,¹⁰² others asserted the existence of customary rules of international law prohibiting States from “misusing” the procedure by denouncing a treaty and re-acceding to it, in order to make it subject to a new reservation.¹⁰³ Others stated that this was contrary to the rules of the international law of treaties that prohibit the formulation of reservations after ratification.¹⁰⁴ Again others adopted a “*lex specialis*” argument, which implies that reservations on the subject of coca leaf chewing are exclusively possible under the special rule of Article 49 of the *1961 Convention* and only until the end of the transitional period contained therein.¹⁰⁵

Despite these arguments, it appears that a large majority of States silently accepted the reservation of Bolivia and the procedure followed in this regard. In fact, the UN Secretary General confirmed that the reservation was deemed to be permitted in accordance with Article 50 (3) of the *1961 Convention* and that the accession of Bolivia, with the reservation, was effected on 11 January 2013.¹⁰⁶ Since none of the objecting States opposed the entry into force of the *1961 Convention* between themselves and Bolivia, the provisions to which the reservation relates will not apply as between those States and Bolivia to the extent of the reservation and the objecting States need not assume towards

⁹⁸ INCB, *Report for 2011*, *supra* note 69, 37, para. 279.

⁹⁹ Letter from the Minister of Foreign Affairs of Bolivia to the Secretary of the INCB (24 February 2012), available at http://www.rree.gob.bo/webmre/principal.aspx?pagina=np09.htm&ruta=notasprensa/2012/2012_febrero/ (last visited 15 June 2013).

¹⁰⁰ See *Communication by Romania*, *supra* note 96.

¹⁰¹ See *Objection by France*, *supra* note 94.

¹⁰² See *Objection by Italy*, *supra* note 94.

¹⁰³ See *Objection by Sweden*, *supra* note 93; UNSG, *Depositary Notification*, UN Doc C.N.95.2013.TREATIES-VI.18, 16 January 2013 [Objection by Finland].

¹⁰⁴ See *Objection by Ireland*, *supra* note 95; *Objection by Netherlands*, *supra* note 97; *Communication by Romania*, *supra* note 96.

¹⁰⁵ See *Objection by Russian Federation*, *supra* note 95; *Objection by Portugal*, *supra* note 93.

¹⁰⁶ See UNSG, *Depositary Notification*, UN Doc C.N.94.2013.TREATIES-VI.18, *supra* note 92.

Bolivia any legal obligation which is affected by the reservation.¹⁰⁷ However, this also means that Bolivia does not need to assume these obligations towards them, thus having successfully removed its legal obligation to prohibit and abolish coca leaf chewing under the *1961 Convention*, despite the objections.

Three important considerations have emerged during the consideration of the case of Bolivia. First, the government made a political choice to give priority to the human rights of indigenous peoples over its international drug control obligations. The existence of a normative conflict between the two legal regimes only partially explains this choice, because coca leaf chewing is a broader social phenomenon and is therefore not limited to the customary and traditional uses by indigenous peoples in Bolivia.

The second consideration relates to the type of measures taken to address the apparent normative conflict. Bolivia initially attempted to change relevant rules of the international drug control regime and, when this proved unviable, subsequently changed its own legal obligations concerning these rules. In terms of the legal relations between the States parties to the *1961 Convention*, it moved from a measure aiming at a high degree of legal change to a measure aiming at a lower degree of legal change. In line with its policy choice, the government seems to have discarded from the outset the question of whether legal change was necessary at all. It did not explore whether the rules in question could have been interpreted in a way so as to avoid conflict between them. This possibility will be considered in the next section.

The third consideration concerns the results of the measures taken by Bolivia. The effects of the procedure followed to make a reservation to the *1961 Convention* are not limited to international human rights law and the international drug control regime. The procedure of denunciation and re-accession with ratification has been followed by a number of States with regard to different types of international treaties.¹⁰⁸ As highlighted by the objecting States, a number of legal issues arise, concerning the international law of treaties, the full examination of which is beyond the scope of this article. The question that will be examined is whether such far reaching consequences could have been avoided by interpreting the rules in question in such a way as to resolve the apparent normative conflict.

¹⁰⁷ See *Vienna Convention on the Law of Treaties*, 22 May 1969, Art. 21 (3), 1155 UNTS 331, 337 [VLCT]; and *1961 Convention*, Art. 50 (3), *supra* note 6, 134.

¹⁰⁸ See Y. Tyagi, 'The Denunciation of Human Rights Treaties', 79 *British Yearbook of International Law* (2008), 86, 173-177.

F. Resolving the Normative Conflict

The present section will determine the scope of the apparent normative conflict and explores underlying reasons for the tensions between indigenous peoples' rights and the international drug control regime. Following the guidance provided by the ILC concerning the fragmentation of international law,¹⁰⁹ it will first explore the question of whether the relevant rules are in conflict or in a "relationship of interpretation", i.e. whether they can be interpreted to produce their effect in a way that is not mutually exclusive. Secondly, the preparatory works of relevant instruments will be considered to reveal the conflicting values and interests that are at the origin of the tension between the two bodies of law.

I. The Relationship Between the Prohibition on Coca Leaf Chewing and the Rights of Indigenous Peoples to Their Customs and Traditions

According to the ILC, the determination of the relationship between the rules in question must be guided by the rules of treaty interpretation. The ILC identified a generally recognized principle of harmonization in international law, according to which different rules dealing with the same issue "should, to the extent possible, be interpreted so as to give rise to a single set of compatible obligations".¹¹⁰ This approach was recently confirmed by the European Court of Human Rights, which held that wherever apparently contradictory instruments are simultaneously applicable they should be construed "in such a way as to coordinate their effects and avoid any opposition between them" and that "diverging commitments must therefore be harmonized as far as possible so that they produce effects that are fully in accordance with existing law".¹¹¹ The relevant rules will first be examined from the perspective of the international drug control regime and then from the perspective of international human rights law.

¹⁰⁹ ILC, *Report of the International Law Commission on the Work of its Fifty-Eighth Session* (2006), UN Doc A/61/10, 400-423, paras 233-251 [ILC Conclusions]; ILC, *Report of the Study Group of the International Law Commission on the Fragmentation of International Law*, UN Doc A/CN.4/L.682, 13 April 2006 [ILC Study].

¹¹⁰ *ILC Conclusions*, *supra* note 109, 408, para. 251 (4).

¹¹¹ *Nada v. Switzerland*, ECHR App. No. 10593/08, 46, Judgment of 12 September 2012, para. 170.

1. Relevant Rules of the International Drug Control Regime

In the context of the international drug control regime, it is necessary to return to the consideration of the relationship between the relevant provisions of the *1961 Convention* and the *1988 Convention*. The drug control regime established in the *1961 Convention* is complemented by the *1988 Convention*. The latter aims at the promotion of international cooperation in order to address illicit drug trafficking more effectively, including by requiring States parties to criminalize and establish jurisdiction over relevant offences and by enabling them to make use of detailed provisions on extradition and mutual legal assistance in investigations, prosecutions, and judicial proceedings.

The *1988 Convention* was adopted only shortly before the end of the transitional period for possible reservations concerning the prohibition on coca leaf chewing provided for by the *1961 Convention*. This is why Article 14 (2) of the *1988 Convention* would appear to provide a possible exception to the prohibition on coca leaf chewing by requiring States parties to respect fundamental human rights and take due account of traditional licit uses when taking measures to eradicate and to prevent cultivation of coca bush and other relevant plants.

To the extent that there is an overlap or conflict between these provisions, it could be argued that the latter one should prevail in virtue of the *lex posterior* principle, especially as both conventions form part of the same regime.¹¹² However, in reality the degree to which both provisions overlap or conflict with each other is minimal. Article 14 (2) of the *1988 Convention* does not affect the prohibition on coca leaf chewing as such, as its scope is limited to drug supply reduction measures and does not include other demand reduction measures that would be necessary to enforce this prohibition. In addition, as mentioned above, Article 14 (1) of the *1988 Convention* prohibits States parties from taking supply reduction measures that would be less stringent than the provisions applicable under the *1961 Convention*. This includes such measures as are necessary to enforce the prohibition on coca leaf chewing under Article 49 of the *1961 Convention*. Article 14 (1) of the *1988 Convention* can be classified as a conflict clause that expressly maintains the earlier treaty,¹¹³ which is evidence of the intention of the parties to avoid conflict between the provisions of the *1988 Convention* and the *1961 Convention*.

¹¹² See *ILC Conclusions*, *supra* note 109, 417, para. 251 (26).

¹¹³ See *ILC Study*, *supra* note 109, 136, para. 268 (6).

Taken as a whole, Article 14 of the *1988 Convention* thus does not derogate or provide any exceptions to the prohibition on coca leaf chewing. States parties to both conventions remain bound by their obligation to abolish coca leaf chewing, but are required to respect human rights when reducing the supply of coca leaf in order to do so. This might include human rights impact assessments in which due account can be taken of traditional uses. It should go without saying that States must respect their international human rights obligations while implementing other international obligations. It must be asked, however, if there is a way in which States can eradicate coca bush and, at the same time, respect the right of indigenous peoples to their customs and traditions in a situation where such peoples cultivate coca bush precisely for traditional coca leaf chewing. The response to this question will depend on the scope of that right, which is further explored below.

Now that the relationship between Article 14 of the *1988 Convention* and Article 49 of the *1961 Convention* has been clarified, its terms must be interpreted in order to better understand the prohibition of coca leaf chewing and to determine whether there is any leeway for its harmonization with the rights of indigenous peoples. The terms of Article 49 are very specific in requiring that States parties do not allow coca leaf chewing unless they make a reservation at the time of signature, ratification or accession. States parties who allowed it had to abolish coca leaf chewing within a transitional period that expired in 1989. Article 49 (2) (a) further restricted the possibility of allowing coca leaf chewing to the extent that it was “traditional in the territories in respect of which the reservation is made”. The fact that States parties who have not made the reservation must prohibit coca leaf chewing is also evident from the context of Article 49. It contains the only exception to the applicable measures of control, which limit the production, manufacture, export, import, distribution of, trade in, use, and possession of coca leaf.¹¹⁴ As mentioned in the official commentary on the *1961 Convention*, “[i]t was one of the most important achievements of the Single Convention that it ended the exceptions permitted in earlier treaties”.¹¹⁵ In line with the general obligation contained in Article 4 (c), the provisions on measures of control oblige States parties to limit coca leaf and other narcotic drugs exclusively to medical and scientific purposes. This is also a key element of the object and purpose of the *1961 Convention*,¹¹⁶ which was mentioned by most Member States in their comments on the Bolivian amendment proposal.

¹¹⁴ See *supra* notes 10-14 and accompanying text.

¹¹⁵ UN Commentary, *supra* note 16, 110, para 9.

¹¹⁶ *Ibid.*

Despite the general prohibition on coca leaf chewing, it might be tempting to argue that, since the term “medical purposes” is not strictly defined, its meaning should be interpreted to include coca leaf chewing when considered as a form of traditional indigenous medicine. According to the official commentary, the meaning of this term may depend on the circumstances and the development of medical science, also taking into account “legitimate systems of indigenous medicine”.¹¹⁷ In this regard, a possible future pronouncement of the WHO on the use of coca leaf as a traditional medicine and its contributions to public health could be of relevance. However, the explicit reference in Article 49 (2) (a), labeling coca leaf chewing as “traditional”, as well as the very existence of Article 49, show that coca leaf chewing is currently outside the scope of the medical and scientific purposes contemplated in the Convention. More importantly, no country has ever questioned this. In fact, when the issue was discussed at the conference for the adoption of the *1961 Convention*, only the use of opium and cannabis in indigenous medicine were mentioned.¹¹⁸ Even Bolivia has made it clear that coca leaf chewing is a broader sociocultural practice and that an amendment was necessary to allow it, despite the country’s view that the *1961 Convention* does not prohibit practices that are not harmful to human health.

Having interpreted the prohibition on coca leaf chewing under the *1961 Convention* in its context and in light of the object and purpose of the Convention, it may also be necessary to take into account other relevant rules of international law that are applicable in the relations between the parties, pursuant to Article 31 (3) (c) VCLT.¹¹⁹ This Article is generally considered as an expression of the objective of “systemic integration”, which governs treaty interpretation and reflects the fact that treaties are created by and operate within the international legal system.¹²⁰ In other words, the meaning of a treaty rule must be interpreted against the background of other relevant rules of international law.

There is a considerable degree of uncertainty concerning the proper application of this article, as became evident in the divergence of views expressed

¹¹⁷ *Ibid.*, 111, para. 12.

¹¹⁸ See UN, *Conference for the Adoption of a Single Convention on Narcotic Drugs*, Official Records, Vol. 1, UN Doc E/CONF.34/24 [UN, Conference for the Adoption of a Single Convention on Narcotic Drugs].

¹¹⁹ See VCLT, Art. 31 (3) (c), *supra* note 107, 340.

¹²⁰ *ILC Conclusions*, *supra* note 109, 413, para. 251 (17); *ILC Study*, *supra* note 109, 208, para. 413 (with further references). See also P. Merkouris, ‘Article 31(3) (c) of the VLCT and the Principle of Systemic Integration’ (2010), available at <https://qmro.qm.ul.ac.uk/jspui/bitstream/123456789/477/1/MERKOURISArticle%2031%283%29%28c%292010.pdf> (last visited 15 June 2013).

both in and on the ICJ judgment on the *Oil Platforms* case.¹²¹ However, it appears indisputable that Article 31 (3) (c) allows the consideration of treaty-based rules, in addition to general principles of law and customary international law, in order to arrive at a consistent meaning of the treaty rule under interpretation.¹²² While different approaches can be followed to determine which are the relevant rules for the purposes of Article 31 (3) (c), it has been argued that this is ultimately an assessment of the proximity between such rules and the provision under interpretation, including with respect to their terminology, their subject matter, their signatory parties, and their distance in time.¹²³

A more difficult question is whether Article 31 (3) (c) allows the interpreter to take into account relevant rules that are in force at present or only those applicable at the time of the conclusion of the treaty under interpretation. It seems that this problem of inter-temporality, famously outlined by Judge Huber in the *Palmas* arbitration,¹²⁴ can only be resolved on a case-by-case basis, by establishing the intention of the parties in this regard,¹²⁵ starting by considering whether the treaty itself allows for future developments of international law to be taken into account.¹²⁶

Although the prohibition on coca leaf chewing does not appear to be an open or evolving concept, it shall be assumed for the sake of argument that it is possible to take into account relevant rules that came into being after the conclusion of the *1961 Convention*. In this case, Article 14 of the *1988 Convention* would be most relevant for the interpretation of Article 49 of the *1961 Convention*, as several aspects of the proximity criterion are fulfilled. Both provisions contain similar terminology as to “traditional” uses, while both conventions deal with the subject matter of drug control and share a large number of States parties. Given the combined effect of both paragraphs of Article 14 of the *1988 Convention* and its relationship with the *1961 Convention*, outlined

¹²¹ *Case Concerning Oil Platforms (Islamic Republic of Iran v. United States of America)*, Judgment, ICJ Reports 2003, 161. For an overview of relevant views, see P. Sands & J. Commission, ‘Treaty, Custom and Time: Interpretation/Application?’, in M. Fitzmaurice, O. Elias & P. Merkouris (eds), *The Issues of Treaty Interpretation and the Vienna Convention on the Law of Treaties: 30 Years On* (2010), 39.

¹²² See *ILC Study*, *supra* note 109, 237, para. 470; R. K. Gardiner, *Treaty Interpretation* (2008), 263.

¹²³ See Merkouris, *supra* note 120, 36-78.

¹²⁴ *Island of Palmas Case (Netherlands, USA)*, 4 April 1928, 2 Reports of International Arbitral Awards 829, 845.

¹²⁵ See Merkouris, *supra* note 120, 120.

¹²⁶ See *ILC Study*, *supra* note 109, 242, para. 478.

above, these rules, albeit relevant, do not shed a different light on the meaning of the prohibition on coca leaf chewing. What Article 14 does clarify is that human rights and traditional uses cannot be ignored by States when enforcing this prohibition.

It may also be argued that the right of indigenous peoples to their customs and traditions is itself a relevant rule of international law that must be taken into account when interpreting Article 49. In this view, the emergence of the rights of indigenous peoples is a significant evolution of the international legal system, which may have an impact on the meaning to be given to the provisions under discussion. Although less relevant in terms of subject matter, the fact that most of the States parties to the treaties enshrining these rights are also parties to the *1961 Convention* could be taken to justify this approach. However, the specific nature of the provisions of Article 49 leaves little scope for their interpretation or development. It is difficult to imagine how States parties could apply the rule obliging them to abolish coca leaf chewing in a way that would not lead to a restriction on the rights of those indigenous peoples, whose customs and traditions involve coca leaf chewing.

2. Relevant Rules of International Human Rights Law

The relationship between the rules in question must also be addressed from the perspective of international human rights law. Given the rigidity of the rules on drug control, it is necessary to consider whether the rules on the rights of indigenous peoples are more flexible in allowing for harmonization and systemic integration.

At first sight, coca leaf chewing by indigenous peoples seems to be an activity within the protected rights of indigenous peoples. The terms “custom” and “tradition” mentioned in Article 2 (b) of *ILO Convention No. 169* and in Articles 11 and 12 of UNDRIP are not further defined by these instruments. According to the dictionary definition, a custom is “a traditional and widely accepted way of behaving or doing something that is specific to a particular society, place, or time”, while a tradition is “a long-established custom or belief that has been passed on from one generation to another”.¹²⁷ The terms thus express similar and partially overlapping concepts, which will include coca leaf chewing if it is long established, widely accepted, or specific to an indigenous people. Another relevant term is ‘cultural expressions’ of indigenous peoples, referred to in Article 31 of UNDRIP, which was explicitly cited by Bolivia in

¹²⁷ A. Stevenson (ed.), *Oxford Dictionary of English*, 3rd ed. (2010), 430, 1884.

support of its amendment proposal. As mentioned above, it may relate to social practices, rituals, and practices concerning nature, arguably including those involving coca leaf chewing.

However, an interpretation of the right of indigenous peoples to their customs and traditions must also take into account relevant rules of international law, pursuant to Article 31 (3) (c) VCLT, as outlined in the previous section. The principle of systemic integration may be more easily applied here, since the provisions on the right of indigenous peoples to their customs and traditions are less specific and appear open to interpretation. As stressed by the ILC with reference to the jurisprudence of the ICJ, States entering into treaty obligations cannot be presumed to act inconsistently with generally recognized principles of international law.¹²⁸ Arguably, one of the most important of these principles is the obligation of States to honor their commitments under the treaties they are parties to (*pacta sunt servanda*), codified in Article 26 VCLT. States that ratify or accede to *ILO Convention No. 169* thus cannot be deemed to deviate from their obligations under the *1961 Convention*, including the prohibition on coca leaf chewing. If this presumption cannot be rebutted, the obligation to respect the rights of indigenous peoples to their customs and traditions under *ILO Convention No. 169* must be interpreted without prejudice to the prohibition on coca leaf chewing under the *1961 Convention*. Arguably, this applies, *a fortiori*, to any customary rules in this regard, as well as the commitments accepted by States under the UNDRIP. As a matter of law, this would mean that the provisions protecting the customs and traditions of indigenous peoples do not extend to coca leaf chewing, even if it is part of their customs and traditions as a matter of fact. This presumption needs to be considered in the context of the relevant provisions and in light of the object and purpose of the instruments protecting indigenous rights.

A central feature of the instruments enshrining the rights of indigenous peoples is the primary role accorded to the interests, views, and aspirations of indigenous peoples. *ILO Convention No. 169* aims at empowering indigenous peoples and at ensuring that they can maintain and develop their cultural identity, customs, traditions, and institutions, in accordance with their own aspirations.¹²⁹ The importance of respect for and the development of the institutions, cultures, and traditions of indigenous peoples in accordance with their aspirations and needs is reaffirmed in the preamble of UNDRIP. Key

¹²⁸ *ILC Conclusions*, *supra* note 109, 414, para. 251 (19) (b).

¹²⁹ B. Feiring, *Indigenous & Tribal People's Rights in Practice: A Guide to ILO Convention No. 169* (2009), 36.

objectives are indigenous peoples' consent to and involvement in the policies and measures that affect them. This is evident from several provisions of *ILO Convention No. 169*. Article 1 (c) establishes self-identification as indigenous as a fundamental criterion for the application of the provisions of the convention. The cooperation and participation of indigenous peoples is required in several articles throughout the Convention.¹³⁰ Article 6 establishes a general principle of consultation, reaffirmed in Article 19 UNDRIP, pursuant to which the peoples affected by legislative or administrative measures must be consulted through their own representative institutions. The requirement of consultations and cooperation with the peoples concerned is also an integral part of several provisions of UNDRIP.¹³¹

Based on these considerations, it is submitted here that any presumptive restriction of the concept of customs and traditions would be at odds with the object and purpose of *ILO Convention No. 169* and other relevant instruments. If the views of indigenous peoples and the principle of consultation are to be taken seriously, States will need to defer to the views of the indigenous peoples concerning their customs and traditions. Therefore, indigenous peoples who identify coca leaf chewing as part of their customs and traditions should, in principle, be entitled to the protection of their rights in this regard. This does not mean that States cannot restrict the rights of indigenous peoples. In fact, these rights are not absolute and may be subject to limitations. What it means is that restrictions of these rights cannot be presumed but must follow the appropriate procedures, in consultation with the indigenous peoples concerned and taking their interests and views into account.

ILO Convention No. 169 does not prevent States parties from applying national laws and regulations on drug control to indigenous peoples. However, its Article 8 (1) requires governments to accord due regard to the customs or customary laws of these peoples when doing so. Article 8 (2) states that the right of indigenous peoples to retain their own customs is contingent on whether such customs are compatible with fundamental rights defined by the national legal system and with internationally recognized human rights. It also requires that procedures shall be established to resolve conflicts, which may arise in this context. Both provisions must be read together with the general principle of consultation set out in Article 6 of *ILO Convention No. 169*, which requires that consultations are to be carried out through appropriate procedures, in particular

¹³⁰ *Convention No. 169*, Arts 2 (1), 5 (c), 7, 15, 20 (1), 22, 23 (1), 25 (2), 27 (1), 29 & 33 (2), *supra* note 30, 1385-1391.

¹³¹ *Ibid.*, Arts 15, 17, 30, 32, 36 & 38, 1387-1388, 1391-1392.

through indigenous peoples' representative institutions, with the objective of achieving agreement or consent to the proposed measures. Comments made by States during the preparatory works of *ILO Convention No. 169* confirm that the purpose of the restriction foreseen in Article 8 (2) is to address situations in which customary practices of indigenous peoples result in discrimination against women, slavery or other human rights violations.¹³²

The international human rights treaties are the yardsticks against which restrictions to the customary practices of indigenous peoples will be measured. Moreover, some of these treaties contain specific obligations that may affect the right of indigenous peoples to practice their cultural traditions and customs. For instance, under Article 2 (f) of the *Convention on the Elimination of All Forms of Discrimination Against Women*, States parties agreed "to take all appropriate measures [...] to modify or abolish existing [...] customs and practices which constitute discrimination against women".¹³³ Under Article 33 of the *Convention on the Rights of the Child*, States parties are obliged to "take all appropriate measures [...] to protect children from the illicit use of narcotic drugs and psychotropic substances as defined in the relevant international treaties".¹³⁴ The result of this provision is an obligation to protect indigenous children from coca leaf chewing, taking into account the relevant provisions of the *1961 Convention*.

Restrictions to the rights of indigenous peoples are also envisaged in the UNDRIP. Under Article 34, indigenous peoples have the right to promote, develop, and maintain their distinctive customs, spirituality, traditions, etc. "in accordance with international human rights standards".¹³⁵ Moreover, Article 46 also allows limitations that are imposed for other purposes, as long as they are determined by law and in accordance with human rights obligations. It also sets out a balancing test that incorporates elements developed in the jurisprudence of the Human Rights Committee. In accordance with that provision, any limitation shall be

"non-discriminatory and strictly necessary solely for the purpose of securing due recognition and respect for the rights and freedoms of

¹³² ILO, *Partial Revision of the Indigenous and Tribal Populations Convention, 1957 (No. 107)*, International Labour Conference (75th Session), Report VI (1) (1987), 38 [ILO, *Partial Revision of the Indigenous and Tribal Populations Convention*, Report VI (1)].

¹³³ *Convention on the Elimination of All Forms of Discrimination Against Women*, 18 December, Art. 2 (f), 18 December 1979, 1249 UNTS 13, 16.

¹³⁴ *Convention on the Rights of the Child*, 20 November 1989, Art. 33, 1577 UNTS 3, 55.

¹³⁵ UNDRIP, Art. 34, *supra* note 23, 9.

others and for meeting the just and most compelling requirements of a democratic society”.¹³⁶

The rights guaranteed to indigenous peoples in the context of Article 27 ICCPR are also not without limits. According to the jurisprudence of the Human Rights Committee, a balancing test must be applied to assess whether there is a reasonable and objective justification for the interference by a State party and whether the interference is necessary, reasonable, and proportionate.¹³⁷ In particular, this jurisprudence considers whether the interference with the way of life of the people concerned is so substantial that it denied or failed to protect their right to enjoy their own culture. In this regard, it is of special importance whether the people affected have been consulted during the proceedings.¹³⁸

The mentioned provisions make it clear that States may lawfully restrict the right of indigenous peoples to their customs and traditions. This can be done in order to safeguard human rights standards, but also for other purposes, such as drug control. In either case, a balancing test will have to be applied to assess whether the interference by a State with the right of indigenous peoples is justifiable. So far, the situation is not dissimilar from restrictions of other human rights, such as limitations to the freedom of peaceful assembly in the interests of national security or public safety.¹³⁹ The distinctive feature of restrictions to the rights of indigenous peoples is the importance of consulting them in this regard, including by using their institutions and taking into account their customary laws. According to some commentators, any assessment of indigenous peoples’ cultural practices should allow the peoples concerned a certain margin of appreciation and an opportunity to use their own decision-making processes in interpreting and applying human rights standards.¹⁴⁰ This would mean that States intending to enforce their international obligation to abolish coca leaf

¹³⁶ *Ibid.*, Art. 46 (2), 11.

¹³⁷ *Lovelace v. Canada*, Communication No. R.6/24, UN Doc A/36/40, 166, 30 July 1981, *Kitok v. Sweden*, *supra* note 34; *Länsman et al. v. Finland*, Communication No. 511/1992, UN Doc CCPR/C/52/D/511/1992, 26 October 1994; *Länsman III v. Finland*, Communication No. 1023/2001, UN Doc A/60/40 (Vol. II), 17 March 2008, 90.

¹³⁸ See *Länsman et al. v. Finland*, *supra* note 137, 11, para. 9.6.

¹³⁹ See *International Covenant on Civil and Political Rights*, 16 December 1966, Art. 21, 999 UNTS 171, 178.

¹⁴⁰ See A. Xanthaki, *Indigenous Rights and United Nations Standards: Self-Determination, Culture and Land* (2007), 109; and Iorns Magallanes, ‘ILA Interim Report’, *supra* note 22, 18; both with reference to S. J. Anaya, ‘International Human Rights and Indigenous Peoples: The Move Toward the Multicultural State’, 21 *Arizona Journal of International and Comparative Law* (2004) 1, 13, 26.

chewing will at least need to consult the indigenous peoples affected as early as possible, making use of their institutions and customary laws in order to achieve consent on the envisaged measures and to possibly implement these measures.

Having considered the problem both from a drug control and a human rights perspective, it would thus seem inevitable to conclude that the rules in question are indeed in a relationship of interpretation. States who are obliged to implement the prohibition on coca leaf chewing can restrict the right of indigenous peoples to their customs and traditions, but should follow the appropriate procedures to do so in consultation with the peoples concerned, in line with the object and purpose of the relevant instruments. Although this outcome appears legally sound, it is not very favorable to the rights of indigenous peoples, because the balance to be drawn will be tilted in favor of the abolition of coca leaf chewing. The question remains whether a consultation procedure will allow States to give enough weight to culture as an essential element of the identity of the indigenous peoples concerned.¹⁴¹

II. Underlying Reasons for Tension Between Indigenous Peoples' Rights and the International Drug Control Regime

Even though the conclusion reached is that the rules containing the prohibition on coca leaf chewing and those enshrining the right of indigenous peoples to their customs and traditions are in a relationship of interpretation, a degree of tension between these rules clearly remains. In order to better understand the values and interests at the heart of this underlying tension, it is helpful to consider the preparatory work of the relevant provisions under the *1961 Convention* and *ILO Convention No. 169*. Both instruments are based on certain sets of value judgments concerning indigenous peoples. The values and attitudes of the international community towards indigenous peoples have changed considerably during the past decades.

The need to limit the production of coca leaf had been discussed in various fora under the auspices of the League of Nations. It was also one of the first issues to be considered by the competent bodies of the United Nations, which decided to establish a Commission of Enquiry on the Coca Leaf.¹⁴² From September to December 1949, the Commission conducted a fact finding mission in Peru and Bolivia to investigate the effects of chewing the coca leaf and the possibilities

¹⁴¹ Iorns Magallanes, 'ILA Interim Report', *supra* note 22, 19.

¹⁴² See UN Division of Narcotic Drugs, 'Commission of Enquiry on the Coca Leaf', 1 *Bulletin on Narcotics* (1949) 1, 20.

of limiting its production and controlling its distribution.¹⁴³ With regard to coca leaf chewers in Peru and Bolivia, the Commission found that almost all of them were “Indian”, i.e. members of the indigenous peoples of the Quechua and Aymara.¹⁴⁴ It highlighted the sacred character of the coca leaf and its important role in the customs and rituals of these peoples, especially those relating to holidays, deaths, agriculture, illnesses and magical practices.¹⁴⁵ However, the Commission dismissed the supernatural beliefs associated with these customs and practices as “superstitions”.¹⁴⁶ It considered the factors encouraging coca leaf chewing as a result of the poor living conditions and the lack of education of the indigenous communities concerned. Although deeply rooted in certain regions and groups, the Commission expressed the view that these factors could be eradicated by improving the living conditions and providing education,¹⁴⁷ and concluded that coca leaf chewing produced harmful effects, including malnutrition, undesirable changes of an intellectual and moral character, and reduced economic activity.¹⁴⁸ It recommended a gradual suppression of coca leaf chewing, including by improving the living conditions of the populations concerned and eradicating the production, distribution, and chewing of coca leaf.¹⁴⁹

The views expressed by the Commission of Enquiry formed the basic understanding among States with regard to the question of the coca leaf, which was addressed at the intergovernmental level in the period leading to the adoption of the *1961 Convention*. The matter was considered within ECOSOC and its Commission on Narcotic Drugs, as well as by the Expert Committee on Drugs Liable to Produce Addiction of the WHO. The health experts agreed that coca leaf chewing was harmful to the individual and to society and should be considered as a form of addiction.¹⁵⁰ The policy-making bodies encouraged countries to progressively abolish its eradication, including by implementing

¹⁴³ See ECOSOC, ‘Report of the Commission of Enquiry on the Coca Leaf’, *supra* note 40, 102.

¹⁴⁴ *Ibid.*, 9.

¹⁴⁵ *Ibid.*, 53-54.

¹⁴⁶ *Ibid.*, 10.

¹⁴⁷ *Ibid.*, 54.

¹⁴⁸ *Ibid.*, 93.

¹⁴⁹ *Ibid.*, 94-98.

¹⁵⁰ WHO, ‘Third Report of the Expert Committee on Drugs Liable to Produce Addiction’, *Technical Report Series No. 57* (1952), 10.

educational programmes to highlight the harmful effects.¹⁵¹ As a response, States like Argentina, Bolivia, Colombia, and Peru adopted a policy of progressive abolition of coca leaf chewing.¹⁵²

During the negotiations at the United Nations Conference for the Adoption of a Single Convention on Narcotic Drugs in 1961, there was a consensus among delegations that coca leaf chewing was harmful and that its gradual abolishment was necessary. While different opinions were expressed as to the length of the transitional period, no delegation questioned the purpose of the relevant provisions in the draft text. The representatives of Bolivia and Peru argued that more time was required to abolish traditional coca leaf chewing by their indigenous peoples, while emphasizing their ongoing efforts in this regard.¹⁵³

The policies of progressive abolition were further developed at the regional level. An Inter-American Consultative Group on Narcotics Control met at Rio de Janeiro from 27 November to 7 December 1961, followed by two meetings of the Inter-American Consultative Group on Coca Leaf Problems, which agreed that coca leaf chewing was harmful and should be abolished. It considered that the incidence of this habit could be radically reduced by improving the “difficult economic, social and harsh climatic conditions under which the highland Indians lived”.¹⁵⁴

These developments show how strongly the provisions requiring the abolition of coca leaf chewing reflect the value judgments and attitudes towards indigenous peoples that were prevalent within the international community in the 1950s and early 1960s. The economic, social, and cultural conditions of indigenous peoples were considered under-developed and destined to disappear with “modernization”. It was believed that governments had a “duty to integrate

¹⁵¹ See *Commission on Narcotic Drugs Res. 1 (VII)*, May 1952; *ECOSOC Res. 1952/436(XIV) E*, 28 May 1952; *ECOSOC Res. 1954/548*, UN Doc E/RES/1954/548(XVIII)E, 12 July 1954.

¹⁵² See *ECOSOC Res. 1954/548(XVIII)E*, *supra* note 151.

¹⁵³ UN, *Conference for the Adoption of a Single Convention on Narcotic Drugs*, *supra* note 118, 57.

¹⁵⁴ *Report of the Consultative Group on Coca Leaf Problems*, Part III, para. 27, reprinted in C. Avalos Jibaja, ‘Consultative Group on Coca Leaf Problems’, 16 *Bulletin on Narcotics* (1964) 3, 25, 31.

the highland Indians in the economic and social life of their nations”¹⁵⁵ and that there was the need for “a fight against superstition and mistaken beliefs”.¹⁵⁶

The same attitude also informed the negotiations and the provisions of the *ILO Convention Concerning Indigenous and Tribal Populations* of 1957 (ILO Convention No. 107).¹⁵⁷ *ILO Convention No. 107* reflected the same paternalistic and integrationist approach, based on the assumption that indigenous groups were culturally inferior and that they needed to be integrated into society in order to help them reach a higher stage of social, economic, and cultural development.¹⁵⁸ This was evident in the provisions of *ILO Convention No. 107*, which established that the progressive integration of indigenous peoples was the main aim of government action,¹⁵⁹ and that “the social, economic and cultural conditions of the populations concerned prevent them from enjoying the benefits of the general laws of the country to which they belong”.¹⁶⁰

A more detailed debate emerged in the 1970s, when indigenous peoples were increasingly organized and visible at the international level, in order to challenge this paternalistic approach.¹⁶¹ At the ILO, this led to a review of *ILO Convention No. 107* during 1988 and 1989 and, ultimately, the adoption and entry into force of *ILO Convention No. 169*. During the preparatory works of *ILO Convention No. 169*, governments agreed that the views concerning indigenous peoples had changed considerably and that the integrationist approach and the assumption of cultural inferiority needed to be removed from the Convention.¹⁶² Instead of aiming at the integration of indigenous culture, the new rules enshrined in *ILO Convention No. 169* and UNDRIP aim at achieving the recognition of, and respect for, the ethnic and cultural diversity of indigenous peoples. This new attitude is also reflected in other instruments. For

¹⁵⁵ *Ibid.*, 32.

¹⁵⁶ M. Granier-Doyeux, ‘Some Sociological Aspects of the Problem of Cocaism’, 14 *Bulletin on Narcotics* (1962) 4, 1, 16.

¹⁵⁷ ILO, *Partial Revision of the Indigenous and Tribal Populations Convention*, Report VI (1) (1987), *supra* note 132, 18-19 & 27-29.

¹⁵⁸ See Xanthaki, *supra* note 140, 52-55.

¹⁵⁹ ILO, *Convention Concerning the Protection and Integration of Indigenous and Other Tribal Peoples and Semi-Tribal Populations in Independent Countries*, 26 June 1957, Arts 1 (2), 2, 4, 5, 7 (2), 17 (3), 22 (1) & 24, 328 UNTS 247, 251, 252, 254, 260, 262.

¹⁶⁰ *Ibid.*, Art. 3 (1), 252.

¹⁶¹ See Anaya, *Indigenous Peoples in International Law*, *supra* note 20, 56.

¹⁶² ILO, *Partial Revision of the Indigenous and Tribal Populations Convention, 1957 (No. 107)*, International Labour Conference (75th Session), Report VI (2) (1988), 3-9. See also ILO, *Provisional Record No. 32*, International Labour Conference (75th Session) (1988); ILO, *Provisional Record No. 25*, International Labour Conference (76th Session) (1989).

instance, Article 1 of the UNESCO *Universal Declaration on Cultural Diversity* states that “cultural diversity is as necessary for humankind as biodiversity is for nature”.¹⁶³

The international drug control regime has not undergone the same fundamental changes. An attempt to open its provisions to the respect of traditional uses of coca leaf by indigenous peoples was made during the preparatory works of the *1988 Convention*. Bolivia and other States proposed the inclusion of a reference to traditional licit uses into the draft article on measures against the illicit cultivation of coca bush and other plants. Many States initially opposed this proposal on the grounds that traditions were often subject to change.¹⁶⁴ Their main concern was to avoid introducing any sweeping exceptions or loopholes that might hinder the effective eradication of drug crops or increase their illicit cultivation.¹⁶⁵ The final compromise was reached by introducing the aforementioned sentence in Article 14 (1) to the effect that any measures taken under the Convention shall not be less stringent than the provisions applicable under the other international drug control treaties.¹⁶⁶ As a result, the reference to traditional licit uses in the *1988 Convention* did not affect the prohibition on coca leaf chewing under the *1961 Convention*. As outlined in section E, there was no support from States outside Latin America for Bolivia’s recent proposal to amend the *1961 Convention* to remove this prohibition.

These developments illustrate the conflicting values and interests that exist within the international community. On the one hand, the value judgments and attitudes of States towards indigenous peoples have moved towards respect for the culture and identity of indigenous peoples. This has led to the development and changes of relevant rules of international human rights law. On the other hand, most States have been reluctant to permit changes to the rules of the international drug control regime. Maintaining the integrity and effectiveness of this body of law seems to be their primary concern, even if they share the attitude of respect for the culture and identity of indigenous peoples. This ambivalence may be considered as the main source of the tension between the prohibition

¹⁶³ UNESCO, *Universal Declaration on Cultural Diversity*, 2 November 2001, Art. 1, 41 ILM 57, 58.

¹⁶⁴ *UN Conference for the Adoption of a Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances*, Official Records, Vol. 1, UN Doc E/CONF.82/16, 26.

¹⁶⁵ *UN Conference for the Adoption of a Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances*, Official Records, Vol. 2, UN Doc E/CONF.82/16/Add.1, 297-298.

¹⁶⁶ *Ibid.*, 300-305; UN, *Commentary on the United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances* (1988), 300.

on coca leaf chewing and the right of indigenous peoples to their customs and traditions.

G. Conclusion

The present article has examined whether a conflict exists between the rules of international law prohibiting coca leaf chewing and those enshrining the right of indigenous peoples to their customs and traditions. In practice, governments of countries where coca leaf chewing is practiced by indigenous peoples do not seem to have considered the issue as a normative conflict. So far, only Bolivia has asserted that a normative conflict exists and has called international attention to the issue by attempting to change relevant rules and its obligations under the international drug control regime. Its choice was a political one and must be seen in light of its broader policy of legalizing and promoting traditional uses of coca leaf, which is not limited to safeguarding the rights of indigenous peoples.

The case of Bolivia has shown that resolving the normative conflict in favor of the rights of indigenous peoples requires changes to existing international law. Such changes are not easily achievable and may have negative impacts on treaty relations. Bolivia only succeeded in removing its own obligation to abolish coca leaf chewing, instead of changing relevant rules of the *1961 Convention* for all States parties. In denouncing the *1961 Convention* and re-acceding to it with a reservation, Bolivia not only affected the integrity of the convention, but also added to existing precedents regarding this procedure with potentially significant consequences. It might appear attractive for other States parties pursuing a new drug policy to use the same procedure in order to avoid international responsibility for decisions to legalize cannabis or other narcotic drugs within their territory. In a case like this, unless one third of the States parties to the *1961 Convention* were to object, all States parties would have to accept the consequence that the provisions excluded by the reservation would not apply as between them and the reserving State. The appeal of using this is not limited to the international drug control regime and may also be used to modify obligations under international treaties on other subject matters.

At the conceptual level, a legal analysis has led to the conclusion that a normative conflict can be resolved or avoided, without changing existing international law, by applying the rules of treaty interpretation and the principle of harmonization. However, the rules in question can be harmonized only by restricting the right of indigenous peoples to their customs and traditions. In this regard, it would be of crucial importance that States consult the indigenous

peoples affected and enable them to use their institutions and decision-making procedures, in order to abolish coca leaf chewing in the least intrusive and most acceptable way possible. Having said this, it is conceivable that there may be borderline cases in which an indigenous people considers coca leaf chewing to be so central to its culture and identity that even the use of appropriate consultations and institutions in abolishing coca leaf chewing would defeat the purpose of preserving its culture and identity.

An examination of the drafting history of relevant provisions has revealed the conflicting values and interests of the international community as the origin of the tension between the rules in question. Whether or not coca leaf chewing is still considered as harmful for human health, its prohibition may be seen as a codification of an outdated attitude towards indigenous peoples that is no longer supported by any State. On the one hand, this begs the question of whether the rule to abolish coca leaf chewing has lost its legitimacy and whether the principle of harmonization should be applied in this case. Restricting the rights of indigenous peoples in order to enable the application of such a rule may seem unfair, especially in borderline cases where the very purpose of these rights is at stake. On the other hand, the prohibition on coca leaf chewing remains a binding obligation of States parties to the *1961 Convention*, despite the attempt of Bolivia to change relevant rules. The main argument in favor of the prohibition is that allowing coca leaf chewing would lead to a greater production and supply of coca, greater availability of cocaine, and increased drug trafficking and related criminal activities. Accordingly, a restriction of the rights of indigenous peoples would be warranted in order to safeguard the health and security of people worldwide.

To conclude, the normative conflict can be addressed either within the existing international legal framework or by changing international legal obligations. Both options have adverse consequences. A coherent solution within existing international law would not be favorable to the rights of indigenous peoples. On the other hand, attempts to amend the international drug control regime are unlikely to succeed in the current political climate. While the procedure of denunciation and re-accession of a treaty with reservation has proven successful for the purposes of Bolivia, a more widespread use of this procedure risks affecting the integrity of multilateral treaties and the stability of treaty relations.