The Right to Land of Indigenous People in Latin America and South Africa: Comparative Analysis

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Contents

Index of abbreviation

ADRIP----------American Declaration on the Rights of Indigenous people

Sec.----------Section

P/pp----------page/pages

ILO----------International Labor Organization

UDHR----------Universal Declaration of Human Rights

UNDRIP----------United Nations Declaration on the Rights of Indigenous people

ICCPR----------International Covenant on Civil and Political Rights

ICESCR----------International Covenant on Civil and Political Rights

Introduction

This thesis is aimed at exploring the efficiency of the current legal regimes on indigenous peoples' right to land, with the view to making authoritative findings on the efficiency of the systems to promote protection of indigenous peoples' right and the corresponding balance of the state's development goals.

In chapter one, the paper will start with exploring previous works in the area of indigenous peoples' right to land. Here, the thesis starts with expounding points that are not properly addressed in previous/existing works. In chapter two, the thesis will address the available international instruments pertaining to the rights to indigenous people.

In chapter three, the thesis will then try to consider what constitutes indigenous peoples right to land. An attempt will be made to thoroughly discuss the various expressions of indigenous people's rights; including the right to land as part of the inherent right to enjoyment of natural resource, cultural right and subsistence right. More importantly, in this chapter, the thesis will try to explore the existing contradictions between Indigenous peoples' right to land and the state's Development program and make comparative analysis of what solutions are adopted under international law and domestic laws of the selected jurisdictions. It is of greater importance to conclude whether the solutions given to solve the contradiction are the best and if not what best alterative are available. In this regard, the right of the state to put land owned or possessed by indigenous people for public purpose, i.e. 'Eminent domain" or "Expropriation" or forced relocation in the context indigenous peoples right to land- is the main scenario in which the state has to give appropriate solution that can protect the interest of Indigenous people on hand and promote development goals on the other hand.

In chapter four, lies the gist of the paper in which a comparative analysis of the legal regime governing indigenous peoples right to land in South Africa on one hand and Latin America on the other hand will be made. Analysis will start form the regional systems of protection in both jurisdiction. In this regard, South Africa has primarily adopted the African Charter on Human and Peoples Right and its constitution as fundamental law along with other subsidiary laws pertaining to the rights of indigenous people. Under the Latin American system, the Inter-American Convention on Human Rights, the Inter-American declaration on the right to land of indigenous people will be the subjects of analysis. Coming to domestic laws, the constitutions of the selected states i.e. Guatemala and Mexico along with other subsidiary laws will be analyzed. Practical cases will also be discussed to support findings. A comparative analysis of the selected jurisdictions is made with some depth.

The last chapter of this thesis is dedicated for making authoritative conclusions on the efficiency of the current legal regime on the protection of indigenous peoples' right to land Recommendations of efficient law and practice will be proffered in this thesis.

Methodology

The methodology employed in this thesis analysis of existing works pertaining to the subject. International and domestic legislations and relevant court cases are also discussed. Other relevant documents such as official reports of pertinent authorities are analyzed. Facts and figure are interpreted. Hence, the thesis briefly based on the following methodology;

- Literature,
- Legislative analysis involving the analysis of international and regional conventions for the protection of indigenous people's right,
- National legal analysis involving comparison of laws of the Sleeted jurisdictions;
- Official reports pertinent to the subject are relined on;
- Jurisprudence namely decisions made by South African court and Inter-American court , is relied to the extent possible and relevant

"Hypothesis statement"

"The current Legal regime on the protection of indigenous people's right to land in South Africa and Latin America must be redesigned, to assure government participation in the development of the indigenous groups, so as to assure the land proper utilization."

Abstract

The topic dealt with in this paper is the right to land of indigenous people's visa-vis state's development goals. In nutshell, how efficient is the current legal regime on the protection of indigenous peoples' right to land the promotion of states' development goals.

The approach for this work is mainly comparative analysis of South African Legal Regime on one hand and Latin American Legal Regime, represented by Guatemala and Mexico on the other hand, on the protection of indigenous peoples' right to land and promotion of state development policy and goals. The thesis involves analysis of the international legal regimes governing indigenous peoples' right to land as since that is

where the obligation of the state starts. International human rights regime and domestic property laws are relevant to the thesis and thus are analyzed to the extent they are relevant. However, since indigenous people have not only legal classification but also anthropological definition, the thesis included the anthropological perspective of indigenous people.

The main aim of the thesis is to describe that the right to land of indigenous people suffers a limit to the extent that it conflicts with the state's development goal by taking the selected jurisdictions i.e. South Africa, Guatemala and Mexico However, the less obvious point suggested in this thesis is that such conflict should be settled, to the extent possible, in favor of development. As in any field of human rights, there is no absolute protection for indigenous peoples' right to land. But the question remain, how efficiently do the states give the solution that can promote efficient utilization of land without however causing injustice to indigenous people.

The paper consists of an introduction, and four chapters. Through out all, the thesis will start with exploring with previous works in the area of indigenous peoples' right to land. The definition of Indigenous people under in international law with the view to suggest workable definition is explored. The thesis considered what constitutes indigenous peoples right to land. An attempt is made to thoroughly discuss the various expressions of indigenous people's rights; including the right to land as part of the inherent right to enjoyment of natural resource, cultural right and subsistence right. It is of greater importance to conclude whether the solutions given to solve the contradiction are the best and if not what best alterative are available. The last chapter of this thesis is dedicated for making authoritative conclusions will on the efficiency of the current legal regime on the

protection of indigenous peoples' right to Recommendations of efficient law and practice will be proffered in this thesis

Chapter-One -Literature Review

1.1. Introduction

This thesis does not claim that there are no sufficient works on indigenous people's right to land. The thesis however, claims the current works on the subject do not specifically address how states settle the conflict between indigenous peoples' right to land in South Africa and Latin America. In this part of the thesis, it is to be expounded that current works do not suggest what is the pragmatic solution in cases where the states development goal and indigenous peoples' right to land conflict. In this regard, international human rights do not provide specific guidance as to the extent to which the right of indigenous people can limited by the state.

"Convention 169 on Indigenous and Tribal Peoples, adopted by the International Labor Organization in 1989 is the single binding international instrument related to the rights of indigenous people 1989"[1]. "The convention provides for the right of indigenous peoples in states to exercise control, to the extent possible, over their own economic, social and cultural development in a number of areas".[2] "The Convention includes a section on land, and requires States Parties to identify lands traditionally occupied by indigenous peoples and guarantee ownership and protection rights".[3] Over all, the convention requires the

[1] International Labour Organization, Convention 169, Indigenous and Tribal Peoples Convention, *opened for signature* Jun. 27, 1989, *available at* http://www.ilo.org/ilolex/cgi-lex/convde.pl?C169 [Hereinafter ILO Convention 169].

[2] *Id.* at art. 1

[3] *Id.* at art. 14

"measures to be taken in appropriate cases to safeguard the right of the peoples concerned to use lands not exclusively occupied by them, but to which they have traditionally had access for their subsistence and traditional activities."[4] The Convention also requires the "provision of legal procedures to resolve land claims"[5], "establishes rights over natural resources"[6], "protects against forced removal"[7] and "establishes a right of return and compensation for lost land through either land (of at least equal quality and quantity) or money".[8]

The above description of the law is important in this thesis as it shows what is the legal frame work out of which controversies arise? This legal framework in particular does not determine when is it "appropriate case" for the state to take measure to safeguard the right of the peoples concerned to use lands not exclusively occupied by them, but to which they have traditionally had access for their subsistence and traditional activities.[9] This is left to states. But it is this point where states give different solutions to the substantially the same questions. In this part of the thesis, it will be shown that current works either took one side or the other side i.e. either favored the state or went for development (rarely) or for protection of indigenous people.

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[4] *Id.* at art. 13

[5] *Id.* at art. 14

[6] *Id.* at art. 15

[7] *Id.* at art. 16.,18

[8] I *d.* at art. 16

[9] *See Supra* note 4.

1.2 Definition of indigenous people

Since the thesis would use indigenous people to mean the thing throughout, it good to have the definition of indigenous people from the very beginning. As note elsewhere in this thesis, indigenous people are of subject both in law and other fields of social science, as anthropology, the latter being even the beginning of any discussion. Thus, indigenous people are defined in both fields as below.

1.2.1. Anthropological definition

Some authors suggest certain defining elements of indigenous people identifying subjective and objective elements.[10]

1.2.1.1. Objective elements

a) "The identification of indigenous peoples inhabitants, or the descendant of the original inhabitants of a particular territory, then conquered by a group arrived in a second time; group from which descendants, the conquered people continue to have a different culture and toward which continue to be in a subordinate position"[11].

b) "Indigenous peoples usually are characterized by a subsistence economy with no production aimed at the market or the profit; the division of Labor, if existing, it is generally defined along gender and age, and the minimum production unit is an

[10]Lorenzo Nesti'; Indigenous peoples' right to land: international standards and possible developments: The cultural value of land and the link with the protection of the environment. The perspective in the case of Mapuche-Pehuenche(15 July 1999), Chap. 1, sec. 1,a, et esq available on: http://www.xs4all.nl/~rehue/art/nest1.html#Chapter%20I

[11] Ibid

essentially self-sufficient group of families; social cohesion is maintained by equally sharing wealth within the group"[12].

c) "Indigenous peoples usually do not have centralized political institutions, but a communitarian form of organization where decisions are taken on the base of consent"[13].

d) "It is often said that indigenous peoples have a strong connection with the environment where they live, that they make a sustainable use of the resource they dispose of, for example, by way of nomadic agriculture or gathering, in full respect to the nature."[14]

e) "Indigenous peoples have as a distinctive feature, the strong link with the land, that usually they held in-groups"[15].

f) "A particular feature not agreed upon by the doctrine is the one of vulnerability of indigenous peoples"[16].

1.2.1.2. Subjective element[17]

"This criterion contains two elements: the recognition of a group and the recognition of a person"[18]. "The first implies that a group asserting itself as indigenous people is so accepted by the international community and the other indigenous peoples"[19]. "The second implies the definition of oneself as an indigenous person and his/her recognition

[12] *Ibid.*

[13] *Ibid.*

[14] *Ibid.*

[15] *Ibid.*

[16] *Ibid.*

[17] *Ibid.*

[18] *Ibid.*

[19] *Ibid.*

as such by the group"[20]. "It is very important for indigenous peoples to assert themselves as subject of rights and as different from minorities, but there can be some risks for individuals"[21]. "It is uncertain, for instance, whether an ethnically indigenous individual would lose whatever legal rights and obligations accrue to an 'indigenous' person, if he or she was expelled from the indigenous community or chooses to become fully assimilated into the dominant society"[22].

1.2.2. Legal Definition

The definition of indigenous people is of greater controversy among scholars and practitioners. The following definition in a report commissioned in 1972 by the UN Sub-Commission for the Prevention of Discrimination and Protection of Minorities to its Special Rapporteur José Martinez-Cobo and presented in 1983 and later accepted by later by the Working Group on Indigenous Populations and various Indigenous Peoples as reference for the works of this organ defines indigenous peoples as;

> "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

[20] *Ibid.*

[21] *Ibid.*

[22] *Ibid.*

> identity, as the basis of their continued existence as peoples, in accordance with their own Cultural patterns, social institutions and legal systems."[23]

The above definition itself falls behind what one think indigenous people might be as it restricts itself to colonial context that it excludes some groups that preserve their distinctness without any pre-colonial element. There are indigenous people in countries that do not have any colonial power but still preserve their distinctness and do not have affiliation to the public authorities in a manner, they are distinctive enough to be considered to belong to separate group. For the purpose of this thesis therefore, the above definition is not adopted. In light of this, let us consider the following definition provided by The Chilean Constitutional Court;

> "…group of people or groups of people from a country that possesses their own common cultural characteristics, that do not find themselves fitted with public authority and that have and will continue to have the right to participate and be consulted, in matters that concern them, with strict subjection to the [Constitutional law] of the respective State in which they form a part."[24]

This definition does not trace the status of Indigenous people to pre-colonial period. This approach has practical significance because certain group of people might preserve their identity and distinctiveness "finding themselves not fitted with the public authorities" to paraphrase the courts defining element. For the purpose of this essay, the latter definition is adopted as a workable definition.

[23] Martínez Cobo, José. 1983. UN Doc. E/CN.4/Sub.2/1983/21/Add, p. 24

[24] GONZALO AGUILAR; THE CONSTITUTIONAL RECOGNITION OF INDIGENOUS PEOPLES IN LATIN AMERICA MAX PLANCK INSTITUTE FOR COMPARATIVE PUBLIC LAW AND INTERNATIONAL LAW(2010), p.50 n16, p.

1.2.3. Right to Land and the states development goals

The central element of indigenous people's right is the right to traditional land and their resources.[25] Though no legal system excludes the right of indigenous people to land, the existing legal frameworks are viewed as inadequate for the protection of the right to and of indigenous people and therefore indigenous peoples right to land requires special protection.[26] Still there are situations where development and protection of individual rights cannot go side by side, that there needs to be compromise between the two. One of the areas where this happens is where the state exercises its inherent power to carry out development works. The following shows this;

> "Territorial rights claimed by indigenous peoples could clash with the "eminent domain" right of a modern state. The state may allocate large tracts of land within its territory for development programs that would involve exploration and exploitation of natural resources such as minerals and water sources. Ironically, indigenous peoples' territories are usually the wealthiest places in term of natural resources, although they remain at the fringe of economic development."[27]

Perera in "International law and Indigenous Right" addressed this issue and tool a liberal approach towards solving the conflict between state development goals indigenous rights.[28] By liberal approach, reference is being made to the absence of cleat cut solutions suggested by the author. Among others, the positive approach of internati9obna law towards indigenous peoples' right to land and the emergence of various international

[25] Id at .58:

[26] Ibid

[27] Jayntha Perera: International law and Indigenous peoples rights,2009, p.30

[28] Ibid

instruments that have moral force on states to protect indigenous peoples right including the adoption of Human Rights council declaration on Indigenous peoples' right are pointed out.[29] Moreover, various procedural aspects in the process involved at the national level such as negotiation between the state and indigenous people are addressed.[30] However, the current trend towards settling the conflict between indigenous rights and state development program is settled almost all the time in favor of development. Thus the state is not pointed out upfront and no attempt to provide practical cases are made.

An important question yet to be asked include what level of special protection and how? In this regard, what is the current situation related to the protection of indigenous people's right? Do indigenous people have or do they need the same special protection? Current works do not question the need to specially protect indigenous peoples' right.

1.3. Collective rights v. indigenous rights

As pointed by Anaya, the inherent conflict (Dilemma) between collective rights and individual rights will be discussed with some depth to consider under which category Indigenous people's right to land best is exercised the answer to which is very obvious. "Collective or communal rights are considered as "common property" or "customary property" rights, which often are not part of national legal systems."[31] The weight of

[29] *Ibid.*

[30] *Ibid.*

[31] *Ibid.*

affording protection to the right to land of indigenous people is addressed by ILO committee in the following words:

> *"when communally owned indigenous land is divided and assigned to individuals or third* parties, this often weakens the exercise of their rights by the community or the indigenous peoples and in general the may end up in losing all or most of the land resulting in general reduction of the resources that are available to the indigenous peoples when they own their land communally (*Emphasis added*)."[32]

But do these reports take into account the development goals of each state counter-balancing indigenous peoples right is yet to be assessed?

1.3.1 Eminent Domain and Indigenous Peoples' Rights

The central element of indigenous people's right is the right to traditional land and their resources.[33] Though no legal system excludes the right of indigenous people to land, the existing legal frameworks are viewed as inadequate for the protection of the right to and of indigenous people and therefore indigenous peoples right to land requires special protection.[34] Still there are situations where development and protection of individual rights cannot go side by side, that there needs to be compromise between the two. One of the areas where this happens is where the state exercises its inherent power to carry out development works. The following shows this;

[32] Report of the Committee setup to examine the representation alleging nonobservance by Bolivia of indigenous and tribal peoples convention1989(No. 196), made under article 24 of the constitution of ILO, by Bolivian Worker Center(BOC), submitted 1989 :

[33] Ibid p.58:

[34] Ibid

> "Territorial rights claimed by indigenous peoples could clash with the "eminent domain" right of a modern state. The state may allocate large tracts of land within its territory for development programs that would involve exploration and exploitation of natural resources such as minerals and water sources. Ironically, indigenous peoples' territories are usually the wealthiest places in term of natural resources, although they remain at the fringe of economic development "[35]

1.3.2. Right to Land as Collective right

As pointed by Anaya, the inherent conflict (Dilemma) between collective rights and individual rights will be discussed with some depth to consider under which category Indigenous people's right to land best is exercised the answer to which is very obvious. Collective or communal rights are therefore considered as "common property" or "customary property" rights, which often are not part of national legal systems.[36] The weight of affording protection to the right to land of indigenous people is addressed by ILO committee in the following words:

> "when communally owned indigenous land is divided and assigned to individuals or third parties, this often weakens the exercise of their rights by the community or the indigenous peoples and in general the may end up in losing all or most of the land resulting in general reduction of the resources that are available to the indigenous peoples when they own their land communally".[37]

But do these reports take into account the development goals of each state counter-balancing indigenous peoples right is yet to be assessed? To the contrary, the writer is of

[35] Jayntha Perera: International law and Indigenous peoples rights,2009, p.30

[36] Ibid

[37] Supra Note 22

the view that with the emergence of globalization and technological advancement, it is not recently possible to promote efficient utilization of land unless the state gets primacy. It is a true that reclaims made by tribal groups was successful but with greater justification and proof that the land was to be put to communal use of comparable economic value(contrast being made to the purpose for which the state expropriated the land).[38] But in majority of the cases, it is not true that the indigenous people maintain communal ownership of land anymore. This point will be shown later in this work.

1.3.3 Remedial actions taken to resolve the conflict between states' development project and Indigenous peoples Right

Under this section, issues of important concern, with the assumption that the state's development goals and indigenous right conflict are that what remedies are available to rectify the problem arising from thee? Are those remedies effective? What did previous authors say about the question? For ease of discussion, the states' duty in case of carrying out development activity over indigenous peoples' land can be categorized as procedural and substantive. This classification does not emanate from any authoritative source; rather it is what the author resorted to based on the nature of the duties. Procedurally, the state owes the duty of consultation of indigenous people before taking any action affecting their rights. Substantively, the state is duty bound to restitute the land or pay adequate compensation. In other words, these are the corresponding rights of indigenous people. Let us see each of shortly as follows;

[38] *THE BAPHIRING COMMUNITY v. MATHHYS JOHANNES UYS et al*; LAND CLAIMS COURT OF SOUTH AFRICA, 5 December 2003,

The procedural rights of indigenous people is Free, prior, and informed consent of the concerned indigenous cultural community is a foremost requirement before any project may be introduced in any area covered by the ancestral domains.[39]. Under certain circumstance this right to consultation goes to the extent to of saying "no to development project."[40] An important point to be marked here is that a distinction is made between prior informed consent and consultation. 'Consent' is a concept that is clear to understand. It should mean that the indigenous group in question should be able to veto a project that, after a period of discussion, information gathering and consultation, it finds it cannot approve.[41] When we turn to 'consultation' instead, we find a truncated approach to the broad 'community consensus' each project is intended to secure. That is the main difference between free, prior, informed consent (FPIC) and free, prior, informed consultation (FPICon) the former implies an ongoing process requiring the latter.[42] If one stick to the FPIC, indigenous people have the right refuse development project that they do not wan to approve. On the other hand, consultation connotes that the state has simply the duty to consult but the ultimate decision resting only with it. In the latter case, consultation is a simple procedure which however, can have effect also on the substantive

[39] Supra note 25, p. 54

[40] Idbid.

[41] *Laura Westra*; Environmental Justice and the Rights of Indigenous Peoples International and Domestic Legal Perspectives(2008), p. 88

[42] Ibid.

remedies to be discussed later. In practice, states choose which terminology to use in their domestic law without however having practical legal significance.[43]

Substantive right of indigenous people includes the right to restitution or land or compensation.

> "Indigenous peoples have the right to the restitution of the lands, territories and resources which they have traditionally owned or otherwise occupied or used, and which have been confiscated, occupied, used or damaged without their free and informed consent. Where this is not possible, they have the right to just and fair compensation. Unless otherwise freely agreed upon by the peoples concerned, compensation shall take the form of lands, territories and resources equal in quality, size and legal status."[44]

However, since it is not always s possible to effect restitutions, the state may be compelled to pay compensations. This has been recognized by Permanent court in the *Factory at Chorzów* case when it said that the responsible State was under "the obligation to restore the undertaking and, if this be not possible, to pay its value at the time of the indemnification, which value is designed to take the place of restitution which has become impossible".[45] This is shows that the state gives the appropriate solution in the circumstances of the case. It is also an indication that the right to land of indigenous peoples is always ultimately determined by the state. This is in line with the assertion that

[43] Ibid 89, whether one or the other is used, states' simply attach the same meaning to it that the duty or the right is not absolute and state can derogate from them in both cases.

[44] Submission by Working Group established in accordance with Commission on Human Rights resolution 1995/32 of 3 March 1995 Indigenous Peoples' Right to Restitution (November 2005), p. 2

[45] Id at 4.

"Right to restitution is a "relative" right"[46] However, exiting works emphasis that the right to land of indigenous people should be given primacy to the extent possible. Review of existing works reveals that to the extent possible, human rights should be able to afford the maximum protection to the indigenous peoples' right to land. This includes both in the context of environmental protection and Human rights in general.[47] It will be clearly shown however in this thesis that there needs to be a paradigm shift from Pro-Indigenous system to Pro-development system based on the current socio-politically and economic situations at the international level and in the selected jurisdictions. A state should also adopt this approach for better utilization of land resource.

1.3.4. Conclusions

In line with this Thesis, excising works suggest that there is a need to give protection to indigenous peoples' right to land. Moreover, thus thesis concurs with the existing works in that Indigenous peoples right to land suffer from limitations thus is subject to eminent domain, with state's duty to make a restitution or adequate compensation. The thesis

[46]S.J. Toope, *Cultural Diversity and Human Rights (F.R. Scott Lecture)*, (1997) 42 McGill L.J. 169, at pp.
177-178:

[47] For this assertion, see See Anil Kalhan & Elisabeth Wickeri; Land Rights Issues in International Human Rights Law(2010),P. 10, Nancy Del Prado: Suriname An Analysis of Land Rights of the Indigenous Peoples and Maroons in Suriname: Adaptation of Legislation in Suriname(December, 2006), p. 77, S. James Anaya; Indigenous peoples in International Law, Oxford University Press(2000), p. 184

however deviates with the existing work on the degree of inclination towards one solution prevailing over the other. In particular, in the current socio-economic and political context the state should give primacy to development goals than to greater protection of Indigenous peoples' right to land.

Chapter –Two- Legal Regimes Governing Indigenous Peoples' Right to Land

2.1. Introduction

In this chapter, an inquiry into the place of indigenous peoples' right to land under the major international human rights conventions on the subject is made. The main objective of this chapter is to assess whether the rule enshrined in the legal instruments under consideration are sufficient to protect the rights of indigenous people to land and assess their enforceability and potential and actual successes and challenges to enforceability. In this thesis, even though the issues of ownership and possessory right to land of indigenous people are of greater debate and relevance to the topic, a focus will be made on the right of indigenous people after relocation or dispossession, whether the right affected is ownership or possession. This is with the assumption that whether it is possession or ownership right that is recognized, depending on the land right recognized by national states, relocation or dispossession is followed by and entails a legal consequence of the same nature. To this end, various rights of indigenous people Vis-à-vis the state is addressed. These include the right of consultation and participation of indigenous people and the right to restitution and compensation. The place of these rights under the ILO convention and the UN declaration on the rights of Indigenous people with the successes of and challenges to the enforcement of these rights is addressed.

2.2. ILO Convention on Indigenous and Tribal Populations[48]

ILO convention concerning indigenous and Tribal populations, convention No. 169 (hereinafter "Convention No. 169") amended the first convention i.e. convention 107[49], to specifically address the rights of indigenous people.[50] Convention No. 169 has been ratified by a number of states representing countries from Latin American African countries and the Middle East the total being twenty-seven countries.[51]

"Convention No. 107 was initiated and adopted following the ILO's concern with the situation of labor in Indigenous and tribal population up on its inception in 1919."[52] Following ILO'S studies on the situation of indigenous labor in 1921, Committee of Experts on Native Labor was established to come up with standard of protection of indigenous labor force in 1926.[53]. The work of this committee becoming the origin of many conventions and documents among which the 1953 ILO study concerning the living and working conditions of indigenous and tribal populations in all the parts of the world published by ILO was a notable document[54]. ''In 1957, during the 39th session of

[48] The convention was adopted in Geneva, on the 27th of may 1981 and came into force on the 5th of September 1991

[49] Convention No. 107, Concerning the Protection and Integration of Indigenous and other Tribal and Semi-Tribal Populations in Independent Countries, adopted in 1959.

[50] Alexandra Xanthi, Indigenous Rights and United Nations Standards: Self-determination Culture and Land, Cambridge University Press(2007) P. 69

[51] *Ibid.*

[52] *Id at* 49.

[53] *Ibid.*

[54] *Ibid.*

the International Labor Conference, the Committee on Indigenous Populations (Conference Committee) discussed the draft text of a convention and a recommendation relating to indigenous populations in independent countries."[55] "After receiving the replies of governments to a questionnaire, the International Labor Conference adopted at its 40th session the Convention concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries, No. 107 (Convention No. 107) and its accompanying Indigenous and Tribal Populations Recommendation (Recommendation No. 104)."[56] Article 12(2) of the convention specifically provides rights to fair consultation, participation in the benefits, and compensation for any damages sustained because of exploration and exploitation of sub-surface resources, which includes land.[57] It also establishes their right to be consulted and freely participate, at all levels of decision-making "in bodies responsible for policies and programmes which concern them"[58] As discussed above, convention 107 was revised by convention 169 due to its narrow protection to the right of indigenous people and focus on Integration of indigenous people. It was particular criticized for its focus on assimilationist approach.[59]

The brief account of the background of the convention shows that it mainly emanated from the desire to design standards of protection of the rights of indigenous labor forces.

[55] *Ibid.*

[56] Ibid.

[57] Supra Note 49, Art. 12(2).

[58] Id. Art. 6(1)

[59] UN, STATE OF THE WORLDS INDIGENOUS PEOPLES(NY,2009), P. 99

Nevertheless, the convention did not only focus on workers' right. It has far reaching provisions on the right to land of indigenous people. The link between indigenous labor force the land is very clear. For the effective protection of the right of labor force of the indigenous population, regulation of their right to land is ideally crucial. But what are the various provisions governing the right to land of indigenous people under convention No. 169 is the issue to be addressed in the following few paragraphs. More specifically, the place of particular aspects of Human Right to land as the right to consultation, the right to restitution and the right to post-settlement support in the convention are to be discussed.[60]

2.2.1. Right to Consultation and participation in development program

As established earlier in this thesis, indigenous people have the right to be consulted before any development project affecting their right to use their ancestral land is affected including the right to give or not to give pre informed consent and object to the project. [61] This right requires the state to make consultation with Indigenous people before it can implement the project in consideration affecting indigenous people. Several questions may arise in relation to this right. One of the questions that could possibly be asked is what happens if the indigenous people did not consent to the project. Would the government give up implementing the project? Alternatively, would it still insist? If yes, under what condition? How are these and other queries addressed under convention no. 169?

[60] This rights are identified in the 5th Economic and social Rights Report series, 2002/2003 financial year, The right to Land: South African Human Rights Commission(June 2004)

[61] See Supra Note 37 &38

As far as the right to consultation and participation in general are concerned, Article of Convention No. 169 clearly states as follows;

> "The peoples concerned shall have the right to decide their own priorities for the process of development as it affects their lives, beliefs, institutions and spiritual well-being and the lands they occupy or otherwise use, and to exercise control, to the extent possible, over their own economic, social and cultural development. In addition, they shall participate in the formulation, implementation and evaluation of plans and programmes for national and regional development which may affect them directly."[62]

By virtue of this provision convention No. 169 recognizes the right in outright way that the people have the right to decide the priorities that affect the land they occupy.[63] They have the right to "participate in the Formation, implementation and evaluation of the plans and programmers for national and regional development which may affect them directly".[64] This provision requires participation of the indigenous people from the very inception of plan or programme to the end including in evaluation and implementation.

As far as the right of consultation is concerned, Art. 15 of the convention which deals with informed consent of the people.[65] Article 15(2) reads as follows;

> "Where the relocation of these peoples is considered necessary as an exceptional measure, such relocation shall take place only with their free and informed consent.

[62] Art. 7(1), Convention concerning Indigenous and Tribal Peoples in Independent Countries, 1989

[63] Ibid.

[64] Ibid.

[65] Id, Article 15(2)

> Where their consent cannot be obtained, such relocation shall take place only following appropriate procedures established by national laws and regulations, including public inquiries where appropriate, which provide the opportunity for effective representation of the peoples concerned."[66]

This provision recognizes the worst scenario that could happen in case of government's implementation of development plan, i.e. the people might be required to relocate. Before relocation can take place however, the indigenous people should give their free and informed consent to that end.[67] As demonstrated earlier in this thesis, free and informed consent does require the state from abstaining to implement the plan against the will of the people. On the one hand it empowers the people to object to government project; on the other hand, it authorizes the state to implement projects against peoples' will. Thus, it is clear that in the majority of the cases, the writer believes, the will be dilemma. While the government wants to implement the plan, the people would reject it. Thus, there needs to be a breaking the tie rule in such a situation.

In concordance with the above discussion, the relevant part of this provision also presupposes that consent of the people may not be obtained in certain circumstances the remedy of which is to be provided by resort to relocation procedure established by the national law of each state.[68] Here, legal questions are yet to be answered. The most important question is what happens if the procedure for obtaining the consent of indigenous people is not followed by the government. Is there a forum to which any

[66] Ibid.

[67] Ibid.

[68] Ibid.

challenge of the non-fulfillment of the procedure can be brought and the decisions of the government can be nullified? Are the national states obligated to put in place such procedure under the convention be it judicial or Quasi-judicial or Administrative? The answer to these questions is negative under the convention. What does the procedures look like, if at all they exist, in the national laws of the states will be dealt with in the respective chapters dealing with the jurisdictions being compared? However, as an international convention, should convention No. 169 have done some thing more than for than leaving the detailed procedures of relocation to each state? The author believes that enshrining the detailed procedure in the convention itself might negatively affect the implementation of the conventions since member state should be given the liberty to set a procedure that meets the practical situation of its society. However, the convention should have incorporated an obligation to set a rule by way of minimal thresholds beyond which the state can but is not required to go.

2.2.2 The Right to Restitution and Compensation

Though the procedure for relocation of indigenous people from their land is determined by national laws,[69] there must be a ground for relocation. Such ground may be unfounded or unjustifiable or may cease to exist at some point in time i.e. either the relocation might have made without the consent of the people concerned because or even if the people might have given their consent, the ground of relocation might disappear.[70] Thus, the question remains what is the consequence of flawed relocation or cessation of the ground

[69] Ibid.

[70] Id. Art. 15(3).

for relocation. The right to restitution and compensation are recognized as one of the remedies in such situations.[71]

> "Indigenous peoples have the right to the restitution of the lands, territories and resources which they have traditionally owned or otherwise occupied or used, and which have been confiscated, occupied, used or damaged without their free and informed consent. Where this is not possible, they have the right to just and fair compensation. Unless otherwise freely agreed upon by the peoples concerned, compensation shall take the form of lands, territories and resources equal in quality, size and legal status."[72]

The right to restitution is the first solution given to loss of land right by indigenous people as can be seen from the above quote. However, if it is not possible to restitute the land itself to the indigenous people, indigenous people have the right to just compensation.[73] Just compensation could take a form of replacement land or Monterey payment or other resources depending on the circumstances of the case.[74]

Convention No. 169 recognizes the right to restitution and Just compensation. Art. 16(3) of the convention declare that "whenever possible, Indigenous peoples shall have the right to return to their traditional lands, as soon as the grounds for relocation cease to exist."[75] The literal reading of this provision indicates that Indigenous people have the

[71] Supra Note, 42.

[72] Ibid.

[73] Ibid.

[74] Ibid.

[75] Id, Art. 16(3)

right to return to their land when the grounds on which they have been relocated cease to exist. This does not however mean that they do not have the right to restitution in case of unjustifiable relocation where the ground still exist but not justified under the convention or the relevant national law. The convention is not clear in this regard however.

As for the right to just compensation, the convention recognizes that it is a solution of last resort. It establishes that "When restitution is not possible, Indigenous people shall be provided in all possible cases with lands of quality and legal status at least equal to that of the lands previously occupied by them, suitable to provide for their present needs and future development."[76] However, the convention requires priority to be given to the preference of the concerned people in choosing between compensation in kind and monetary compensation.[77] In any case, the compensation should fully compensate the relocated persons of their loss.[78] Based on the analysis of the convention, it can be concluded that it provides fairly sufficient framework of protection of indigenous people's rights. However, this does not mean that the convention is free from flaws.

"Among other things, the convention was adopted by several states that took into account the rights indigenous people as enshrined in the convention. Most states have revisited

[76] Id, Art. 16(4).

[77] Ibid, Last alinea.

[78] Id, Art. 16(5)

their domestic law and enacted legislations taking into account the right of indigenous People including constitutional changes".[79]

However, there still challenges to the full implementation of the convention. Some of the challenges follow from inherent nature of conventions that their implementation is highly subject to political commitment of the states though it is not totally devoid of any legal obligation. Moreover, the convention leaves certain aspects of its implementation to the signatory states. As pointed out earlier, the state determines restitution or compensation payable in case of relocation through the appropriate procedure established in the national law.[80] The problem with this rule is that states do not clearly set procedure to that end. Similarly, as pointed out above, the convention does not bring to the attention of the members the importance of procedures of challenging decisions of the government want of free and informed consent of the people of absence of justifiable ground.

"In its 2008 general observation on the Convention, the CEACR (Committee of Experts on the Application of Conventions and Recommendations) acknowledged that the establishment of appropriate and effective mechanisms for the consultation and participation of indigenous and tribal peoples regarding matters that concern them remain one of the main challenges in fully implementing the Convention in a number of

[79]S. James Anaya; Indigenous peoples in International Law, Oxford University Press(2000), P. 135-136

[80] See Supra Note 60.

countries."[81] In certain cases, while agencies have been established with responsibility for indigenous or tribal peoples' rights, they often contemplate little or no participation of these peoples, or have insufficient resources or influence.[82] For example, the key decisions affecting indigenous or tribal peoples are in many cases made by ministries responsible for mining or finance, with little, if any coordination with the agency responsible for indigenous or tribal peoples' rights.[83] As a result, these peoples do not have a real voice in the policies likely to affect them.[84]

2.3.1. UN Declaration on the Right of Indigenous people

The UN declaration on the rights of indigenous people(herein after "the UNDRIP") was adopted on 13th of September 2007[85] nearly after 22 years of negotiations between representatives of the world's 350 million Indigenous peoples and representatives of UN member countries, the United Nations.[86] This declaration is said to emanate from the

[81] REPORT OF THE INTERNATIONAL LABOUR ORGANIZATION Study by the Expert Mechanism on the Rights of Indigenous Peoples on: Indigenous peoples and the rights to participate in decision-making, sec. 5.

[82] Ibid.

[83] Ibid.

[84] Ibid.

[85] General Assembly Resolution, 61/295. United Nations Declaration on the Rights of Indigenous Peoples, 107th plenary meeting 13 September 2007

[86] Rainy Blue Cloud Greens elder(Ed), Towards a Campaign in support of the UN declaration on the Rights of Indigenous people: An international Forum for Globalization (August, 2, 2007) [Draft Report], p. 2

effort of indigenous people in the creation of an international standard of protection in the setting of the United Nations.[87]

> "After experiencing centuries of struggle with national governments who continued their colonialist attitude and conduct toward indigenous peoples, often not even granting them formal recognition in national laws, many indigenous leaders came to believe t it could be useful to create a tool to leverage support from *the international level* to help protect their collective rights as distinct peoples who existed before today's nation-states were ever formed".[88]

However the UN declaration on the Rights of the indigenous people might have come into existence, it is a declaration and as such, it does not have a binding status on member states.

2.3.2. The right to consultation and participation

As has been discussed above, the major focus of this thesis to show how indigenous people can affect the decision making of the government affecting their rights. One way to influence states action or decision is the right to participation and consultation. The UNDRIP also enshrines this right as follows;

> "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"[89]

[87] Id, p. 4

[88] Ibid.

[89] Supra Note 83, Art. 32(2).

In the same tone with the ILO convention, the UNDRIP calls on state parties to obtain free and informed consent before approving the implementation of any project affecting a land they occupy. This provision reiterates a principle enshrined under article 15(2) of the ILO convention 169 with some minor innovations, which however do not have practical significance. Moreover, the UNDIRP enshrined rule on protection of indigenous people from forcible removal from their land and bans relocation with their free, prior and informed consent.[90]

2.3.3. The Right to Restitution and compensation

The UNDRIP provided for the right to restitution and compensation in case of forcible relocation or confiscation.

> "Indigenous peoples have the right to redress, by means that can include restitution or, when this is not possible, just, fair and equitable compensation, for the lands, territories and resources which they have traditionally owned or otherwise occupied or used, and which have been confiscated, taken, occupied, used or damaged without their free, prior and informed consent."[91]

The UNDRIP clearly gives priority to choice of modality of the compensation to be made by the people concerned by indicating that unless expressly agreed up on by the people, the compensation should be in a form of replacement land or other resource of equal value.[92] Thus, the people concerned can choose whether they need to be compensated in replacement land or in monetary terms. "Unless otherwise freely

[90] Id, Art. 10.

[91] Id, Art. 28(1).

[92] Id, Art. 28(2).

agreed upon by the peoples concerned, compensation shall take the form of lands, territories and resources equal in quality, size and legal status or of monetary compensation or other appropriate redress."[93] In any case, the compensation must be fair, just and equitable.[94] These terms are not objective in indicating the amount of compensation. Put otherwise, what is just, fair, or equitable to one (to the government) may not be fair, just or equitable to others (the people).[95] That is why there needs to be an independent body that has an ultimate say in resolving issues related to the extent of compensation payable to the people. However, the declaration does not have a provision on such an organ.

2.3.4. What is changed under the Declaration?

One of the mains innovations of the UNRIP is said to be its recognition of the legal personality of indigenous people.[96] This is important for several reasons. One of them relevant to the topic at hand is that it can ease judicial process of challenging any decision affecting the rights of indigenous people. Sine access to justice through class action or public interest litigation might be procedurally burdensome in many countries and prohibitively so in some cases, recognizing the legal personality of indigenous people could facilitate easy and better access to justice.

[93] *Ibid.*
[94] Ibid.
[95] I am referring to the government and the people as they have conflicting claims.
[96] FABIANA DE OLIVIERA GODINOH, THE UNITED NATIONS DECLARATION ON THE RIGHT OF INDIGENOUS PEOPLES AND THE PROTECTION OF INDIGENOUS RIGHTS IN BRAZIL(Max Planck UNYB 12, 2008), at 247

As has been said however, the declaration does not have binding force and thus states parties to it are not bound to implement them into their national legal system or apply in court of law.[97] Thus, it has only normative force and can influence national legal systems.

2.4.1 The status of Convention No. 169 and the UNDRIP in the Jurisdictions Compared

Once again, it is to be noted that the UNDRIP does not have a biding force and is not subject to ratification by UN member states. In contrast, however, ILO convention is subject to ratification and implementation in domestic legal system.[98] The ratification of the ILO convention is found important for the several reasons. A ratification process starts with campaign for ratification, which could lead to awareness of the right of indigenous people and share commitment.[99] Moreover, Ratification promotes a common commitment-based ground for cooperation between the state and the indigenous people.[100] Since the ILO Supervises and technically assists member states, ensuring systematic and long-term follow up of implementation in the signatory states, ratification could pave the way to this.[101] In addition to the fact that a state that ratifies the convention is considered to have commitment to the protection of the rights of

[97] Id, at 248

[98] ILO: Equality Team of the International Labor Standards Department, ILO standards and the UN Declaration on the Rights of Indigenous Peoples**,** Information note for ILO staff and partners, p. 1.

[99] Ibid.

[100] Ibid.

[101] Ibid.

indigenous people by donors, ratification imposes a legal obligation on the state that can be judicially invoked.[102]

In the light of the above consideration, one of the jurisdictions under consideration i.e. Guatemala has ratified ILO convention.[103] Mexico that originally ratified convention 107[104] denounced convention 169 as of January 2003.[105] South Africa did not ratify this convention. What effect does South Africa's failure to ratify the convention and Mexico's denunciation of the convention have on the protection of Indigenous peoples right to land is to be considered later in this thesis?

2.4.2. Conclusion

The right of indigenous people to land is enshrined in a sufficient manner in international legal instruments. The ILO convention No. 169 and the UN Declaration on the rights of Indigenous peoples are two of the major international instruments providing for the Land Right of indigenous peoples. Two of the instruments recognize the right to ownership possession of land. More importantly, the two instruments provide for the obligation of the states obligation to obtain free and informed consent of the indigenous people to implement any plan or project affecting the lives of indigenous people. Moreover, the

[102] Ibid.

[103] See ILOEX on http://www.ilo.org/indigenous/Conventions/no169/lang--en/index.htm and Guatemala ratified it on 05:06:1996

[104] Ibid, the date of ratification was 05:09:1990

[105] ILO, ILO CONVENTION ON INDIGENOUS AND TRIBAL PEOPLES, 1989 (No. 169): A MANUAL (2003), P. 103.

right of indigenous people not to be displaced from the land is recognized in the two instruments. If this happens, the state has an obligation to pay the people concerned compensation. In both instruments, the indigenous people are given the choice of accepting either replacement land or other resource of equivalent value to Monterey compensation. However, both instruments failed to address procedure states should follow to obtain the consent of the people. Moreover, the issues of challenging decisions of the government on the implementation of projects are not addressed. This are left to be addressed by the national states. Thus, whether these procedures exist in the national legal systems under discussion is to be analyzed later in chapter three. As for the status of the instruments in the jurisdictions under consideration, Guatemala has ratified convention No.169 while Mexico has denounced and South Africa has never ratified it.

Chapter –Three - Comparison of the right to land of indigenous people in South Africa and Latin America

3.1. Introduction

Under this chapter, a comparison of indigenous people's right to land under the legal system of two of the jurisdiction from Latin America, i.e. Guatemala and Mexico on the one hand and South Africa on the other hand will be made. More specifically, the extent of protection to the right of indigenous people in the context of implementation of states development plan and programmers will be analyzed. Hence, the rights of consultation and participation and the rights of restitution and compensation will be the primary targets.

In order to have comprehensive analysis of the issues, brief discussions of the regional system of protection of the right of indigenous people in the selected jurisdictions will be analyzed. Thus, respective regional treaties and charters affecting indigenous people's right to land in the concerned jurisdictions will be the starting point. Moreover, the place of indigenous people's right to land on the constitutions will be dwelled up on, as the constitution is the supreme and primary law that greatly affects the implementation of treaties in domestic legal system.

The ultimate target in this chapter is to assess whether the rights enshrined in the international and regional instruments are implemented. Whether there are differences in the protection of indigenous people's right to land in the jurisdictions concerned and why? Whether remedies given to the indigenous community is proper under the all the jurisdictions compared? Moreover, what implementing agencies and judicial procedure are available in all the jurisdictions and how do they work? Are the solutions given in all the jurisdictions concordant to development policy of the states? For the sake of convenience, a discussion will start from South Africa and then will proceed to Guatemala and Mexico. However, since the right of indigenous people to land of states work under some regional legal instrument framework, discussion available regional legal instruments covered. Hence, the status of indigenous peoples right to land under the African Charter on Human and peoples right(the Banjul Charter)[106] and the Inter-

[106] OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), (Adopted 27 June 1981, entered into force 21 October 1986).

American charter on Human rights and the Inter-American Charter on Indigenous peoples right Covered.

3.2. African system of protection of indigenous peoples Right to land

The right of indigenous people to land is protected in African under the ambit of African Charter on Human and Peoples right(hereinafter: "the Banjul Charter")[107] and other International Legal instruments such as ILO convention of on the Rights of indigenous people depending on the status of such international instrument in the domestic law of the state. The Banjul Charter is designed for protection of human rights in general and as such is not concerned with the right of indigenous people. No single provision is dedicated for the right to of indigenous people in General or the Right to land in particular.

However, still the general provision related to property right can address the issues of indigenous people's right to land. Thus, the Banjul charter dictates the lawful recovery, with compensation, of dispossessed property, thus guaranteeing the right to property, not only to individuals but also indigenous people as a group.[108] Moreover, the Banjul Charter seeks to guarantee the right to "Property, stating that the right to property may only be encroached upon in the interest of public need or in the general interest of the community, and in accordance with the provisions of relevant laws."[109] Thus, the charter requires taking of land only for public interest or general interest and according to the

[107] Ibid.

[108] Id. Article 21(2).

[109] Id, Article 14

appropriate procedure. Thus, it is the writer's belief that South Africa does not have specific legal obligation pertaining to the right to land of indigenous people in the regional Human Rights instrument. Only a general obligation of protecting property right exists in Banjul Charter. In the absence of specific obligation coupled with the status of the ILO convention (South Africa being not signatory to the ILO convention) on the rights of Indigenous people, it will be seen how the Right to land of indigenous peoples is guaranteed and enforced in South Africa.

3.3. Inter-America system of protection of indigenous people's right to land

"In the Americas, the discussion with respect to the Indigenous people has advanced substantially due to the fact that in most countries of this continent at least 10% of the population is Indigenous."[110] It is pointed out that since the time of colonialism, the poorest life condition and marginalization of indigenous people in amongst the Latin American population is a fact of general knowledge.[111] In countries including Guatemala, which is of the jurisdictions under consideration, where the indigenous people constitute ethnic minority, facts of marginalization and exclusion includes from access to legal protection including the right to land.[112] Based on empirical research, it is found out that

[110] NANCY DEL PRADO: SURINAMEAN ANALYSIS OF LAND RIGHTS OF THE INDIGENOUS PEOPLES AND MAROONS IN SURINAME: ADAPTATION OF LEGISLATION IN SURINAME (December, 2006),p 45

[111] JOUNI PIRTTIJÄRVI IBERO, INDIGENOUS PEOPLES AND DEVELOPMENT IN LATIN AMERICA, American Center, University of Helsinki (1999), p. 4

[112] Ibid.

the great majority of indigenous people live in absolute poverty and of people living below poverty in Latin America, the quarter constitutes indigenous population.[113] In the light of these facts, what safeguards are provided in the regional human rights instruments to alleviate the situation of indigenous people's right to land? Thus, in the following sections, overview of the system of protection in the Latin America region is considered.

Talking of the right of indigenous people in the Latin American context, the starting point is the American declaration on the rights and duties on man, and the American Convention on Human Rights, the latter of which is the counterpart of the Banjul charter in Africa. Hence, in the context of Latin American system, Article XXIII of the American Declaration of the Rights and Duties of Man [herein after: "the American Declaration"] and Article 21 of the American Convention on Human Rights [herein after "the American Convention"] are the main sources of the right of indigenous people. [114] Article 21 of the American Convention and Article XXIII of the American Declaration protect this close bond between Indigenous people and land as well as with the natural resources of the ancestral territories, considering it as fundamental for the full enjoyment of the rights of indigenous people.[115] In this setting, the Inter-American Court has called up on stats to respect the special relationship between indigenous and tribal people to ensuring their

[113] Ibid, see the data for more details.

[114]Inter American Human Rights Commission, INDIGENOUS AND TRIBAL PEOPLES' RIGHTS OVER THEIR ANCESTRAL LANDS AND NATURAL RESOURCES Norms and Jurisprudence of the Inter-American Human Rights System (2009) P. 2.

[115] Id, at 20, n.136.

social, cultural and economic survival.[116] The recent move in the field of indigenous people's right is the initiation of the Inter-American Declaration on the Rights of Indigenous people.

3.3.1. Inter-American Declaration on the Rights of Indigenous Peoples[117]

Institutionally, at the regional level, the organization of American states (OAS), actively engaged in promotion of the right of indigenous people as a part of which Inter-American Commission on Human Rights prepared a draft American declaration on the rights of indigenous peoples, which was approved by the OAS IN 1997.[118]. Hence, in addition to the UN declaration on the rights of Indigenous people (herein after: "ADRID") which has normative force as it is not binding on states and the ILO convention on the rights of indigenous people, the Latin American system of protection of the rights of indigenous people surrounds the American declaration of the rights of man and the declaration on the rights of indigenous people, the latter of which is under analysis here. "In order to come to a declaration that is broadly supported, the OAS held consultations with special committees of Indigenous people at national, international and regional conferences in the preparatory phase."[119] The declaration, signed by significant number of states in

[116] Ibid, n.137.

[117] PERMANENT COUNCIL OF THE ORGANIZATION OF AMERICAN STATES, OEA/Ser.G CP/doc.2878/97 corr. 1, available at: http://www.summit-americas.org/Indigenous/Indigenous-Declaration-end.htm. It is to be noted that this Proposed Declaration was approved by the Inter-American Commission on Human Rights on February 26, 1997. It defines the term "indigenous peoples", and proclaims that these people possess all human rights, including right to land, to develop that land, the right to intellectual property, and labor rights.

[118] Id, p. 12.

[119] *Supra* note 107.

America, combines the UDRIP and the ILO convention.[120]. It is where the states came to recognize the need to take affirmative to afford special protection to indigenous people.[121]

3.3.1.2. Features of the Inter-American Declaration on the Rights of indigenous people

Compared to the UNDRIP and the ILO convention, then American declaration on the rights of indigenous people seem to be more resonant in providing for the rights of indigenous people. Below, brief overview of some of the important provisions in the declaration pertinent to the topic at hand is supplied.

Among others, the ADRIP recognizes indigenous people's right to legal personality.[122] Hence, article 4 of the ADRIP unambiguously calls for states to attribute legal personality to Indigenous people in their community.[123] "Moreover, ADRIP lay down that the people have the right to an effective judicial framework to protect their rights to natural resources, including the possibility to use, manage and to protect such resources establish procedures for participation of the Indigenous people."[124] As has been discussed earlier, one of the points to be inquired into is the availability of judicial proceedings to indigenous people against infringement in the context of land rights. Thus, the declaration under discussion has positive bearing in this regard.

[120] *Ibid.*

[121] Ibid.

[122] See *supra* note 107,

[123] Art. 4, ADRIP

[124] See *supra* note 107.

"Just as in the UNDRIP, the ADRIP, states that relocation or transfer will not take place than after the consent thereto of the people in question."[125] "In any case, this will be done with the prior compensation and immediate replacement of the land that has been taken, which shall be of an equal or better quality and which shall enjoy the same judicial status; and with the right to return if the causes that led to the relocation cease to exist."[126] "If restitution is not possible, the Indigenous land occupants have the right to compensation on a basis that is not less favorable than the standards pursuant to international law." [127]

In conclusion, it can be said that the ADRIP provides for fair framework of protection of the indigenous peoples right to land. As briefly analyzed above, the ADRIP establishes the right of indigenous people to prior and informed consent for relocation. In any case, indigenous people are entitled to restitution of they owned or possessed by them in case of forced relocation or absence the grounds of relocation. In case impossibility of restitution, compensation is made the last resort remedy.

[125] *Id,* at 47. Art. The ADRIP XVIII (6) declares that "States shall not transfer or relocate indigenous peoples except in exceptional cases, and in those cases with the free, genuine and informed consent of those populations, with full and prior indemnity and prompt replacement of lands taken, which must be of similar or better quality and which must have the same legal status; and with guarantee of the right to return if the causes that gave rise to the displacement cease to exist."

[126] Supra note 107, at 47, see also Art. The ADRIP XVIII (7) which states "Indigenous peoples have the right to the restitution of the lands, territories and resources which they have traditionally owned or otherwise occupied or used, and which have been confiscated occupied, used or damaged, or the right to compensation in accordance with international law when restitution is not possible".

[127] See Article, XVII(7) of ADRIP cited above

Two of the steps taken by this declaration is the fact that it provided in an explicit manner for the legal personality of indigenous people. This is important for public class action in court proceeding. The second point is its clear terms on the right of indigenous people to have access to judicial remedy. Even though this is a declaration and does not have binging for on stated, it has normative force. Moreover, states can use it as a policy guideline while enacting their laws. Compared to the African system of protection of indigenous people's right to land, the Latin American system is strong on the face due to the existence of this declaration and other conventions.

3.4. Domestic legislations on Implementation of Indigenous peoples Right in South Africa

It is noted in this thesis that a comparative analysis of rights of indigenous people is to be made by inquiring into the domestic legislation of the jurisdictions under consideration. The starting point for such an inquiry is the constitution. Discussions of other domestic legislations and analysis of practical cases is made. Here, since the thesis is aimed at bringing practical difference in the level of protection of the rights of indigenous people in the jurisdictions concerned by introducing relevant cases and practical data, it is of at most important to analyze if there were cases where there existed situations wherein indigenous people where able to pursue judicial or Quasi-Judicial remedy against the state on account of violation of their right to land. Hence, analysis of cases is necessary to that end.

3.4.1. Constitutional Recognition of Indigenous peoples Right to Land

South Africa has obligations under the constitution with respect to Indigenous peoples Right to land. These obligations emanate either from general duty of the state to ensure property right of the people or the right to land of indigenous people. According to Section 7(2) of the Constitution, these obligations include obligation to respect, Obligation to protect, and the obligation to promote and fulfill.[128] South Africa has an obligation to respect that right of access to Land in a sense that the State should not arbitrarily infringe the right to access to land, in any situation, except on the ground of general application of the law.[129] This entails not only the duty of inaction of states by not intervening in the right to access to land but also requires positive actions on the part of South Africa by facilitating favorable conditions under which persons in need of land will have access to it.[130] Without going into the details of the general right to access to land, it is crucial to see how the rights of participation and consultation, Restitution and compensation- which are the center of the analysis in this thesis- are recognized in the constitution.

3.5. Rights

1.1 All the efforts of recent years, including the very recent crystallized constitutional recognition of collective rights of indigenous peoples, have failed to consistently generate

[128] SOUTH AFRICAN HUMAN RIGHTS COMMISSION, THE RIGHT TO LAND: 5th Economic and Social Rights Report Series 2002/2003 Financial Year (2004), p. 40

[129] Ibid.

[130] Idid.

further decisions, actions and effects required to overcome and alleviate the heavy burden of damage that occurred and today mean more than 510 of continuous years of injustice, abuse, contempt, oversights and violations of the most basic human rights inherent to the indigenous population of the countries. This population remains clinging to the hope to live and live fully.

1.2 It should be recognized that the indigenous population not only have an international bill of rights[131], which is recognized in most of the countries of South Africa and Latin America, but there is also the Universal Declaration of Human Rights [132] and the laws in effect in the different countries where the right are equal because none of its clauses denotes the non-fulfillment of a right to be indigenous or tribal.

1.3 In the preamble of the Universal Declaration of Human Rights the following citation is made: "Whereas the peoples of the United Nations in the Charter reaffirmed their faith in fundamental human rights, the dignity and value of the human and in the equality in the rights of men and women and have determined to promote social progress and elevate the standards of life in a larger concept of freedom"[133].

[131] The United Nations Declaration on the Rights of Indigenous Peoples
Resolution adopted by the General Assembly, September 13, 2007.
[132] On December 10, 1948, the General Assembly of the United Nations adopted and proclaimed the Universal Declaration of Human Rights
[133] Preamble Universal Declaration of Human Rights

1.4 "Everyone has the rights and freedoms"[134] set forth in this Declaration, without distinction of race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status .

Furthermore, "no distinction shall be made based on the political, jurisdictional or international status of the country or territory to which a person belongs, whether it is an independent country, a Trust Territory, not autonomous or under any other limitation of sovereignty"[135].

The existence of laws in different countries that support the opportunity to access their own land and that the State guarantees the propitiation of improved living conditions is an opportunity to make arrangements for the tenancy of land. It has always been injustice and inequity in the treatment of indigenous and tribal population.

Indigenous peoples suffer the consequences of historical injustice, namely colonization, dispossession of their lands, territories and resources, oppression and discrimination, and lack of control over their own lifestyles. Colonial and modern States, in pursuit of economic growth, have largely been denied their right to development.

"As a result, indigenous peoples are losing out to more powerful actors and become the most impoverished groups in their countries"[136]. Which is why the "Right to Land" constitutes a utopia for indigenous peoples regardless of their level of development in the

[134] In reference to the preamble of the Universal Declaration of Human Rights.
[135] Universal Declaration of Human Rights Articles 1 and 2
[136] The Situation of Indigenous Peoples
http://www.un.org/esa/socdev/unpfii/documents/SOWIP_fact_sheets_ES.pdf
Produced by the Department of Public Information, United Nations, January 2010

country.There are international laws and treaties which express a common agreement that protects the country compliance with the performance of this vital law, as mentioned by the United Nations Declaration on the Rights of Indigenous Peoples in Articles 10 and 26:

Article10

"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 indigenous peoples concerned and after agreement on just and fair compensation and, where possible, the option of return. "

Article 26

"1. Indigenous peoples have the right to lands, territories and resources traditionally owned, occupied or otherwise used or acquired.

2. Indigenous peoples have the right to own, use, develop and control the lands, territories and resources which they possess by reason of traditional ownership or other traditional occupation or use, as well as those who have purchased otherwise.

3. States shall give legal recognition and protection of these lands, territories and resources. Such recognition due respect to the customs, traditions and systems of land tenure of indigenous peoples concerned.".[137]

[137] The United Nations Declaration on the Rights of Indigenous Peoples
Resolution adopted by the General Assembly, September 13, 2007, Articles 10 and 26

"States shall give legal recognition and protection of these lands"[138], also noting that there can be no *forced* mobilization or without their *consent* is why governments that are part of this statement should promote laws and legal actions to protect the ownership of the lands of indigenous peoples.

In order to protect the land tenure of indigenous peoples there are international treaties that shelter them, unfortunately the implementation and monitoring of these rights depends on the interpretation of justice in every country in Latin America where there are only 9 countries which in their constitutions or laws of the country, clarify laws and regulations in respect to indigenous peoples[139].

I conclude that the right to land by indigenous peoples is a right based on laws and treaties not only of countries and governments but also international bodies which look after the rights of indigenous peoples as well as all civilizations and cultures, *"human rights are international legal value, not because they correspond to abstract conceptions of what it means to be human, but because it is the monitor of the distributive justice of the structure and functioning of the international legal order"*[140].

[139] Database of the Americas. (1998) National sovereignty. Comparative analysis of constitutions of presidential regimes. [Internet]. Georgetown University and the Organization of American States. In: http://pdba.georgetown.edu/Comp/Estado/soberania.html#idx. Information updated databases to 2006)

[140] Article Summary Sheet: What is the International Law of Human Rights?
Patrick Macklem

3.5.1. The implementing agencies

Within the executing agencies of the laws and means by which indigenous peoples have access to decent lifestyles and living conditions are the local governments (in communities) in the first instance until vertically arriving at the government of each country. This is compounded by different NGOs that exist in each country in which its main focus is in the context of Human Development and working with indigenous and tribal populations.

Within these organizations interventions it was found that the majority of capital invested in indigenous people are constituted by NGOs and the governments of each country, creating a low contribution of the countries to improve the living conditions of these civilizations and cultures. No organization can ever replace the fundamental role of government so there must be public policies and laws that permit the timely intervention of indigenous people not as a tourism means of exploitation, but as human beings they represent and the proper conditions for residence and development of their families.

This is a major concern in terms of land tenure of indigenous peoples because of their limited conditions of access and development one of the more viable activities becomes agriculture and in other cases the management of minor species.

These processes are of easy intervention by the international organizations, but the bottleneck is in state intervention to provide land to the indigenous families that have no land of their own which means they rent, work and even the invasion of land in order to make their home and do their work of farming and agriculture.

It is recognized that in not owning land, it is impossible to have an homeownership or income and to maintain adequate production of the family, which brings as a consequence of high levels of malnutrition and infant death.

Among the contributions that the NGOs provide in reference to access to land by the indigenous peoples are the advocacy process implemented in the local governments for land management and worthy living spaces for indigenous people (as their country has the conditions in the case of Latin America), while for Africa these conditions become great differences. (See: 3.4.)

3.5.2 Brief comparison of indigenous people land rights in southern Africa and Latin America

As for the conditions conducive to the land rights of indigenous peoples in South Africa and Latin America, is context variables provided better conditions for the possession of land in Latin America since at least 75% of the total population lives in cities, agriculture remains an important subsistence activity in the region, this brings a significant contribution to the rural sector and other sectors of the economy and is driven mostly by indigenous farmers. [141]

Most laws and initiatives by trying to meet the objectives of achieving a just indigenous support for access to land and fair funding to boost its production will not have met

[141] World Bank, Main data of "Beyond the City: the Rural Contribution to Development" http://web.worldbank.org/WBSITE/EXTERNAL/BANCOMUNDIAL/EXTSPPAISES/LACINSPANISHET/

because of the lack of political will, also because of the excessive costs it represents and the social and political conflicts that originate from various sectors.[142]

Taking into account that these had little effectiveness in reducing inequality, in the increasing agricultural output and employment, and improving living conditions, the 90s was captured by land policy reforms that were market-oriented; this is due to the uneven economic model of the twentieth century.

The indigenous population has less access to obtaining resources to develop better economic capital and the ownership of land, whether by inheritance or purchase, from the 80s to this day programs of land reform land have been designed to facilitate land markets without the benefit of the indigenous population.

On the one hand in South Africa land tenure takes a different turn to be part of a racial segregation that has left one side to the black population, this situation would be resolved with a new agrarian reform which would bring about a total restructuring of the reform program.

In both continents there are high development opportunities, there are also conditions for proper exploitation of their land and access to them being themselves dependent on government power to monitor and provide advice to the treatment of land by indigenous groups, land access strengthens the participation of the poor in the labour market, also employment, housing and better living conditions.

[142] Law of agronomic reform, Honduras.

The international human rights law assigns to the states, clear and substantial obligations regarding the exploitation of natural resources in indigenous lands and territories: the Human Rights Committee UN has said that the freedom enjoyed by a state to promote economic development is limited by the obligations of that state under international law of human rights [143]; the Human Rights Commission has found that state policies and practice related to the exploitation of natural resources can not run inside a vacuum ignoring their human rights obligations[144], and also expressed in the African Commission on Human and Peoples [145] and other intergovernmental human rights bodies [146].

In other words, states have no right to justify violations of the rights of indigenous peoples under the pretext of national development. The basic principle, reaffirmed at the World Conference on Human Rights (Vienna 1993) states that:

"While development facilitates the enjoyment of all human rights, but the lack of development can not be invoked to justify the abridgement of internationally recognized

[143] Lansman et al. vs. Finland (Comunication No. 511/1992), CCPR/C/52/D/511/1992, 10

[144] Report on the Situation of Human Rights in Ecuador. OEA/Ser.L/V/II.96, Doc. 10 rev. 1 1997

[145] Comunication No. 155/96, The Social and Economic Rights Action Center and the Center for Economic and Social Rights / Nigeria, in paragraph. 58 and 69 (hereinafter 'the Ogoni Case') – "The intervention of multinational corporations could be a potentially positive force for development if the State and the people involved remained permanently alert to the common good and observance of the sacred rights of individuals and communities." (Non-official translation)

[146] Among others, see Committee on the Elimination of Racial Discrimination UN General Recommendation XXIII (51) on the situation of Indigenous Peoples. Adopted at the Committee's 1235th meeting of August 18, 1997. Doc. UN CERD/C/51/Misc.13/Rev.4.; and the UN Committee on Economic, Social and Cultural Rights, General Comment No. 7, The Right to Adequate Housing (Art. 11 (1) of the Agreement): forced evictions (1997). In Compilation of General Comments and General Recommendations adopted by bodies established under human rights treaties. UN Doc HRI/GEN/1/Rev.5, April 26, 2001, pps. 49-54, at para. 18 (hereinafter 'Compilation of general comments / recommendations').

human rights."[147] While the obligations of states that have traditionally been the focus of international law of human rights in contemporary law there is overwhelming evidence indicating that the obligation to respect human rights could be applied to non-state perpetrators including [17] multinational corporations. [148].

In addition, states have an affirmative obligation to take the necessary measures to prevent and exercise due diligence in response to human rights violations committed by natural persons, including[149] corporate entities. In addition, international financial institutions like the World Bank in its capacity as subjects of international law, are certainly obliged to respect the rules of customary international law and general

[147] Declaration and Programme of Vienna Action adopted by the World Conference on Human Rights on June 25, 1993, Part I, at para. 10. UN Doc A/CONF.157/23, July 12, 1993.

[148] Among others see, Rio Declaration on Environment and Development, UN Doc A/CONF.151/26 (Vol. 1) (1992) The Copenhagen Declaration and Programme of Action, Doc.UN A / CONF. 166 / 9 (1995); G.A. Res 42/115, February 11, 1988, The Impact of Property on the Enjoyment of Human Rights and Fundamental Freedoms, Human Rights Commission resolutions 1987/18 and 1988/19; Principles relating to the conduct of business on human rights. Working Paper prepared by Mr. David Weissbrodt. E/CN.4/Sub.2/2000/WG.2/WP.1, May 25, 2000, M. Addo (ed.), Human Rights Standards and the Responsibility of Transnational Corporations. The Hague: Kluwer Law International (1999); J.R. Paul, Holding Multinational Corporations Responsible Under International Law 24 Hastings Int'l. and Comp. Law Rev. 285 (2001), Patrick Macklem, Indigenous Rights and Multinational Corporations at International Law, 24 Hastings Int'l. and Comp. Law Rev. 475 (2001), and, B. Frey, The Legal and Ethical Responsibilities of Transnational Corporations in the Protections of International Human Rights, 6 Minn.. J. Global Trade 153 (1996)

[149] Inter-American Court of Human Rights, Velásquez Rodríguez Case, Judgement of July 29, 1988, Series C No. 4, para. 172 - "An illegal act which violates human rights and initially was not directly attributable to the State (for example, because it is an act made by a natural person or or the person responsible has not been identified) can lead to international responsibility of the State, not because the act itself, but because of the lack of due diligence to prevent the violation or to respond to it, as required by the Convention; "(unofficial translation) - Inter-American Commission on Human Rights, Case 7615 (Brazil). OEA/Ser.L/V/II.66, doc 10 rev 1 (1985), 33; Human Rights Committee of the UN, Communication No. 161/1983, Annual Report of the Committee on Human Rights 1988, 197 and 181 / 1984, Annual Report of the Committee on Human Rights 1990 (Vol. II), 37; Ogoni Case, at para. 58, European Court of Human Rights, Sunday Times Case, Judgement of April 26, 1979, ECHR, Series A, (Vol. 30), 318.

principles of international law, including those principles on human rights[150]. The International Court of Justice made specific reference to these obligations in the Agreement Case of the OMS. [151]

In short, without secure property rights and enforceable to the lands, territories and resources, the livelihoods of indigenous peoples are permanently threatened. Their lands and territories are basic resources and their "food basket." Lands and territories also represent the source among others, medicine, building materials and resources for the manufacture of household implements and other tools. Loss or degradation of land and resources results in the deprivation of the basics they need to survive and maintain an adequate quality of life.

The Special Reporter of the United Nations on indigenous land rights is also consistent with this argument, claiming default on the guarantee of the rights of indigenous peoples over their lands, significantly undermines their socio-cultural integrity and economic security: *"Indian companies from various countries are in a state of rapid deterioration and change due in large part because they have been denied their rights to lands, territories and resources."*[152]

[150] Entre otros, C.F. Amerasinghe, Principles of the Institutional Law of International Organizations. Cambridge: Cambridge University Press (1996), 240; H.G. Schermers y N.M. Blokker, International Institutional Law: Unity within Diversity (3rd Rev. Ed.) Martinus Nijhoff: The Hague (1995), 824 & 988; S. Skogly, The Human Rights Obligations of the World Bank and IMF. Cavendish: London, (2001), 84-87; P. Sands & P. Klein (eds.), Bowett's Law of International Institutions (5th Ed.), London: Sweet & Maxwell (2001), 458-59; y, F. Morgenstern, Legal Problems of International Organizations. Cambridge: Grotius Publications (1986), 32

[151] Interpretation of the Agreement of March 25, 1951 between OMS and Egypt. International Court of Justice, Reports of Judgments, Advisory Opinions and Orders (1980), 89-90.

[152] Indigenous people and their relationship to land, supra nota 3, en párr. 123

3.6. The main similarities and differences in protection

Indigenous and Tribal Populations in Latin America and South Africa have achieved significant progress in recent years compared to its previous situation in particular Latin America, where the indigenous sector has created opportunities for integration within government organizations with initiatives and proposals worked together with community-based indigenous communities,

The issue of rights of indigenous communities to lands, territories and resources has been addressed on numerous occasions by the intergovernmental bodies under human rights instruments of general application. With regard to economic and territorial self-determination, the Human Rights Committee of the UN stated that:

"The right to self-determination requires, inter alia, that all peoples may freely dispose of their natural wealth and resources and not be deprived of their means of subsistence (Art. 1 para. 2). . . . The Committee also recommends the abandonment of the practice of extinguishing inherent rights of indigenous peoples as incompatible with Article 1 of the Covenant "[153].

[153] Concluding Observations of the Human Rights Committee: Canada. 07/04/99, at para. 8. CCPR/C/79/Add.105 UN Doc. (Observations / comments) (1999). See also Concluding Observations of the Human Rights Committee: Mexico. UN Doc CCPR/C/79/Add.109 (1999), para. 19, Concluding Observations of the Human Rights Committee: Norway. UN Doc CCPR/C/79/Add.112 (1999), paras. 10 and 17, and Concluding Observations of the Human Rights Committee: Australia. 28/07/2000. CCPR/CO/69/AUS. (Observations / Comments), para. 8

Article 27 [154] of the International Covenant on Civil and Political Rights (ICCPR) [155] protects linguistic, cultural and religious, in the case of indigenous peoples, including, among others, the rights to lands and resources, subsistence and participation. [156] These rights are owned by individuals, but exercised "in community with other group members" (unofficial translation) by placing them in this way, a measure of community.

The Human Rights Committee interprets Article 27 includes the "rights of individuals, in community with others, to participate in economic and social activities that are part of the culture of the community to which they belong." [157] (non- official translation.) In reaching this conclusion, the Human Rights Committee acknowledges that the livelihoods of indigenous peoples and other traditional economic activities are an integral part of their culture and any interference with these activities can be detrimental to their cultural integrity and survival. In 1994, the Committee further elaborated the interpretation of Article 27, stating that:

[154] Article 27 reza: "In the States where ethnic, religious or linguistic minorities exist they will not be denied the right they have in common with the rest of the members of the group, to have their own cultural life, to profess and practice their own religion and use their own language."

[155] The International Covenant on Civil and Political Rights has been ratified by 149 States as of December 2002

[156] Bernard Ominayak, Chief of the Lubicon Lake Band vs.. Canada, Report of the Human Rights Committee, 45 UN GAOR Supp. (No.43), UN Doc A/45/40, vol. 2 (1990), 1. See also, Kitok vs. Sweden, Report of the Human Rights Committee, 43 UN GAOR Supp. (No.40) UN Doc A/43/40; vs.Canadá Lovelace (No. 24/1977), Report of the Human Rights Committee, 36 UN GAOR Supp. (No. 40) 166, A Doc.A/36/40 (1981). I. Lansman et al. vs. Finland (Communication No. 511/1992), supra note 4, J. Lansman et al. vs. Finland (Communication No. 671/1995), UN Doc CCPR/C/58/D/671/1995, and General Comment No. 23 (50) (art. 27), adopted by the Human Rights Committee in its session 131 (fiftieth session), April 6, 1994. CCPR/C/21/Rev.1/Add.5 UN Doc. Although not decided under Article 27, see also Hopuv. France. Communication No. 549/1993: France. 29/12/97. UN Doc CCPR/C/60/D/549/1993/Rev.1, December 29, 1997.

[157] Among others, Ominayak vs. Canada, Report of the Human Rights Committee, id. See also, A. Huff, Resource Development and Human Rights: A Look at the Case of the Lubicon Cree Indian Nation of Canada. 10 Colorado J. Int'l. Enviro. Law and Policy 161 (1999).

"As regards to the exercise of cultural rights protected by Article 27, the Committee observes that the 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. 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 effective participation of members of minority communities in decisions that affect them." [158]

Historically, land tenure systems in Latin America were based on private ownership and concentration of agricultural land in the hands of a few families and the existence of a large number of farming families or landless workers, either in what was called complex estates, smallholdings, or the plantation economy. The landowners had large tracts of land, of higher agricultural quality, while the peasants had very small holdings in marginal areas, forced to sell their labour power, also as a way to access more land.[159]

The agrarian reform processes of the '50s, '60s and '70s trying to change this inequity through expropriation and purchase of large estates and their redistribution to peasants with little or no land, usually in contexts political and social mobilization.

Several decades later, the effects of Agrarian Reform on the relations of production in agriculture, the development of a modern capitalist agriculture in terms of solving the problems of poverty and equity are still part of the debate. In several countries, large

[158] General Comment No. 23 (50) (art. 27), supra note 22, at 3

[159] (Lastarria-Sanjal Cornhiel and Melmed, 1998).
The land tenure in Latin America. The State of the Art Discussion Cris Van Dam Region, World Conservation Union (UICN)

farms have led to commercial agriculture and agro-industries that control the bulk of the production process, both for the domestic market and increasingly oriented to external markets.

Among the African peoples, it is clear that there are groups of people who have always lived where they are, who have struggled to maintain their culture, their language and way of life, and suffering from problems similar to those of indigenous peoples elsewhere, particularly when they are forced to leave their land, for example, problems of poverty, marginalization, loss of culture and language and the attendant problems of identity that often lead to social problems such as alcoholism and suicide. Because of these specific similarities, many people find it useful and convenient to consider such groups as indigenous peoples.

The hunter-gatherers of the forest (pygmies) living in the rainforests of central Africa, composed of many groups are threatened by conservation policies, logging, agricultural expansion, and by the political upheavals and civil wars. Generally found in the lowest rung of the social structure. It is ironic that modern conservation policies to protect species of animals and not groups of people hunting ban many of these hunter-gatherers [160]. Agrarian reform in the 70, 80 and 90 brought significant advances to the possession of land through land reforms more consistent benefit the indigenous and tribal peoples, but the process remains stalled.

There is a similarity between Latin America and South Africa this has been that indigenous peoples of both continents have begun to move towards to improve their

[160] El Fantasma del racismo, Conferencia Mundial contra el Racismo, http://www.un.org

living conditions with the support of international organizations that have provided monitoring compliance with international treaties and rights of the Indigenous peoples.

As indigenous and tribal peoples they have been discriminated against and taken away from their rights, have also expressed to the various governments in order to retrieve and access land.

In both continents there is international intervention, but the need is so big in Africa to eradicate hunger, malnutrition, water scarcity and other problems that have become a priority for these organizations, with similar cases in Latin America but on a smaller scale, providing an opportunity for training processes and non-formal education and influence public policies that benefit favourably the indigenous peoples by international support organizations.

3.7. Analysis of the effectiveness of the current right regimen of indigenous peoples to land proper use of the land

Effective systems of land tenure are crucial for efficient agricultural production, land use in a diverse and dynamic for sectional changes and rural development processes.

Should not focus only on economic efficiency, however, obscure the crucial role of land tenure and land policy of equity and social balance in Latin America and South Africa as well as environmental development consistent with the needs of indigenous and tribal peoples.

Through NGOs in Latin America and South Africa and other organizations such as the World Bank, have promoted advocacy processes that have led to greater access to land by

indigenous peoples as well as fair funding for the treatment of their land and the acquisition with the support of some sectors of government.

However, the system is inadequate and lacking in political will to do more intervention to fulfil the rights of the indigenous population. This process has become slow and costly, in most cases the government has no involvement therefore participating NGOs do not achieve in making more efficient the investments in indigenous communities.

When actions to provide equitable access to land to the indigenous communities are initiatives of the government of a country that promotes increased opportunities, to fulfil this goal, and major interventions by these development organizations. However the problem of land tenure continues to worsen.

One of the goals should focus on government level is to have a higher percentage of families that have land and create conditions that allow income to also access their own home. That they have planting conditions on the land, but also the technical support needed to foster in a greater way not only the production and income, but a change in living standards and human development.

Agrarian Reform Projects in Latin America and South Africa have not solved the problems of extreme inequality in land distribution, illegal occupation and destruction of natural resources by small farmers in fragile ecological systems. These problems are considered a time bomb in terms of economic efficiency, equity and environmental objectives.

Illegal occupation of vacant areas (often with the passive acceptance of government) is a safety valve in late agrarian reforms. Result arising for example, damage to the rainforest, a depletion of biodiversity and a threat to the global community. Indigenous communities are particularly more affected by land occupation and land conflicts. Illegal occupations in urban and suburban areas can lead to new disputes tenure systems of these lands.

The " neoliberal miracle " [161] so far failed to achieve in a larger scale, land reforms allow market-oriented to a significant proportion of the population opt for better access to land and consequently contribute to the solution of problems of tenure. Currently, groups of landless peasants led to protests and take action more militants, including for example the invasion of land (in the case of Central America).[162]

If current trends of legal insecurity persist, and conflicts over the use of resources worsen, activities will be prevented, such as foreign investment, they can contribute to economic and social development also limiting the same actions of local investment.

If there is efficiency in existing utility rights of indigenous and tribal peoples in Latin America and South Africa, the situation of inequality in land ownership would be lower, however the land tenure does not ensure that people can improve their living conditions no access to funding and educational training to promote production and income generation.

[161] The term **neoliberalism** is a neologism that refers to a technocratic economic policy and macroeconomic emphasis aims to minimize government intervention in economic and social matters, defending free-market capitalism as the best guarantor of institutional balance and the country's economic growth except in the presence of so-called market failures
Term taken from the DRAE Real Academia Española Dictionary.
[162]Law of Agronomic reform Honduras.

3.7.1. The main strength and weakness of the current system

The constitutionality of the State includes the constitution and respect for human rights and the division of state powers. The constitutionality of the state is based on a system of parliamentary independence, executive and judiciary, as well as respect for indigenous legal systems. As Europe's historical experience clearly demonstrates, public discussion of reforms in the legislation is crucial to the general acceptance of a new system of land tenure.

"Without the participation of all those affected by changes in the systems of land tenure, indigenous institutions and local knowledge can not be included in the process of change (reform), or will be able to obtain a abundant and legitimate acceptance by the people. Increased participation has to be accompanied by the decentralization [163] *and the further application of the principles of subsidiary. Only such participation can ensure that legal reforms reflect the complexity of economic and social interactions."*[164]

If formulated a new reform at government level for recognition of the needs of indigenous and tribal peoples should be made by all the powers of state and cooperating agencies, among them civil society plays an important role.

[163] *Decentralization: it can be understood as a process or method of operation of an organization. It involves transferring power from a central government to authorities that are not hierarchically subordinate. The relationship between Decentralised entities are always horizontal nonhierarchical. An organization has to make strategic and operational decisions* Term taken from the DRAE Real Academia Española Dictionary.

[164] UCT/GTZ/FILSA International Conference on the Development of Land Tenure in South Africa, Cape Town from 27 to 29 January 1998. http://www.gtz.de/lamin/

The neo-institutionalism economic demand [165] law, the establishment of land tenure (and / or natural resources) based on individual property rights and clearly defined community, as well as a legal and regulatory framework.

However, the current system does not encourage an environment conducive to a favourable resolution to the Indigenous village, which expresses their care needs and governments have short-term strategies which are not given any continuity.

The State may become the greatest strength of indigenous peoples, focusing on priority issues such as land tenure. Promoting public policies and decentralization processes they will benefit indigenous peoples in greatest need without affecting the entire society in general in the country. But today the state is constituted not as a strength but as a stumbling block to the development of indigenous people.

Concluding that the state has the entire organization, laws, systems and the ability to create constitutional reforms that could lead to the space required for land tenure for indigenous and tribal people with fairness and equity, but its main weakness focuses on the lack of social and political will for undertaking this recognition.

"There can be major difficulties with abundant good will" [166]

Niccolo Machiavelli (1469 - 1527)

The state constitutes the main strength of indigenous peoples and also its main weakness.

[165] The neo institutionalism reports that the rules that guide the behavior of agents in a society are fundamental in explaining economic performance.

[166] Niccolo Machiavelli (1469 - 1527) Diplomat, government official, philosopher, politician and writer Italian.

Conclusions and Recommendations

There is weakness of the indigenous community-based organizations and tribal decision-making from within the community that will provide timely solutions and alternatives in the development process driven by their own efforts.

Recognition of the right of indigenous peoples has been widely produced internationally, but has yet to develop State policies and laws within their specific legislation in order to realize the rights.

States are one of the most important roles in ensuring fairness in the enforcement of the rights of indigenous peoples.

The base welfarism as such to give land in the hands of indigenous and tribal peoples would not reflect impact of change in terms of living conditions of the population without proper advice from the government and partner organizations.

Supporting indigenous organizations is based on the interpretation of the law that each state discerning, creating an imbalance in compliance with the law of the indigenous and tribal peoples.

The fragmentation of government systems is a factor which hinders the formulation of laws for protection and support to indigenous and tribal peoples.

Governments and states have the responsibility to provide the necessary access to every individual to have a better standard and condition of life, regardless of religion, gender and race, therefore this opportunity must be accessible to indigenous and tribal people. .

Most managed lands are the richest in terms of natural resources, which are most coveted by others who have made buying unfair and taking names in their previous community.

The arrangements for the implementation of the rights and equitable treatment of indigenous people are being made only with NGOs in each country and international organizations by the Government there is still no clear and purposeful projection.

Every indigenous community needs governments help in other to achieve a higher efficiency percent in the utilization of the land. Machines, empowerment in agronomic tasks, seed capital, and constant technical assistance is necessary in order to have a productive indigenous community.

The relationship between the government and the indigenous community must not be a synonym of contradiction. If the assistance of the government is done in alliance and respect of the international treaties ratified by each third work country, there should not be any trouble with this economic relationship between this two.

In South Africa and Latin America the situation with the indigenous groups is not good in relation to the land proper utilization economically speaking. In the light of this, we should find solutions in order to achieve an economic rising of these indigenous communities.

Instead of creating domestic legislation that is not efficient because of the implementation, governments should try to work together with the endogenous groups to improve the lad utilization and mechanization. This involvement of the government should guarantee that these groups will have better conditions to work the land and to have better economic results. This cooperation should avoid any interruption of the indigenous cultural development, and respect every part of the indigenous cultural expression as and minority group.

Governments should avoid the creation of indigenous "land lords", in the sense of giving land to the indigenous without any technical assistance. This assistance will help their economic development and guarantee the better utilization of the land. When the government simply give lands to the indigenous groups as a given right, prescribe both in the constitution and the international legislation, with no technical and economic support, the percentage of economic development is lower.

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2. General Assembly resolution 2200A (XXI); ICCPR International Covenant on Civil and Political Rights; 23 March 1976

3. General Assembly Resolution, 61/295. United Nations Declaration on the Rights of Indigenous Peoples, 107th plenary meeting 13 September 2007

Regional instruments

1. OAU Doc. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), entered into force 21 October 1986

2. The inter-American Human Rights convention

2. Inter-American Declaration on the Rights of Indigenous Peoples 121, 255

Domestic laws

Guatemala

Agreement on Identity and the Rights of Indigenous Peoples (1995) 91

The constitutions of the two jurisdictions are the starting point of all comparisons

1. The constitution of South Africa
2. The constitution of

Cases

THE BAPHIRING COMMUNITY v. MATHHYS JOHANNES UYS et al; LAND CLAIMS COURT OF SOUTH AFRICA, 5 December 2003

Reports and Other documents

ILO: Equality Team of the International Labor Standards Department, ILO standards and the UN Declaration on the Rights of Indigenous Peoples**,** Information note for ILO staff and partners