CENTRAL EUROPEAN UNIVERSITY

Between Progress and Stagnation:

Environmental Rights of Indigenous Peoples

By

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Abstract

This thesis assesses progress and continuing challenges facing the contemporary indigenous rights movement in relation to the substantive right to own, use and occupy traditional lands. The articulation of collective environmental rights in terms of culture, property and self-determination is examined, and the scope of protections offered in a multi-level system is measured. Further, the mutually reinforcing dynamics of the multi-level system is elaborated upon as one court looks to another for guidance across international, regional and domestic contexts. The breadth of protections is first investigated on the international level, focusing on specialized instruments including soft law mechanisms, from a human rights-based approach as well as through international labor law and environmental law. Regional protections of the Inter-American and African Systems are then compared, focusing on jurisprudential developments and the extent to which regional systems may effectively ensure rights. Additionally, the degree to which international normative standards can shape domestic jurisprudence is analyzed, as well as precedential rulings with which domestic systems may provide indigenous protections in their own right. Beyond the cross-fertilization of progressive jurisprudence in the multi-level system, structural obstacles to rights protections are critically assessed. The backward-looking nature of human rights law is problematized in relation to the destruction of ancestral lands, and thereby culture, of indigenous peoples, calling for a greater emphasis to be placed on preventative action. Finally, the extent to which States may effectively provide for protections given the fact that activities of non-state actors pose the primary threat to indigenous rights is critically examined, concluding in the need for accountability on the part of non-state actors, and assessing advancements toward that end.

Contents

1 Introduction

The body of international human rights law and commentary regarding indigenous peoples has evolved at rapid pace through the last three decades of the 20th century. In the discourse on human rights protections of indigenous peoples, environmental rights are paramount due to the unique relationship this group has with the lands which they traditionally occupy, and a particular lifestyle associated with the use of their environmental resources.[1] Marginalization, discrimination and dispossession of indigenous populations have strong roots in the era of colonization, in which States legally considered land inhabited by indigenous peoples to be *terra nullius* – in essence, unoccupied.[2] These historical discriminations resulted in sweeping dispossession, requiring concrete protections and meaningful remedies.[3] However, violations of indigenous peoples continue to be a contemporary reality – due to myriad factors surrounding the often resource-rich regions in which indigenous peoples live, corporate interests and a frequent lack in state-recognized land title, indigenous peoples continue to be faced with dispossession, discrimination and marginalization. The efficacy of the indigenous rights movement in relation to environmental rights in the face of such historical, contemporary and future violations will be the over-arching focus of this paper.

1.1 **Defining Indigenous Peoples**

The term indigenous peoples does not articulate a single, universal definition but rather encompasses myriad variations across the globe, specifying particular characteristics for the

[1] Hendrik A Strydom, 'Environment and Indigenous Peoples', *Max Planck Encyclopedia of Public International Law* (Rüdiger Wolfrum 2010).
[2] Lillian Aponte Miranda, 'The Hybrid State-Corporate Enterprise and Violations of Indigenous Land Rights: Theorizing Corporate Responsibility and Accountability Under International Law' (2007) 11 Lewis and Clark Law Review 142.
[3] Robert K. Hitchcock, 'Endangered Peoples: Indigenous Rights and the Environment' (1994) 5 Colorado Journal of Environmental Law and Policy 6.

peoples in reference. In the early days of the indigenous rights movement the definition of indigenousness was linked to the notion of "existing descendents",[4] in the working definition for the first comprehensive study of indigenous peoples by Special Rapporteur Martinez-Cobo (1972). This pre-colonial understanding was quickly expanded within the broader context of historical continuity with traditional lands in the 1986/87 report by Martinez-Cobo:

> "Indigenous communities, peoples and nations are those which, having a historical continuity with pre-invasion and pre-colonial societies that developed on their territories, consider themselves distinct from other sectors of the societies now prevailing in those territories, or parts of them. They form at present non-dominant sectors of society and are determined to preserve, develop and transmit to future generations their ancestral territories, and their ethnic identity, as the basis of their continued existence as peoples, in accordance with their own cultural patterns, social institutions and legal systems."[5]

Further in the report, the definition elaborates the concept of historical continuity as including one or more of the following: occupying all or part of ancestral lands, shared ancestry with original inhabitants, culture in a broad sense, or specific manifestations including religion, language, and residence.[6] This definition has been further expanded through recent decades of jurisprudence to account for historical dispossession and transformative traditions, which will be discussed in subsequent chapters in this thesis.[7]

Convention 169 of the International Labour Organization[8] (ILO) contains a legally binding definition of indigenous peoples,[9] utilizing the terms *indigenous* as well as *tribal*, and

[4] José R. Martinez Cobo, 'Study of the Problem of Discrimination against Indigenous Populations, Preliminary Report' (Sub-Commission on Prevention of Discrimination and Protection of Minorities 1972) E/CN.L/Sub.2/L.566 para 34.
[5] José R. Martinez Cobo, 'Study of the Problem of Discrimination Against Indigenous Populations Vol. 5' (Sub-Commission on Prevention of Discrimination and Protection of Minorities 1987) E/CN.4/Sub.2/1986/7/Add.4. para 379.
[6] Ibid 380.
[7] See Chapter 4 on domestic jurisprudential developments
[8] International Labour Organization (ILO), *Indigenous and Tribal Peoples Convention, C169*, 27 June 1989, C169, available at: http://www.refworld.org/docid/3ddb6d514.html [accessed 16 November 2014].

places key importance on self-identification as indigenous – a concept that has taken precedent in the most recent decades of the indigenous rights movement.[10] Within the United Nations, the following defining features have been repeatedly invoked, as reflected in the fact sheet of the United Nations Permanent Forum on Indigenous Issues:

> "Self- identification as indigenous peoples at the individual level and accepted by the community as their member.
> Historical continuity with pre-colonial and/or pre-settler societies
> Strong link to territories and surrounding natural resources
> Distinct social, economic or political systems
> Distinct language, culture and beliefs
> Form non-dominant groups of society
> Resolve to maintain and reproduce their ancestral environments and systems as distinctive peoples and communities."[11]

Further to defining indigenous peoples, cultural and spiritual dependency on the land is articulated by numerous human rights bodies as well as legally binding and guiding documents. This is exemplified by the Office of the High Commissioner of Human Rights in Leaflet no. 10:

> "The link between culture and environment is clear among indigenous peoples. All indigenous peoples share a spiritual, cultural, social and economic relationship with their traditional lands. Traditional laws, customs and practices reflect both an

[9] Ibid.
"1. (a) Tribal peoples in independent countries whose social, cultural and economic conditions distinguish them from other sections of the national community, and whose status is regulated wholly or partially by their own customs or traditions or by special laws or regulations; (b) peoples in independent countries who are regarded as indigenous on account of their descent from the populations which inhabited the country, or a geographical region to which the country belongs, at the time of conquest or colonisation or the establishment of present state boundaries and who, irrespective of their legal status, retain some or all of their own social, economic, cultural and political institutions.
2. Self-identification as indigenous or tribal shall be regarded as a fundamental criterion for determining the groups to which the provisions of this Convention apply.
3.The use of the term peoples in this Convention shall not be construed as having any implications as regards the rights which may attach to the term under international law."

[10] E.g. see the '2008 United Nations Development Group Guidelines on Indigenous People's Issues' <http://www2.ohchr.org/english/issues/indigenous/docs/guidelines.pdf> accessed 22 September 2014.

[11] 'Fact Sheet: Who Are Indigenous Peoples?' (United Nations Permanent Forum on Indigenous Issues) <http://www.un.org/esa/socdev/unpfii/documents/5session_factsheet1.pdf>.

> attachment to land and a responsibility for preserving traditional lands for use by future generations."[12]

It additionally stresses that the "…physical and cultural survival of indigenous peoples is dependent upon the protection of their land and its resources".[13]

The above represent defining characteristics at the forefront of the indigenous rights movement. The importance of a non-singular definition lies in the vast variety of indigenous peoples across the world and their unique corresponding historical and contemporary situations of discrimination and marginalization – a singular definition would risk exclusion or over-inclusion, and therefore identification as opposed to definition is the predominant legal norm.[14] However, it must be noted that the lack of definition has proved contentious in relation to the concept of self-determination and sovereignty of State – a blockade which has produced resistance in international and regional mechanisms and the broader indigenous rights movement.[15]

Due to the aforementioned variance in characteristics of indigenous peoples, regional specifications are crucial to indigenous rights and jurisprudence. For instance, the African position utilizes a broader concept of the term "indigenous", as it considers that all Africans are "first peoples"[16] to the continent, as they were prior occupiers to colonialism.[17] However not all

[12] 'Leaflet No. 10: Indigenous Peoples and the Environment' (Office of the High Commissioner of Human Rights) <http://www.ohchr.org/documents/publications/guideipleaflet10en.pdf>.
[13] Ibid.
[14] 'Indigenous and Tribal Peoples' Rights Over Their Ancestral Lands and Natural Resources: Norms and Jurisprudence of the Inter-American Human Rights System' (Inter-American Commission on Human Rights 2010) OEA/Ser.L/V/II. Doc. 56/09 9 <http://www.oas.org/en/iachr/indigenous/docs/pdf/AncestralLands.pdf>.
[15] Willem van Genugten, 'Protection of Indigenous Peoples on the African Continent: Concepts, Position Seeking, and the Interaction of Legal Systems' (2010) 104 American Journal of International Law 6.
[16] The term "first peoples" is another term for "indigenous", specifying original occupation of a particular area, prior to invasion by other countries or ethnic groups, such as conquests or colonialism.
[17] 'Advisory Opinion of the African Commission on Human and Peoples' Rights on the United Nations Declaration on the Rights of Indigenous Peoples' (2007) 41 1.13 <http://www.achpr.org/files/special-mechanisms/indigenous-populations/un_advisory_opinion_idp_eng.pdf>.
"Moreover, in Africa, the term indigenous populations does not mean "first inhabitants" in reference to

African people have unique customs, political systems, religious practices, and a relationship to the land which marks prominent cultural differences from the dominant society.[18] These characteristics must be delicately articulated and limited, and the inclusion of regional definitions is therefore paramount to the term.

Parallel to the lack of a singular definition, there are in fact multiple terms used that carry an overlapping meaning to *indigenous*. These terms include but are not limited to, first peoples, first nations, tribal peoples, native peoples, aboriginals, and adivasi janajati.[19] For the purposes of this paper, I will use the term "indigenous", due to its prominence in international law.

The collective description of indigenous peoples has also transformed through the decades. The Working Group on Indigenous Populations has chosen to use the term *populations*, officially, and the Convention on Biological Diversity has opted for *communities.*[20] There has been further debate between the use of *people* and *peoples* – while the former term dominated much of the rhetoric in the 1980s and 1990s, there has been a growing usage of the latter, which solidifies the collective aspect of indigenous rights, as well as an often contentious dimension of self determination.[21] The most recent declarations on the subject, the United Nations Declaration on the Rights of Indigenous Peoples[22] and the draft American Declaration on the Rights of

aboriginality as opposed to non-African communities or those having come from else-where. This peculiarity distinguishes Africa from the other Continents where native communities have been almost annihilated by non-native populations. Therefore, the ACHPR considers that any African can legitimately consider him/herself as indigene to the Continent."
Note: Section 12 therefore outlines specific criteria for identification beyond the concept of "first inhabitants", which are synonymous with the criteria listed in this section.

[18] African Commission on Human and Peoples' Rights (ACHPR), 'Indigenous Peoples In Africa: The Forgotten Peoples?' (2006) 10 <http://www.achpr.org/files/special-mechanisms/indigenous-populations/achpr_wgip_report_summary_version_eng.pdf>.

[19] 'Fact Sheet: Who Are Indigenous Peoples?' (n 11).

[20] Patrick Thornberry, *Indigenous Peoples and Human Rights* (Manchester Univ Pr 2003) 40.

[21] Ibid 41.

[22] UN General Assembly, United Nations Declaration on the Rights of Indigenous Peoples 2007 [A/RES/61/295].

Indigenous Peoples[23] exemplify the emerging trend toward the usage of *peoples* as standard in international law.

1.2 **A Brief History of the Indigenous Rights Movement**

Indigenous populations comprise up to 370 million individuals – approximately 6% of the world's total population,[24] yet for nearly three decades, the 1957 International Labour Organization Convention No. 107 (C107)[25] was the only international legal instrument which specifically addressed rights of indigenous peoples, with the primary aim of affording rights and protections to unpaid indigenous workers, and it was ratified by less than 30 countries.[26] In the 1960s, the contemporary indigenous rights movement started to gain momentum when indigenous peoples across Australia, New Zealand and the Americas, began to vocalize their specific needs for the survival of their unique communities in an international context. The greater prominence of indigenous issues in the international arena led to the commission of a report by Special Rapporteur Jose Martinez Cobo, of the UN Sub-Commission on the Prevention of Discrimination and Protection of Minorities, to conduct an extensive global study on discrimination experienced by indigenous peoples.[27]

By the 1970s indigenous representatives had carved out a place for themselves in international conferences and had gained consultative status within the United Nations.[28] A

[23] Inter-American Commission on Human Rights, Proposed American Declaration on the Rights of Indigenous Peoples 1997 [OEA/Ser/L/V/.II.95 Doc.6].
[24] Robert K. Hitchcock (n 3); Hendrik A Strydom (n 1).
[25] Convention No 107 Concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries 1957 (328 UNTS 247 entered into force 2 June 1959).
[26] Robert K. Hitchcock (n 3) 6.
[27] José R. Martinez Cobo, 'UN Doc. E/CN.4/Sub.2/1986/7/Add.4' (n 5); Megan Davis, 'Indigenous Struggles in Standard-Setting: The United Nations Declaration on the Rights of Indigenous Peoples' [2008] Melbourne Journal of International Law 439. See also Rhiannon Morgan, *Transforming Law and Institution: Indigenous Peoples, the United Nations and Human Rights* (Ashgate Publishing, Ltd 2011).
[28] Today these organizations include the Consejo Indio de Sud-América (CISA, Four Directions Council, Grand Council of the Crees (of Québec), Indian Law Resource Center, Indigenous World Association, International

turning point came during the 1977 International Non-Governmental Organization (NGO) Conference Against Discrimination in the Americas[29] which established a unified indigenous movement inclusive of indigenous populations from diverse locations across the world.[30] The advocacy and lobbying efforts of indigenous representatives, supported by scholarly literature affirming the applicability of rights claims,[31] finally translated into a comprehensive legal document, when in 1989 the ILO drafted Convention No. 169[32] concerning Indigenous and Tribal Peoples in Independent Countries to replace its assimilationist predecessor C107. This was followed by the 1992 Convention on Biological Diversity,[33] which elaborated on the traditional dependence of indigenous peoples on biological resources. Then, in 1995 began two consecutive International Decades of the World's Indigenous People,[34] culminating in the United Nations Declaration on the Rights of Indigenous Peoples (DRIP) in 2007.[35]

Regional and domestic protections have paralleled the growth of the international indigenous rights movement. On a supranational level, indigenous peoples were historically recognized as a vulnerable group within the Inter-American system as early as 1948 with Article 39 of the Inter-American Charter of Social Guarantees[36], adopted at the same time as the

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Indian Treaty Council, International Organization of Indigenous Resources Development, Inuit Circumpolar Conference, National Aboriginal and Islander Legal Services Secretariat, National Indian Youth Council, the Saami Council, and the World Council of Indigenous Peoples. Anaya, S. James, *Indigenous Peoples in International Law*, Oxford University Press, USA; Second Edition, 2004, 62

[29] Organized by the NGO Sub-Committee on Racism, Racial Discrimination, Apartheid and Colonialism

[30] S James Anaya, *Indigenous Peoples in International Law* (2 edition, Oxford University Press 2004) 62.

[31] Ibid 46.

[32] Convention No 169 Concerning Indigenous and Tribal Peoples in Independent Countries 1989 (1650 UNTS 383 entered into force 5 September 1991).

[33] Convention on Biological Diversity 1992 (GA res 49/117, 49 UN GAOR Supp (No 49) at 143, entered into force Dec 29, 1993).

[34] 'Leaflet No. 7: The International Decade of the World's Indigenous People' (Office of the High Commissioner of Human Rights) <http://www.ohchr.org/Documents/Publications/GuideIPleaflet7en.pdf>.

[35] UN General Assembly United Nations Declaration on the Rights of Indigenous Peoples (n 22).

[36] International Conferences of American States, Second Supplement, 1942-1954, Washington, D.C.: Pan American Union, 1958, 262.

American Declaration of the Rights and Duties of Man.[37] The American Convention on Human Rights[38] and American Declaration on the Rights of Man do not specifically mention indigenous peoples, however, both documents include provisions protecting traditional lands and resources of indigenous communities through articles affirming the right to integrity of culture, property, and physical well-being. These provisions have been interpreted as affirming environmental rights of indigenous people based on historical and traditional patterns of use and occupancy.[39] Further, over the past two and a half decades, the Inter-American system has progressed toward an American Declaration on the Rights of Indigenous Peoples,[40] which has faced similar obstacles as the United Nations DRIP, and is currently in draft form.

Additionally, while the African Charter on Human and Peoples Rights[41] (1981) does not specifically address the rights of indigenous peoples, its scope is inclusive of indigenous rights, as shown by the report from the Working Group on Indigenous Populations/Communities in Africa (AWGIPC) in 2000 which interpreted Article 21 – the right to natural resources, as relating to indigenous communities.[42] On a domestic level, countries such as Canada, Finland, Australia, Brazil and the Philippines have adopted legal measures for securing indigenous land rights, or have legal procedures in place for addressing indigenous land-related issues.[43]

[37] Inter-American Commission on Human Rights (IACHR), *American Declaration of the Rights and Duties of Man*, Approved 10 December 1948.
[38] American Convention on Human Rights, 'Pact of San Jose', 1969 (Entry into force: 18 July 1978).
[39] S. James Anaya, Robert A. Williams Jr., 'The Protection of Indigenous Peoples Rights Over Lands and Natural Resources Under the Inter-American Human Rights System' (2001) 14 Harvard Human Rights Journal 6.
[40] Inter-American Commission on Human Rights Proposed American Declaration on the Rights of Indigenous Peoples (n 23).
[41] African Charter on Human and Peoples' Rights ('Banjul Charter') 1981 (CAB/LEG/67/3 rev 5, 21 ILM 58 (1982)) *entered into force* Oct. 21, 1986.
[42] Gaetano Pentassuglia, 'Indigenous Groups and the Developing Jurisprudence of the African Commission on Human and Peoples' Rights: Some Reflections' (2010) 3 UCL Human Rights Review 150, 153.
[43] 'Leaflet No. 10: Indigenous Peoples and the Environment' (n 12).3.

Additional countries have amended their constitutions to recognize indigenous peoples' right to own, occupy and enjoy their native lands.[44]

As discussed above, during the human rights "boom" from the 1970s through the 1990s, immense progress was made on an international stage as regards environmental rights protections afforded to indigenous peoples, which has had a trickle-down effect to regional and domestic systems. These systems interact in a complex interplay, providing different layers of protection. Additionally the intersection between human rights and environmental protections increases the density of protection, contributing to the development of customary standards. These standard-setting instruments which will be reviewed have both binding and non-binding norms on States, leaving gaps in the protections available for indigenous peoples. While in the 70s the need for indigenous rights emerged as a strong voice that would shape numerous international instruments, these instruments do not have the sweeping protections of their original aims. The United Nations Declaration on the Rights of Indigenous Peoples was held in draft for nearly two decades due to the objectionist nature of a few powerful States, and there is a similar trend in regional instruments.[45]

I will therefore examine in my thesis the feasible protections offered by these varying systems and critically assess whether the movement that began with such momentum has plateaued. I will be addressing the history of environmental rights for indigenous peoples in an international framework and examine global norms in international human rights law, international labour law and international environmental law pertaining to indigenous rights over the environment. In addition, I will analyze the protection offered by regional mechanisms, focusing on the Inter-American and African systems. The inquiry into regional systems of

[44] Ibid.
[45] See in particular, Section 3.1.1. on the Draft American Declaration on the Rights of Indigenous Peoples

protection will be followed by an analysis of the abilities of States to elaborate international and regional standards within domestic jurisprudence. Finally, I will discuss structural obstacles to an effective future protection of indigenous rights by re-thinking the State-centric approach to indigenous protections, and by framing the problematic nature of reparations in the context of indigenous rights, highlighting the need for preventative action.

2 International Environmental Rights of Indigenous Peoples

In the last half century, the International Indigenous Rights Movement has developed norms in both soft and hard law instruments. The following will survey standards of protection as provided for by international human rights instruments, as well as international labor law and environmental law, in an effort to assess the overall normative framework on environmental rights of indigenous peoples.

2.1 International Human Rights Standards

The right of indigenous peoples to enjoy and occupy their traditional lands, enjoy their natural resources, and participate in traditional subsistence activities such as hunting and fishing fall under two primary rights in international law; firstly, the right to self-determination and secondly, the right to enjoy and participate in one's own culture. Collective rights to property,[46] resources and stewardship are considered elaborative norms under these umbrella rights.[47]

2.1.1 International Covenant on Civil and Political Rights

The International Covenant on Civil and Political Rights[48] (1966) forms one part of the 'International Bill of Human Rights'.[49] This Covenant has proved to be extremely influential in furthering the progress environmental rights of indigenous peoples. The key protections can be found in two articles. Article 1 establishes the right to self-determination, providing for the free determination of political status and the pursuit of economic, social and cultural development. While it does not fall under the optional protocol for individuals to bring complaints to the

[46] Lillian Aponte Miranda (n 2) 147–148.
[47] Anaya (n 30).
[48] UN General Assembly, International Covenant on Civil and Political Rights 1966 [U.N. Doc. A/6316] United Nations Treaty Series vol. 999 p. 171. *entered into force* Mar. 23, 1976
[49] The International Bill of Human Rights consists of the following: the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights, and the International Covenant on Civil and Political Rights along with its two Optional Protocols.

Human Rights Committee, Art. 1 maintains significance for the interpretation of additional rights under the Covenant. In particular, the cultural integrity norm under Article 27 guarantees cultural and religious rights to persons of ethnic, linguistic, or religious minorities, which is the key article dealt with in indigenous land rights cases brought before the Human Rights Committee.[50]

Through General Comment 23[51] under the ICCPR, the Human Rights Committee (HRC) elaborates the interpretation of Art. 27, a necessity brought about through its jurisprudence relating to effective participation and cultural dependency on land, resources, and economic activities:

> "With regard to the exercise of the cultural rights protected under article 27, the Committee observes that culture manifests itself in many forms, including a particular way of life associated with the use of land resources, especially in the case of indigenous peoples. That right may include such traditional activities as fishing or hunting and the right to live in reserves protected by law. The enjoyment of those rights may require positive legal measures of protection and measures to ensure the effective participation of members of minority communities in decisions which affect them."[52]

Additionally, in points 3.1 and 3.2, the HRC articulates the difference between Art. 1 of the ICCPR and Art. 27, a point of contention in the *Ominayak* case, clarifying indigenous protections that had not been previously elaborated.[53] The HRC also importantly expands upon the negative phrasing of Art. 27:

> "Although article 27 is expressed in negative terms, that article, nevertheless, does recognize the existence of a "right" and requires that it shall not be denied. Consequently, a State party is under an obligation to ensure that the existence and

[50] Anaya (n 30). 134.
[51] Human Rights Committee, CCPR General Comment 23: Article 27 (Rights of Minorities) 1994 [CCPR/C/21/Rev.1/Add.5].
[52] CCPR/C/21/Rev.1/Add.5, 7.1.
[53] Ibid. See paragraphs 3.1 and 3.2 in particular

> the exercise of this right are protected against their denial or violation. Positive measures of protection are, therefore, required not only against the acts of the State party itself, whether through its legislative, judicial or administrative authorities, but also against the acts of other persons within the State party."[54]

2.1.1.1 Jurisprudence under the Optional Protocol of the ICCPR

The scope of protections offered to indigenous interests has also been shaped by the jurisprudence of the United Nations Human Rights Committee. The landmark case of *Kitok v. Sweden*[55] involves the loss of membership within a Sami village due to pursuing other economic activities for a period of three years, and thereby, resulting in the loss of reindeer herding rights by the applicant, Ivan Kitok.[56] While a violation was not found due to the applicant's continued access to reindeer herding, the HRC forged a jurisprudential development in which economic regulation has cultural dimensions, including traditional activities of hunting, fishing and farming.[57] The Committee stated, "The regulation of an economic activity is normally a matter for the State alone. However, where that activity is an essential element in the culture of an ethnic community, its application to an individual may fall under article 27 of the Covenant."[58] However, while the HRC did not find a violation of Art. 27, it was concerned with the implications of several articles under the Reindeer Husbandry Act, under which the applicant lost his herding rights, and its assimilationist potential for the Sami majority.[59]

The cultural-economic relationship was further elaborated in *Ominayak*, which will be discussed below, and in *Lansman v. Finland No. 1*,[60] it was expanded to protect not only

[54] Ibid 6.1.
[55] *Ivan Kitok v Sweden* [1988] Human Rights Committee CCPR/C/33/D/197/1985, Communication No. 197/1985.
[56] Thornberry (n 20) 158.
[57] Martin Scheinin, 'Indigenous Peoples' Land Rights Under the International Covenant on Civil and Political Rights' (Norwegian Centre for Human Rights University of Oslo 2004) 4.
[58] *Ivan Kitok v. Sweden* (n 57) [9.2].
[59] Thornberry (n 20) 160.
[60] *Ilmari Lansman et al v Finland* [1994] Human Rights Committee Vol. II, GAOR, Fiftieth Session, Suppl. No. 40 (A/50/40), (Communication 511/1992).

traditional activities associated with livelihood, but also their contemporary adaptation.[61] In *Diergaardt v Namibia*[62], however, the decision of the HRC expressed that, while the community in question had been connected to their land for 125 years and privatization of that land has resulted in the loss of opportunity for the Rehoboth community to pursue their traditional pastoral activities of cattle grazing,[63] it was not the kind of connection as to establish a unique culture, and therefore the nexus between economic activities and culture must be reciprocally linked.[64] The concurring opinion of Elizabeth Evatt and Cecilia Medina Quiroga articulates the findings succinctly:

> "This claim raises some difficult issues as to how the culture of a minority which is protected by the Covenant is to be defined, and what role economic activities have in that culture. These issues are more readily resolved in regard to indigenous communities which can very often show that their particular way of life or culture is, and has for long been, closely bound up with particular lands in regard to both economic and other cultural and spiritual activities, to the extent that the deprivation of or denial of access to the land denies them the right to enjoy their own culture in all its aspects. In the present case, the authors have defined their culture almost solely in terms of the economic activity of grazing cattle. They cannot show that they enjoy a distinct culture which is intimately bound up with or dependent on the use of these particular lands, to which they moved a little over a century ago, or that the diminution of their access to the lands has undermined any such culture. Their claim is, essentially, an economic rather than a cultural claim and does not draw the protection of article 27."[65]

A further important step in the evolution of international indigenous jurisprudence was the case of *Chief Ominayak and the Lubicon Lake Band of Cree v Canada*[66] (1990) (hereinafter,

[61] Martin Scheinin (n 59) 5.
[62] *JGA Diergaardt (late Captain of the Rehoboth Baster Community) et al v Namibia* [2000] Human Rights Committee U.N. Doc. CCPR/C/69/D/760/1997 (2000), Communication No. 760/1997.
[63] Ibid Individual opinion of Elizabeth Evatt and Cecilia Medina Quiroga (concurring).
[64] Thornberry (n 20) 160.
[65] *J.G.A. Diergaardt (late Captain of the Rehoboth Baster Community) et al. v. Namibia* (n 64) Individual opinion of Elizabeth Evatt and Cecilia Medina Quiroga (concurring).
[66] *Lubicon Lake Band v Canada* [1990] Human Rights Committee U.N. Doc. Supp. No. 40 (A/45/40) at 1 (1990), Communication No. 167/1984.

Ominayak case). The complaint was brought by Chief Bernard Ominayak against Canada in 1984, claiming that peoples of the Lubicon Lake Band were denied their right to self-determination and to freely dispose of their natural resources under Art. 1 of the ICCPR, due to the expropriation of indigenous lands for the benefit of corporate resource extraction.[67]

Canada argued that the complaint was inadmissible as the Lubicon Lake Band did not constitute a "people" under Art. 1 of the convention. The HRC chose to indirectly address this issue by *sua sponte* transferring the complaint to Art. 27, among others. In its reasoning, the Committee elaborated that Chief Ominayak could not, as an individual, bring a case under Art. 1 as it refers to the rights of peoples, however, in its interim decision on admissibility the Committee elaborates that a group of individuals, similarly affected may collectively bring a complaint about breaches of their individual rights.[68]

In its final decision in the *Ominayak* case, the HRC found a violation of Art. 27 of the ICCPR by allowing oil and gas exploration as well as logging within the traditional territory of the Lubicon Lake Band, to the extent that it threatened the way of life and the culture of the indigenous group.[69] The HRC made further pronouncements on Art. 1 of the Convention in its concluding observations to Canada, stating:

> "The Committee, while taking note of the concept of self-determination as applied by Canada to the aboriginal peoples, regrets that no explanation was given by the delegation concerning the elements that make up that concept, and urges the State party to report adequately on implementation of article 1 of the Covenant in its next periodic report."[70]

[67] Anaya (n 30) 254.
[68] Ibid 255.
[69] S. James Anaya, Robert A. Williams Jr. (n 39) 12.
[70] United Nations, 'Concluding Observations of the Human Rights Committee on Canada' para 8.

While the *Ominayak case* is a notable and prominent step forward in terms of international indigenous rights law, it has been justifiably criticized by human rights commentators for lack of remedial action.[71] The HRC neglected to recommend specific remedies in its decision, which stated only,

> "Historical inequities, to which the State party refers, and certain more recent developments threaten the way of life and culture of the Lubicon Lake Band, and constitute a violation of article 27 so long as they continue. The State party proposes to rectify the situation by a remedy that the Committee deems appropriate within the meaning of article 2 of the Covenant."[72]

The result has been two decades of "negotiations" between Canada and the Lubicon Cree, yet the indigenous land has not been demarcated. However, while there remains a gap between jurisprudence and effective remedies, the *Ominayak* case did have a positive effect on articulating with greater clarity principles of international law relevant to indigenous peoples, as we can see from the emergence of General Comment 23.

The decision in *Ominayak* laid the ground work for the case of *Apirana Mahuika v. New Zealand*[73] in which the authors alleged that the Treaty of Waitangi (Fisheries claims) Settlement Act (1992) infringed on their fishing territories, an activity which was deeply ingrained in their cultural practices, and further denied their right to freely determine their political status. In this case the Committee states that Art. 1 may be viewed in conjunction with Art. 27 of the covenant,[74] forging a new jurisprudential norm. Further, the *Apirana case* is known for confirming the legality of economic and cultural restrictions within the bounds of certain safeguards. The Committee States:

[71] Laura Westra, *Environmental Justice and the Rights of Indigenous Peoples: International and Domestic Legal Perspectives* (Reprint edition, Routledge 2008) 188.
[72] *Lubicon Lake Band v. Canada* (n 68) [33].
[73] *Apirana Mahuika et al v New Zealand* [2000] Human Rights Committee U.N. Doc. CCPR/C/70/D/547/1993, Communication No. 547/1993.
[74] Ibid 3.

> "In its case law under the Optional Protocol, the Committee has emphasised that the acceptability of measures that affect or interfere with the culturally significant economic activities of a minority depends on whether the members of the minority in question have had the opportunity to participate in the decision-making process in relation to these measures and whether they will continue to benefit from their traditional economy."[75]

The Case of *Ángela Poma Poma v. Peru*[76] further deepens the protections of Art. 27 of the Covenant. The complaint is brought by a member of the Aymara community in response to the drilling of wells by the government on Aymara land, in order to distribute water from the region to the coast. The diversion of groundwater resulted in the destruction of 10,000 hectares of Aymara pastoral lands, contributing to the death of thousands of livestock - the community's traditional means of livelihood, leaving the community in poverty.[77]

The Committee states:

> "[T]he admissibility of measures which substantially compromise or interfere with the culturally significant economic activities of a minority or indigenous community depends on whether the members of the community in question have had the opportunity to participate in the decision-making process in relation to these measures and whether they will continue to benefit from their traditional economy. The Committee considers that participation in the decision-making process must be effective, which requires not mere consultation but the free, prior and informed consent of the members of the community. In addition, the measures must respect the principle of proportionality so as not to endanger the very survival of the community and its members."[78]

This reasoning affirms the fundamental relationship between indigenous peoples and the land which they traditionally occupy, and elaborates the concept of effective participation beyond consultation, to, at a minimum, requiring that the "free, prior, and informed consent" of the

[75] Ibid 9.5.
[76] *Ángela Poma Poma v Peru* [2009] Human Rights Committee U.N. Doc. CCPR/C/95/D/1457/2006, Communication No. 1457/2006.
[77] Ibid 1.1.
[78] Ibid 7.6.

community affected be obtained. However, the Committee qualifies these otherwise comprehensive protections through activities which "substantially compromise or interfere" with economic activities deemed to be *culturally significant* – the latter reiterating *Diergaardt v Namibia*.

In its conclusion, the Committee found a violation under Art. 27 for activities substantially compromising the way of life of the applicant, for a lack of consultation on the part of the state, for failing to minimize harmful effects of the project, and for failing to perform environmental impact assessments. A violation of Art. 2(3a) was additionally found for the failure to provide an effective remedy.[79]

2.1.2 Other Human Rights Standards

The Convention on the Rights of the Child[80] (CRC) (1989) was in fact the first core human rights instrument to include indigenous references in three articles. The greatest protection for indigenous children is found in Article 30:

> "In those States in which ethnic, religious or linguistic minorities or persons of indigenous origin exist, a child belonging to such a minority or who is indigenous shall not be denied the right, in community with other members of his or her group, to enjoy his or her own culture, to profess and practise his or her own religion, or to use his or her own language."[81]

Additionally, article 29(d) regarding the education of the child makes reference to "persons of indigenous origin" in the context of equality and friendship among all peoples. In addition, Art. 17(d) "encourages the mass media to have particular regard to the linguistic needs of the child who belongs to a minority group or who is indigenous."[82]

[79] Ibid 7.7–7.8.
[80] Convention on the Rights of the Child 1989 (United Nations, Treaty Series, vol 1577, 3, 44/25) *entered into force* 2 September 1990.
[81] Ibid Art. 30.
[82] Ibid Art. 17(d).

General Comment no.11[83] (2009) is a detailed document elaborating indigenous children's' rights under the convention. Traditional lands and the greater environment are emphasized throughout the document, including in Article 35:

> "In the case of indigenous children whose communities retain a traditional lifestyle, the use of traditional land is of significant importance to their development and enjoyment of culture. States parties should closely consider the cultural significance of traditional land and the quality of the natural environment while ensuring the children's right to life, survival and development to the maximum extent possible."[84]

Article 30, however, elaborates on the best interests of the child, cautioning States that group interests including land and resource rights may in fact neglect or even violate the best interests of the child.

While the CRC includes indigenous protections in its original text, other international instruments have grown to encompass indigenous rights over time. Concern for indigenous rights is not explicitly referred to in the Convention on the Elimination of All Forms of Racial Discrimination[85] (CERD) but the CERD Committee issued, in 1997, a General Recommendation addressing the right of indigenous people under the Convention. The Committee urges States to protect the right of indigenous peoples to own their land and resources, and where applicable, return traditional lands and resources to indigenous peoples.[86] It derives the need for such protections from historical discrimination patterns that persist in contemporary law.[87] While this is a non-binding recommendation, the CERD is a nearly universally ratified instrument, and the

[83] Convention on the Rights of the Child, General Comment No. 11: Indigenous Children and Their Rights under the Convention 2009 [CRC/C/GC/11].
[84] Ibid.
[85] International Convention on the Elimination of All Forms of Racial Discrimination 1965 (GA res 2106 (XX), Annex, 20 UN GAOR Supp (No 14) at 47 entered into force Jan 4, 1969).
[86] Office of the High Commissioner of Human Rights, General Recommendation No. 23: Indigenous Peoples 1997.
[87] S. James Anaya, Robert A. Williams Jr. (n 39) 9.

addition of specific indigenous protections in the late 1990s gives greater weight to indigenous land rights as customary law.

In line with its General Comment, in 2004 the Committee initiated a robust report utilizing its early warning and urgent action procedure, concluding that New Zealand's Foreshore and Seabed Bill[88] was discriminatory against New Zealand's indigenous Maori population.[89] New Zealand's position was one of denial and hostility toward the Committee, as it was the first time the country had been found in violation of human rights against its indigenous population, and a comment by the Prime Minister contended that the Committee is not a judicial body, nor a central UN body – alluding to its non-binding power in issuing judgments and opinions.[90] This highlights the value of the CERD as an instrument providing protections for indigenous peoples, though non-binding, the early action procedures and recommendations continue to put pressure on States to conform to normative standards. However, New Zealand's response further points to the greater need for binding mechanisms to overcome a State's lack of political will in securing environmental protections.

2.1.3 United Nations Declaration on the Rights of Indigenous Peoples

In addition to the protection offered by treaty norms, important soft law (non-binding) instruments complement the current normative framework in protecting environmental rights of indigenous peoples. As a result of over two decades of tireless work by indigenous rights activists, the United Nations' Twin Decades of the World's Indigenous People (1995 – 2004 and

[88] New Zealand Foreshore and Seabed Bill 2004 [no 129-1].
[89] For a detailed account of the CERD conclusion and the process leading up to it, see *Report from the Inside: The CERD Committee's Review of the Foreshore and Seabed Act 2004*, by Claire Charters and Andrew Erueti, http://www.victoria.ac.nz/law/research/publications/vuwlr/prev-issues/pdf/vol-36-2005/issue-2/charters-erueti.pdf
[90] Claire Charters, Andrew Erueti, 'Report from the Inside: The CERD Committee's Review of the Foreshore and Seabed Act 2004' 2005 36 VUWLR 258 <http://www.victoria.ac.nz/law/research/publications/vuwlr/prev-issues/pdf/vol-36-2005/issue-2/charters-erueti.pdf>.

2005 – 2014)[91] culminated in the United Nations Declaration on the Rights of Indigenous Peoples (DRIP) (2007).[92] It is a non-binding instrument, though it remains the single most comprehensive international mechanism protecting the rights of indigenous peoples. It is progressive not only in its completed state, but also in its process of development – it is the first instrument that the UN has drafted in direct coordination with the beneficiaries.[93]

In 1982 as the indigenous rights movement gained ground on an international level, calling for a Convention that reflected an era recognizing and protecting ethnic and cultural diversity, the United Nations responded by establishing a Working Group on Indigenous Populations (WGIP) under the Sub-Commission on the Prevention of Discrimination and Protection of Minorities of the UN Human Rights Commission.[94] Its mandate was two-fold, firstly, "to review developments pertaining to the promotion and protection of human rights and fundamental freedoms of indigenous peoples"[95] and secondly, "to give attention to the evolution of international standards concerning indigenous rights."[96]

In 1985, under the second mandate which was interpreted to include standard setting, the WGIP was tasked with producing an international instrument on indigenous rights, which would fill the gap of protections in international law. The WGIP utilized what was at the time innovative working procedures, integrating the expertise of indigenous groups and NGOs during the drafting process. In order to accommodate such participation, a voluntary fund was established for indigenous populations to participate in oral interventions.[97] In 1995, two years

[91] Megan Davis (n 27) 440.
[92] UN General Assembly United Nations Declaration on the Rights of Indigenous Peoples (n 22).
[93] Megan Davis (n 27) 440.
[94] Robert K. Hitchcock (n 3) 6.
[95] 'Mandate of the Working Group on Indigenous Populations' <http://www.ohchr.org/EN/Issues/IPeoples/Pages/MandateWGIP.aspx>.
[96] Ibid.
[97] Megan Davis (n 27) 446.

after the submission of the Draft Declaration, the Commission on Human Rights (CHR) established an inter-sessional working group (WGDD) on the draft declaration, to elaborate the draft in a negotiating process between applicable parties, which continued the important addition of consultation with indigenous groups, spear-headed by the WGIP.[98]

In essence the WGIP was a catalyst in establishing more permanent mechanisms with a greater mandate on indigenous issues. In 2000 the Economic and Social Council (ECOSOC) established the Permanent Forum on Indigenous Issues. In the following year, the Office of the High Commissioner for Human Rights established the position of Special Rapporteur on the Situation of Human rights and Fundamental Freedoms of the Indigenous People.[99] In 2007, the WGIP was replaced by the Expert Mechanism on the Rights of Indigenous Peoples.

In the drafting process of the DRIP, self-determination and land and resource tenure were the primary contentious issues.[100] During the third session, the African group sought legal advice on implications of collective rights and self-determination, delaying progress of the declaration by a full year. States were concerned that broad provisions on self-determination could create a basis for accession, even though the instrument was not legally binding and would be subject to existing international law.[101]

It was Canada, Australia, New Zealand and the United States, however, who were seen as the primary countries obstructing the progress of the Declaration, with key points of contention on the self determination of indigenous peoples, as well as land and resource rights.[102] While

[98] Ibid.
[99] 'Office of the United Nations High Commissioner on Human Rights: Working Group on Indigenous Populations' <http://www2.ohchr.org/english/issues/indigenous/groups/groups-01.htm>.
[100] Megan Davis (n 27) 441; Karen Engle, 'On Fragile Architecture: The UN Declaration on the Rights of Indigenous Peoples in the Context of Human Rights' (2011) 22 European Journal of International Law 141, 142–143.
[101] Megan Davis (n 27) 441.
[102] Ibid 447.

numerous States abstained, those four were the only countries to vote against the adoption of the declaration.[103] While they have since come to support the instrument, it was only with simultaneously acknowledging the non-binding nature of the declaration.[104] Indigenous groups additionally hindered evolution of the process by adopting an idealistic "no change" policy during the second phase of the WGDD of the original text, refusing to admit amendments or deletions for fear of weakening key provisions – a standpoint which proved impossible to uphold in the end.[105] Therefore the current DRIP is a diluted version of the original proposal.

In its adopted state, the declaration approaches self-determination in two articles.[106] Firstly in Article 3: "Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development." And secondly, in Article 31.1:

> "Indigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations of their sciences, technologies and cultures, including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs, sports and traditional games and visual and performing arts. They also have the right to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions."[107]

Additionally, the retrospective nature of land rights has been a contentious issue. The DRIP draws upon the International Labour Organization's Convention 169[108] model, which largely defers cases of dispossession over lands that were previously occupied to national

[103] United Nations Declaration on the Rights of Indigenous Peoples : Voting Record, A/RES/61/295, A/61/PV.107 [Available from http://unbisnet.un.org:8080/ipac20/ipac.jsp?profile=voting&index=.VM&term=ares61295]
[104] Karen Engle (n 101) 145.
[105] Megan Davis pg 12
[106] Hendrik A Strydom (n 1) 3.
[107] UN General Assembly United Nations Declaration on the Rights of Indigenous Peoples (n 22).
[108] (n32). Background of ILO Convention 169 is elaborated in Section 2.1.5.

laws.[109] Matters of sub-surface resources have also been left unresolved. Article 26(2) addresses resources which are currently in use, but it does not address participation in the economic benefits from sub-surface exploitation, in this case ILO 169 offers greater economic protections, but only mildly, in the formulation of article 15(2).[110]

While the DRIP is a non-binding instrument with weak enforcement provisions, it is influential in its standard setting role, and has been recognized by regional and domestic systems as an interpretive tool elaborating protections for indigenous rights, thus fulfilling a primary objective of the instrument. This has occurred both in the jurisprudence of the Inter-American system and the African system, [111] which will be discussed in depth in the next chapter.

In addition to the DRIP, a further product of the twin decades of indigenous people was the creation of the United Nations Permanent Forum on Indigenous Issues (2000), as an advisory body to the Economic and Social Council. Its mandate was limited to an advisory role, awareness-raising and gathering and disseminating information.[112] The DRIP, however, expanded its role in article 42, providing that the forum "shall promote respect for and full application of the provisions of this Declaration and follow up the effectiveness of this Declaration."[113]

2.2 **International Labour Standards**

The International Labour Organization (ILO) was established in 1919 as part of the Treaty of Versailles in a post-war effort to secure social justice and peace, and was the first

[109] Gaetano Pentassuglia, 'Towards a Jurisprudential Articulation of Indigenous Land Rights' (2011) 22 The European Journal of International Law 168.
[110] Ibid 169.
[111] Gaetano Pentassuglia (n 42) 161.
[112] United Nations Economic and Social Council, Establishment of a Permanent Forum on Indigenous Issues 2000 [E/2000/22].
[113] UN General Assembly United Nations Declaration on the Rights of Indigenous Peoples (n 22) Article 42.

specialized agency of the UN, established in 1946.[114] Its mandate includes the formulation of international policies in relation to human rights and employment, living and working conditions, the creation of binding international labor standards and a supervisory system to monitor and enforce them, as well as training, education and research capacities.[115] The ILO has been concerned with indigenous issues as early as 1921,[116] and in 1926 established a Committee of Experts on Native Labour in an effort to create international standards to protect indigenous workers, particularly in colonized countries.[117] The first attempt to codify indigenous protections into a legally binding document was with ILO Convention 107 (1957)[118] which remained the only international legal instrument on indigenous rights for three decades. The pith of C107 was in improving the social and economic conditions of indigenous peoples, however the method has been considered as flawed.[119] The convention reflected the social development discourse of an era in which indigenous communities were considered transient in the face of modernization, and assimilation was the long-term aim of the convention.[120] The rhetoric addressed indigenous peoples as individuals or a population, as opposed to peoples, and the general aim of C107 is contained in Article 2:

> "Governments shall have the primary responsibility for developing co-ordinated and systematic action for the protection of the populations concerned and their progressive integration into the life of their respective countries." [121]

[114] 'International Labour Organisation: Origins and History' <http://www.ilo.org/global/about-the-ilo/history/lang--en/index.htm>.
[115] 'International Labour Organization: Mission and Objectives' <http://www.ilo.org/global/about-the-ilo/mission-and-objectives/lang--en/index.htm>.
[116] Robert K. Hitchcock (n 3) 7.
[117] Thornberry (n 20) 321.
[118] *ILO C107* (n 25).
[119] Anaya (n 30) 55; Robert K. Hitchcock (n 3) 8.
[120] 'International Labour Organization : Indigenous and Tribal Peoples Convention No. 107' <http://www.ilo.org/indigenous/Conventions/no107/lang--en/index.htm>.
[121] *ILO C107* (n 25).

Despite its shortcomings, one must acknowledge its success in providing protections for indigenous peoples land rights, thanks to its active supervisory and implementation mechanism, that requires not only reports on domestic legal compatibility, but also practical application of the convention.[122] While the convention is no longer available for ratification, it remains in force in 18 countries.[123] It has additionally been successful in providing a legal foundation for future indigenous protections to build upon.

In the new wave of the indigenous rights movement, the first tangible progress was made only in 1989 with ILO Convention No. 169 (C169) concerning Indigenous and Tribal Peoples in Independent Countries.[124] The Convention was a direct product of indigenous voices rising up against the single existing instrument regarding indigenous peoples, C107, viewed by many indigenous leaders as paternalistic.[125] Convention 169 is a legally binding instrument on State parties, and specifically addresses environmental rights in numerous articles. Art. 7(3) addresses participatory rights, stating that indigenous peoples will be allowed to participate in environmental impact assessment studies on development activities.[126]

In addition, Part II of C169 specifically addresses land rights. Art. 13 addresses the spiritual relationship between tribal peoples and their traditional land, Art. 14 provides protections for lands which have been traditionally occupied as well as situations of non-exclusive occupation such as with nomadic cultures. This articles calls upon governments to:

> "[T]ake steps as necessary to identify the lands which the peoples concerned traditionally occupy, and to guarantee effective protection of their rights of

[122] Anaya (n 30) 144.
[123] International Labour Organization, 'Major Differences: Convention 107 and Convention 169' <http://www.ilo.org/indigenous/Conventions/no107/lang--en/index.htm>.
[124] *ILO C169* (n 32).
[125] Robert K. Hitchcock (n 3) 8.
[126] Hendrik A Strydom (n 1) 4.

> ownership and possession. Adequate procedures shall be established within the national legal system to resolve land claims by the peoples concerned."[127]

Regarding indigenous consent in cases when the State retains ownership of sub-surface resource deposits, addressed in Art. 15, the right to consultation of indigenous peoples concerned may only be equivalent to that of non-indigenous property owners;[128]

> "…In cases in which the State retains the ownership of mineral or sub-surface resources or rights to other resources pertaining to lands, governments shall establish or maintain procedures through which they shall consult these peoples, with a view to ascertaining whether and to what degree their interests would be prejudiced, before undertaking or permitting any programmes for the exploration or exploitation of such resources pertaining to their lands. The peoples concerned shall wherever possible participate in the benefits of such activities, and shall receive fair compensation for any damages which they may sustain as a result of such activities."

The weak nature of this provision can be contrasted against recommendations by the former Special Rapporteur on the Rights of Indigenous Peoples, Rodolfo Stravenhagen, who recommends more vigorous protections in relation to indigenous rights in the face of development projects, almost to go so far as affording veto power. [129]

> "Any development projects or long-term strategy affecting indigenous areas must involve the indigenous communities as stakeholders, beneficiaries and full participants. […] The free, informed and prior consent, as well as the right to self-determination of indigenous communities and peoples, must be considered as a necessary precondition for such strategies and projects[130]

[127] *ILO C169* (n 32). Art. 14
[128] Jo Pasqualucci, 'International Indigenous Land Rights: A Critique of the Jurisprudence of the Inter-American Court of Human Rights in Light of The United Nations Declaration on the Rights of Indigenous Peoples' (2009) 27 Wisconsin International Law Journal 88.
[129] Ibid.
[130] Rodolfo Stavenhagen, 'Human Rights and Indigenous Issues' (Economic and Social Council, Commission on Human Rights 2003) E/CN.4/2003/90 para 73 <http://www.un.org/en/ga/search/view_doc.asp?symbol=E/CN.4/2003/90>.

Article 16 protects indigenous peoples from arbitrary removal from the lands which they occupy, providing for safeguards based on national laws, and protections of legal representation and public inquiries in the event of forced relocation. In the case of such an event, compensation in the form of equivalent lands suitable to "present needs and future development" are required, unless monetary compensation is expressly preferred by the community.[131]

This Convention was the major instrument dealing with indigenous peoples for nearly two decades, yet it has extremely low ratification numbers – only 20 countries are bound by the content of the convention.[132] While several of the South American States who ratified contain high populations of indigenous citizens, on the continent of Africa, only the Central African Republic has ratified as of 2014.[133] Additionally, while the initiatives of the ILO are only minimally effective in themselves, they have been extremely influential in the articulation of normative international legal standards, setting the stage for international recommendations, general comments and declarations.[134] However, the low ratification numbers even through the strongest years of the indigenous rights movement are a clear indication that while international awareness regarding indigenous protections grows, political will is lacking as States are reticent to meet those standards.

2.3 **International Environmental Law Standards**

In the intersection between the indigenous right to self-determination and environmental rights, protections have also appeared in international environmental instruments particularly in reference to sustainable stewardship or development. In cases in which indigenous peoples

[131] *ILO C169* (n 32). Art. 16
[132] 'ILO Ratifications of C 169' <http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11300:0::NO::P11300_INSTRUMENT_ID:312314>.
[133] Ibid.
[134] Hendrik A Strydom (n 1) 2.

possess specific knowledge or expertise in the environments in which they have a traditional relationship, the scientific community engages with the notion that indigenous peoples may be important stewards for protecting the biological diversity and imparting medicinal uses of flora to the greater scientific community.[135] Two international instruments with varying legal significance afford land rights to indigenous peoples.

From the initial UN Conference on Environment and Development (1992) was born Agenda 21 – a comprehensive program of action for sustainable development, of which the Rio Declaration on Environment and Development[136] was one part. It is a non-binding international instrument, which acknowledges the crucial role of indigenous peoples in the preservation of the environment and calls on States to effectively implement programs and procedures to include active participation of indigenous peoples in decision-making processes in matters relating to their traditional lands.[137] In Chapter 26, it additionally encourages governments to integrate indigenous values, knowledge, and traditions within the framework of national policies, recognizing the historical relationship between indigenous peoples and their traditional lands.[138]

Two years after the adoption of Agenda 21, a legally binding instrument on sustainability and the environment was signed into law. In 1988 the United Nations Environment Programme created an ad hoc working group to begin research for The Convention on Biological Diversity[139] (1994) with the aim to preserve the global asset of biological diversity, and the need to "share

[135] Inter-Agency Support Group on Indigenous Peoples Issues, 'Thematic Paper Towards the Preparation of the 2014 World Conference on Indigenous Peoples, "Indigenous Peoples and Policies for Sustainable Development: Updates and Trends in the Second Decade of the World"s Indigenous People'' (2014) 2; Secretariat of the Convention on Biological Diversity, 'Sustainable Forest Management, Biodiversity and Livelihoods: A Good Practice Guide' (2009) 29 <http://www.cbd.int/development/doc/cbd-good-practice-guide-forestry-booklet-web-en.pdf>.
[136] Rio Declaration on Environment and Development 1992 (A/CONF151/26 (Vol I)).
[137] United Nations Sustainable Development, United Nations Conference on Environment & Development. Rio de Janerio, Brazil: Agenda 21 1992.
[138] Hendrik A Strydom (n 1) 5.
[139] *Convention on Biological Diversity* (n 33).

costs and benefits between developed and developing countries."[140] This convention contains two key articles protecting indigenous land rights. Article 8(j), requires that States Parties obtain the "approval and involvement" of indigenous communities regarding land projects with the aim to preserve and respect traditional knowledge and practices, promoting the conservation of biological diversity, and importantly, to "encourage the equitable sharing of the benefits arising from the utilization of such knowledge innovations and practices";[141] for which a working group was created in 1998 to implement the commitments of this article.[142] In addition, Article 10(c) urges States insofar as is possible to "Protect and encourage customary use of biological resources in accordance with traditional cultural practices that are compatible with conservation or sustainable use requirements."[143]

In spite of the seemingly patchwork nature of overlapping mechanisms, the sum total of them amounts to significant advancements in framing normative environmental rights for indigenous peoples. Jurisprudence under the Human Rights Committee has carved out greater protections by further articulating the cultural integrity norm to be read in conjunction with self-determination. Within this framework, economic activities have been protected by Art. 27 as having a cultural dimension, which was later expanded to include a contemporary adaptation of economic activities, importantly acknowledging the changing nature of culture.

General comments by the CRC and CERD further support a universally accepted nature of indigenous rights, strengthened by overlapping environmental norms. ILO C169, though narrowly ratified, retains importance as one of the few binding international mechanisms for indigenous rights, and has successfully provided a foundation from which more elaborate

[140] 'History of the Convention on Biological Diversity' <http://www.cbd.int/history/default.shtml>.
[141] *Convention on Biological Diversity* (n 33). Art. 8
[142] Ibid. Art. 8
[143] Ibid. Art. 10

articulations have emerged. The DRIP, though a soft law instrument, is the most comprehensive declaration on indigenous rights. Its evolutionary principles are utilized as a guide post in judicial decisions, as will be discussed in the next chapter. However, the lengthy drafting process and negative votes by key States point to a reticent political climate in establishing international norms.

3 Regional Standards Protecting Environmental Rights of Indigenous Peoples

This chapter focuses on two regional systems – the Inter-American system, and the African system concerning indigenous protections and environmental rights. While the instruments within the systems themselves do not specifically articulate environmental rights for indigenous peoples, there is an interplay between international law and regional law that has created a growing jurisprudence of such protections for indigenous groups. The regional systems themselves interact with and reinforce one another, and Inter-American jurisprudence takes a specifically evolutionary approach as regards indigenous issues, elaborating on existing human rights norms to create a concrete framework and greater protections.

3.1 **The Inter-American Human Rights System and Indigenous Rights**

The Inter-American system of human rights functions as part of the Organization of American States (OAS), which contains two primary written documents protecting human rights. The American Declaration of the Rights and Duties of Man (1948) is a non-binding declaration of moral obligations,[144] and the binding American Convention on Human Rights (1969), which entered into force in 1978, and has been ratified by the vast majority of member States, of which primary exceptions include Canada and the United States.[145] Every State in the American system is party to either the declaration or the convention.

While neither the declaration nor the convention contain specific references to indigenous rights, the OAS first took action toward protecting indigenous peoples in 1948 when it

[144] Robert K. Goldman, 'History and Action: The Inter-American Human Rights System and the Role of the Inter-American Commission on Human Rights' (2009) 31 Human Rights Quarterly, 863.
[145] S James Anaya, *International Human Rights and Indigenous Peoples* (Aspen Publishers 2009).

established the Inter-American Charter of Social Guarantees. Article 39 provides a positive obligation on member States to take measures necessary to ensure the protection of indigenous peoples and their right to property, specifically "defending them from extermination, sheltering them from oppression and exploitation".[146]

The two main instruments in the inter-American system have two primary governing bodies for promotion of human rights, recommendations, and enforcement. The Inter-American Commission (IACmHR), established in 1960 by the council of the Organization of American States (OAS) is limited to making non-binding recommendations for the adoption of effective measures to States party to the American Declaration, as well as engaging in studies and reports, and serving as an advisory body to the OAS.[147] The Inter-American Court (IACtHR) provides legally binding rulings to States who have ratified the Convention, as well as functioning in an advisory capacity to the IACmHR.[148] While neither the Convention nor Declaration explicitly offer environmental indigenous protections, both contain general provisions that protect cultural integrity as well as rights to property.[149]

The Inter-American Court is able to pursue an expansive approach in exercising its judiciary power; it interprets the Convention in accordance with the practice of current International Human Rights Law, and with each decision must offer the highest degree of protections to all persons under its jurisdiction. [150] The IACmHR has recognized indigenous

[146] S. James Anaya, Robert A. Williams Jr. (n 39) 1.
[147] Robert K. Goldman (n 145) 862.
[148] Ibid.
[149] S. James Anaya, Robert A. Williams Jr. (n39) 6.
[150] Hendrik A Strydom (n 1) 6–7.

land rights as customary international law, as demonstrated by paragraph 140(d) of the *Awas Tingni Community* case which will be discussed further in this chapter.[151]

When the United Nations Declaration on the Rights of Indigenous Peoples was passed, the Inter-American legal system already had produced a well-developed body of case law in line with the declaration, acknowledging the traditional and spiritual relationship between indigenous peoples and the lands that they have traditionally occupied as integral to their cultural identity. However, weaknesses still exist within Inter-American jurisprudence. The IACtHR does not protect the right of indigenous peoples to all resources on ancestral lands, but rather to those resources which are traditionally used and are necessary for the preservation of cultural integrity.[152] This creates a gap in protections that allows States, under certain circumstances, to restrict indigenous property rights and grant third parties exploratory or exploitative access to harvest resources. While the jurisprudence of the Court has reaffirmed the non-absolute nature of property rights, it has additionally provided safeguards in the judgment of *Saramaka Peoples v. Suriname*, which will be discussed later in this chapter. These protections do not, however, go so far as requiring the free, prior, and informed consent of indigenous peoples concerned in all cases, but are rather based on the extent to which land and resources may be affected, and the importance of the resources in question to the cultural survival of the community.[153] In this way, the IACtHR takes a more conservative approach to limiting territorial claims than the DRIP.

3.1.1 Draft American Declaration on the Rights of Indigenous Peoples

In 1989 at the request of the Organization of American States (OAS), the Inter-American Commission on Human Rights began drafting a legal instrument on indigenous populations.

[151] *Mayagna (Sumo) Awas Tingni Community v Nicaragua* [2001] Inter-American Court of Human Rights (Ser. C) No. 79.
[152] *Saramaka People v Suriname* [2007] Inter-American Court of Human Rights Series C No. 172 [128].
[153] Jo Pasqualucci (n 129) 97.

Over the next seven years they consulted governments, indigenous organizations and intergovernmental organizations to develop the 1997 Proposal of the American Declaration on the Rights of Indigenous Peoples. In that same year the OAS established a working group of the permanent council for the draft. Beginning in 2001, the working group took measures to ensure greater participation from indigenous groups, which, in the same trend as the DRIP, was considered crucial for moving the draft forward.[154]

However, two and half decades after its original proposal, the American Declaration on the Rights of Indigenous Peoples remains in draft. One must note that the United Nations DRIP took over two decades to come into force itself,[155] and as discussed previously, during the negotiations phase of the DRIP the United States and Canada were two of the four countries to vote against the declaration, and took an oppositional stance during the entire drafting process.[156] The proposed American Declaration has witnessed a similar trend. In the Eleventh Meeting of Negotiations in the Quest for Points of Consensus (2008), both the United States and Canada lodged reservations regarding the negotiations process, and declined to participate in the process, reserving all commentary for the final text.[157] The Indigenous Peoples' Caucus of the Americas notes that the United States refusal to "constructively engage" in the Draft's negotiations process violates treaty obligations it has made with sovereign Indigenous nations as well as its duty of consultation.[158] The Caucus further stated the following:

> "The Indigenous Peoples' Caucus of the Americas regrets that Canada and the United States are continuing to disrespect this process and the human rights of

[154] Inter-American Commission on Human Rights Proposed American Declaration on the Rights of Indigenous Peoples (n 23).
[155] Gaetano Pentassuglia (n 42) 151.
[156] See Chapter 2.1.3.
[157] Working Group to Prepare the Draft American Declaration on the Rights of Indigenous Peoples, 'Eleventh Meeting of Negotiations in the Quest for Points of Consensus OEA/Ser.K/XVI GT/DADIN/doc.334/08 Rev. 3' 30 <http://www.oas.org/council/CAJP/Indigenous%20special%20session.asp>.
[158] Ibid 31.

> Indigenous peoples, which places what we have achieved to date in this process at great risk. These two States with their positions of "reservations" constitute a pre-emptive veto on the consensus that we are building with the great majority of States and representatives of Indigenous peoples for a draft American Declaration that is consistent with the *UN Declaration on the Rights of Indigenous Peoples*."[159]

Despite the fact that both Canada and the United States have since formally endorsed the DRIP, in the fourteenth and most recent negotiation session of 2012, both countries reiterated their reservations established in the tenth and eleventh sessions, and continue to not actively participate in negotiations, functionally halting the evolution of the declaration as there have been no further negotiation sessions.[160] The United States put forth in its statement at the 2012 session, "We note that negotiations on this text have gone on for more than ten years, and that the working group remains deadlocked on key issues."[161] It then calls for other means to advance indigenous rights outside of the declaration. Therefore at this stage, the future of this regional Indigenous Rights declaration remains uncertain.

3.1.2 Recommendations by the Commission and Decisions of the Court

Despite the stagnation of the American Declaration on the Rights of Indigenous Peoples, the Inter-American Commission and Court have expanded protections for indigenous groups through their recommendations and jurisprudence. The 2001 case of *Mayagna (Sumo) Awas Tingni Community v. Nicaragua* (hereinafter, *Awas Tingni*) was a landmark case for both the

[159] Ibid.

[160] Working Group to Prepare the Draft American Declaration on the Rights of Indigenous Peoples, 'Statement by the Delegation of the United States Fourteenth Meeting of Negotiations in the Quest for Points of Consensus on the Draft American Declaration on the Rights of Indigenous Peoples OEA/Ser.K/XVI GT/DADIN/INF. 56/12' <http://www.oas.org/council/CAJP/Indigenous%20special%20session.asp>; Working Group to Prepare the Draft American Declaration on the Rights of Indigenous Peoples, 'Statement by the Delegation of Canada Fourteenth Meeting of Negotiations in the Quest for Points of Consensus on the Draft American Declaration on the Rights of Indigenous Peoples OEA/Ser.K/XVI GT/DADIN/INF. 56/12' <http://www.oas.org/council/CAJP/Indigenous%20special%20session.asp>.

[161] Working Group to Prepare the Draft American Declaration on the Rights of Indigenous Peoples, 'Statement by the Delegation of the United States Fourteenth Meeting of Negotiations in the Quest for Points of Consensus on the Draft American Declaration on the Rights of Indigenous Peoples OEA/Ser.K/XVI GT/DADIN/INF. 56/12' (n 161).

American and international indigenous rights movements due to the expansion of the loose notion of indigenous land rights interpreted within the scope of Art. 21 as communal property;[162] as well as the reference to both draft and existing international instruments in a separate opinion of the judgment by Judge Sergio Ramirez, illuminating a broader consensus of such protections toward the existence of customary law.[163] It marks the first case by the IACtHR decided in favor of indigenous communities' rights to ancestral territories.[164]

The case was recommended to the IACtHR within the mandate of the Commission, and brought by a number of indigenous groups residing in Nicaragua's Atlantic Coast. The case was brought under Art. 21 relating to property rights, complimentary articles 1 and 2 ensuring positive obligations and domestic implementation of rights protected by the Convention, and Art. 25 regarding effective judicial measures.[165] The complaints included failure to demarcate ancestral territories, failure to adopt effective measures to ensure ancestral property and natural resource rights to indigenous peoples despite repeated recommendations from the Commission and requests from indigenous groups, as well as the concession of logging on communal lands without the free, prior and informed consent of indigenous groups.[166]

The Inter-American Commission explicitly prosecuted this case under the assertion that the protection of property rights extended to traditional land and resource tenure under customary law, due to the widely accepted nature of such protections within a variety of instruments. Those instruments included ILO Convention 169, and the DRIP which was then in

[162] Gaetano Pentassuglia (n 110) 170.
[163] Anaya (n 30) 70.
[164] International Network for Economic, Social and Cultural Rights, 'ESCR-Net: Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua' <http://www.escr-net.org/docs/i/405047> accessed 22 March 2014.
[165] *Mayagna (Sumo) Awas Tingni Community v. Nicaragua* (n 152) [1].
[166] Ibid 2.

its draft form, as well as the draft American Declaration.[167] In a less explicit interpretation, the IACtHR confirmed the Commission's assessment, stated in the following considerations of the court:

> "148. Through an evolutionary interpretation of international instruments for the protection of human rights, taking into account applicable norms of interpretation and pursuant to article 29(b) of the Convention -which precludes a restrictive interpretation of rights-, it is the opinion of this Court that article 21 of the Convention protects the right to property in a sense which includes, among others, the rights of members of the indigenous communities within the framework of communal property, which is also recognized by the Constitution of Nicaragua."[168]

This case clearly outlines the way in which international, customary, regional, and domestic laws interact; contributing to the *opinio juris* of indigenous environmental rights and further strengthening developing indigenous rights jurisprudence. Additionally, as the case originated with a petition to the Commission, and Nicaragua continually ignored the 1998 recommendation of the Commission to demarcate the lands,[169] this case also exemplifies the importance of a legally binding judicial mechanism to motivate a State which lacks political will for establishing positive measures for protection. The importance of the Commission, however, cannot be understated – the Inter-American system has been largely evolutionary in its interpretation of ancestral land claims and environmental rights, and the Commission is the body that has been primarily proactive in researching and adjudicating cases, making preliminary recommendations and bringing cases to the IACtHR. Further, the decision of the supranational body in this case resulted in domestic legislative action. In January of 2003, the community filed what's known as an *amparo* action, protecting constitutional rights, against eleven government

[167] Anaya (n 30) 69–70.
[168] *Mayagna (Sumo) Awas Tingni Community v. Nicaragua* (n 152) [148].
[169] S. James Anaya, Robert A. Williams Jr. (n 39) 3.

officials including President Bolaños for a failure to enforce the decision of the court. In the same month, Law 445[170] was passed aimed at demarcating indigenous lands throughout the country, this was partly in response to the *Awas Tingni* decision, and partly in response to requirements made by the World Bank for funding disbursement.[171]

The 2007 decision in the case of the *Saramaka People v. Suriname*[172] further expanded indigenous protections established in *Awas Tingni*, through articulating the importance of effective participation of indigenous peoples in decisions that affect them and their property. The case serves several functions in the progress of the indigenous rights movement. Firstly, it strengthens the principle of communal property rights for both indigenous and tribal peoples by reaffirming the concept in the *Awas Tingni*, *Sawhoyamaxa* and *Yakye Axa* cases.[173] Secondly and of primary importance, the significance of this case lies in the elaboration of three safeguards of indigenous and tribal property rights. It provides contextual and procedural requirements for the process of balancing the needs of the community and interests of the State.[174]

The reflections of the Court in this case, found that Suriname law only allowed for the "use" of land by indigenous peoples – an inadequate protection that can be overtaken by legal title of third parties, or can easily be removed by the State, and that for the full enjoyment of the right to property, the State must be required to demarcate and delimit the land, and recognize the

[170] Ley No. 445, 13 Dec. **2002**, Ley del Régimen de Propiedad Comunal de los Pueblos Indígenas y Comunidades Étnicas de las Regiones Autónomas de la Costa Atlántica de Nicaragua y de los Ríos Bocay, Coco, Indio y Maíz [Law of the Communal Property Regime of Indigenous Peoples and Ethnic Communities of the Autonomous Regions of the Atlantic Coast of Nicaragua and of the Bocay, Coco, Indio, and Maíz Rivers], Ley No. 445, La Gaceta [L.G.] No. 16, 23 Jan. **2003** (Nicar.), [available at http://www.elaw.org/resources/text.asp?ID=1516]; To read more on the nature of Law 445, events leading up to it and following implementation, see: Leonardo J. Alvarado, 'Prospects and Challenges in the Implementation of Indigenous Peoples' Human Rights in International Law: Lessons from the Case of Awas Tingni v. Nicaragua' (2007) 24 Arizona Journal of International and Comparative Law.

[171] Ibid 8.

[172] *Saramaka People. v. Suriname* (n 153).

[173] Ibid 89.

[174] Gaetano Pentassuglia (n 110) 176.

title of ownership both in law and in fact.[175] This requirement has proved an important precedent in subsequent legal cases.[176] Since Suriname domestic law did not recognize a communal property right, nor had it ratified ILO Convention 169, under Art. 29 (b)[177] of the Convention, which articulates restrictions regarding interpretation, the IACtHR drew upon Articles 1 and 27 of the ICCPR, as well as Art. 1 of the ICESCR to affirm Suriname's duty to protect communal land rights of indigenous and tribal peoples.[178] It additionally drew upon Art. 32 of the DRIP which had at the time been recently approved by the General Assembly with the support of Suriname.[179]

However, the Court also found that the right to property is not an absolute right. The reasoning of the Court states that while communal property rights may be restricted to a degree by the State, including use of and access to natural resources, it may only be restricted to the extent that it "does not deny their survival as a tribal people."[180] Acknowledging the delicacy of such a restriction, the Court provided the following safeguards:

> "Thus, in accordance with Article 1(1) of the Convention, in order to guarantee that restrictions to the property rights of the members of the Saramaka people by the issuance of concessions within their territory does not amount to a denial of their survival as a tribal people, the State must abide by the following three safeguards: First, the State must ensure the effective participation of the members of the Saramaka people, in conformity with their customs and traditions, regarding any development, investment, exploration or extraction plan (hereinafter "development or investment plan")[181] within Saramaka territory.

[175] *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya* [2010] African Commission on Human and Peoples' Rights 276/2003 [206].
[176] See para 159-162, 206, *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v. Kenya* (n 176).
[177] "29. No provision of this Convention shall be interpreted as:" "b. restricting the enjoyment or exercise of any right or freedom recognized by virtue of the laws of any State Party or by virtue of another convention to which one of the said states is a party;"
[178] *Saramaka People. v. Suriname* (n 153) [92–95].
[179] Ibid 132.
[180] Ibid 128.
[181] By "development or investment plan" the Court means any proposed activity that may affect the integrity

> Second, the State must guarantee that the Saramakas will receive a reasonable benefit from any such plan within their territory. Thirdly, the State must ensure that no concession will be issued within Saramaka territory unless and until independent and technically capable entities, with the State's supervision, perform a prior environmental and social impact assessment. These safeguards are intended to preserve, protect and guarantee the special relationship that the members of the Saramaka community have with their territory, which in turn ensures their survival as a tribal people."[182]

The Court expanded to define that free, prior and informed consent must be in good faith[183] and in conformity with the cultural traditions and customs of the group at hand.[184] Additionally, the group must "reasonably participate in the benefits derived from any such possible concession, and perform or supervise an assessment on the environmental and social impact prior to the commencement of the project."[185] The judgment of the Court stated that the Saramaka community had been left with "a legacy of environmental destruction, despoiled subsistence resources, and spiritual and social problems, but they received no benefit from the logging in their territory."[186]

This case strengthens the Court's jurisprudence on the linkages between ancestral territory, natural resources and communal property rights; an interpretation of Article 29(b) allowed an expansion of legal principles into international human rights fora, expanding upon the interplay between these varying systems. However, the Court also affirms that property rights are not absolute, and concurrent with previous jurisprudence, the State retains ownership of sub-

of the lands and natural resources within the territory of the Saramaka people, particularly any proposal to grant logging or mining concessions.

[182] *Saramaka People. v. Suriname* (n 153) [129].
[183] Ibid 138 footnote 137.
[184] Ibid 155.
[185] Ibid.
[186] Ibid 153.

surface resources in many countries in the Americas, with limitations.[187] Previously mentioned was the referral to the ICCPR and ICESCR in interpreting the applicability of communal rights.

Two more cases are worth mentioning concerning the jurisprudence of the IACtHR on issues of indigenous land rights. The cases of *Yakye Axa Indigenous Community v. Paraguay*[188] and *Sawhoyamaxa Indigenous Community v. Paraguay*[189] involve issues of historical dispossession of ancestral lands. *Sawhoyamaxa* details the importance of a case-by-case analysis of indigenous ties to ancestral land, and how those ties must be measured through time. They are not only based on a particular date of dispossession, but manners in which the communities have attempted to regain property rights or continue to use the land for traditional or cultural purposes, through time.[190] As with historical dispossession, existing interests between third party owners must be addressed, for which both *Sawhoyamaxa* and *Yakye Axa* provide a general framework for weighing competing claims. The Court in *Sawhoyamaxa* expands on the provisions laid out in *Yakye Axa,*[191] stating that lands which are privately held by third parties for a long time, do not offer an "objective and reasoned" ground for dismissing indigenous land claims prima facie. The Court expands:

> "In this respect, the Court has pointed out that, when there are conflicting interests in indigenous claims, it must assess in each case the legality, necessity, proportionality and fulfillment of a lawful purpose in a democratic society (public purposes and public benefit), to impose restrictions on the right to property, on the one hand, or the right to traditional lands, on the other."[192]

[187] Marcos A Orellana, 'Saramaka People V. Suriname' (2008) 102 American Journal of International Law 841, 846 <http://www.jstor.org/discover/10.2307/20456684?uid=2134&uid=382772641&uid=2&uid=70&uid=3&uid=382772631&uid=60&sid=21104233286831> accessed 27 September 2014.
[188] *Case of the Yakye Axa Indigenous Community v Paraguay* [2005] Inter-American Court of Human Rights Series C No. 125.
[189] *Sawhoyamaxa Indigenous Community v Paraguay* [2006] Inter-American Court of Human Rights Series C No. 146.
[190] Ibid 131.
[191] *Case of the Yakye Axa Indigenous Community v. Paraguay* (n 189) [147–149].
[192] *Sawhoyamaxa Indigenous Community v. Paraguay* (n 190) [138].

The Inter-American Commission and Court therefore represent a regional system active in further expanding and articulating indigenous rights protections. However, it must be noted that despite the court's evolutionary jurisprudence and stringent follow-up mechanisms, the political will of the State is ultimately what determines compliance, which has been sporadic across Central and South America. For instance, while the IACtHR has issued court orders for demarcation of ancestral lands to Nicaragua, Suriname and Paraguay, only Nicaragua has fully complied as a result of the Awas Tingni case.[193] Suriname has created a National Commission on Land Rights to study effects of demarcation, but has not yet demarcated for the Moiwana or Saramaka communities, and continues to offer third parties resource extraction concessions which will be discussed in the final chapter.[194] Paraguay has been ultimately negligent toward the Yakye Axa, Sawhoyamaxa and Xákmok Kásek communities. In fact, in 2009 the legislative body voted against expropriating traditional lands of indigenous communities, thereby rejecting the 2005 decision of the IACtHR, and instead seeks to find alternative lands for the indigenous communities in question.[195] It is clear that many governments in the Americas have been ambivalent toward the work of the Inter-American Court and Commission, in the next section of this Chapter we will witness a similar trend in the African system.[196]

[193] Jo M. Pasqualucci, *The Practice and Procedure of the Inter-American Court of Human Rights* (Cambridge University Press 2003) 313.
[194] Jo M. Pasqualucci (n 194).
[195] Ibid.
[196] Robert K. Goldman (n 145) 863.

3.2 **The African Regional System**

The African Charter of Human and Peoples' Rights (AfrCH)[197] is, in terms of time and progress, a younger sibling to the Inter-American Charter. It was adopted in 1981, over a decade after the IACHR and its jurisprudence greatly draws upon its regional predecessor *post-Saramak*a. While the Inter-American system contains both a Commission and Court, allowing for greater capacity to hear cases, the African System contained only a single effective monitoring mechanism until 2008. The African Commission has been progressive in the area of indigenous rights, but largely under the umbrella of peoples' rights, which are broadly protected by the African Charter, which will be discussed in detail in this chapter.

The Organization of African Unity (OAU)[198] was born in 1963 with the aim of facilitating the end of colonialism on the continent.[199] The decolonization period established a unified movement toward nation building, development, poverty reduction, and a greater African unity, within which, the notion of minority and group rights were *not* articulated, to the extent that such concepts did not enter the dialogue of the African Commission on Human and Peoples' Rights (ACHPR) until the international movement was well developed.[200] In 2000, under its promotional mandate and due to consistent lobbying by NGOs,[201] the ACHPR established a Working Group on Indigenous Populations/Communities in Africa (AWGIPC) – the first of its kind in the African system, with the aim of investigating the status of indigenous populations on the continent and the implications the Charter had on their well-being.[202] The results of their

[197] Also known as the African Charter or Banjul Charter, Adoption : 1981, Entry into force: 1986
[198] The Organization of African Unity transformed into the African Union (AU) in 2002.
[199] George Mukundi Wachira, 'African Court on Human and Peoples' Rights: Ten Years On and Still No Justice' (Minority Rights Group International 2008) 5.
[200] Thornberry (n 20) 246.
[201] African Commission on Human and Peoples' Rights, 'About: Background Information' <http://www.achpr.org/mechanisms/indigenous-populations/about/> accessed 17 July 2014.
[202] African Commission on Human and Peoples' Rights, 'Working Group on Indigenous Populations/Communities in Africa' <http://www.achpr.org/mechanisms/indigenous-populations/> accessed 17 July 2014.

efforts, a 2003 report, connected numerous "peoples' rights" to an African notion of indigenousness, which is not linked to standard pre-colonial definitions of indigenous peoples, as aboriginality is not a meaningful foundation for employing protection to indigenous groups in Africa.[203] Rather, the ACHPR has adopted criteria centered around self-identification as distinct from other groups on the continent, and employs an analytical understanding of the concept, weighing marginalization, cultural difference, and discrimination.[204]

It is important to note that the climate in Africa regarding indigenous rights has been one of reticence. As mentioned previously, it was the General Assembly of the African Union, in 2006 who delayed the process of the DRIP by one year, due to uncertainties regarding indigenous participation in decision-making, as well as land rights, and in 2007, the concern was expanded to self-determination and the definition of indigenous people.[205] In this vein, the AfrCH does not have a direct provision over indigenous rights, however, numerous articles under the unique classification of "peoples' rights" have been interpreted by the ACHPR as encompassing minorities, including indigenous peoples, as opposed, exclusively, to society as a whole.[206] Key articles linked to indigenous peoples by the AWGIPC report, which are central to the jurisprudence of the ACHPR regarding environmental and cultural rights, including the right to self-determination (Art. 20), the right to the disposal of natural resources (Art. 21), the right to economic, social and cultural development (Art. 22) and the right to a general satisfactory environment (Art. 24).[207]

[203] African Commission on Human and Peoples' Rights (ACHPR) (n 18) 11–12; Gaetano Pentassuglia (n 79) 185.
[204] African Commission on Human and Peoples' Rights (ACHPR) (n 18) 11.
[205] Gaetano Pentassuglia (n 42) 151.
[206] Gaetano Pentassuglia (n 110) 185.
[207] Ibid; 'Report of the African Commission's Working Group of Experts on Indigenous Populations/Communities' (2005) Adopted by The African Commission on Human and Peoples' Rights at its 28th ordinary session 21 <http://www.iwgia.org/iwgia_files_publications_files/African_Commission_book.pdf>.

The primary monitoring mechanism of the Charter – the African Commission on Human and Peoples' Rights (ACHPR)[208] was established in 1987, and under article 45, its mandate includes both promotional and protective functions. It uniquely accepts complaints from individuals, groups or NGOs who *may or may not* be the direct victims of the violation of the complaint, subject to additional procedural requirements under Article 56. This allows for a greater capacity to receive complaints, and the potential for a broader reach of protections, particularly in relation to marginalized groups. Additionally, Articles 60 and 61 of the Charter allow for the African Commission to draw upon, *inter alia* international conventions and jurisprudence, customary law, African practices corresponding to international human rights norms, as well as legal precedence and doctrine.[209]

However, the work of the Commission has not been without its shortcomings. It has faced issues of funding, resulting in extra-budgetary donations from NGOs, and criticism of being subject to the interest of those foreign organizations. In response, the African Union (AU) increased the Commission's budget by 400% in 2008.[210] Additional constraints include the lack of implementation and enforcement by member States and an inadequate follow-up mechanism based on diplomatic *notes verbales*.[211] Lack of a formal mechanism may be additionally constrained by issues of funding.

In recognition of the Commission's limitations, African civil society engaged in a strong lobbying effort toward an enforceable regional mechanism.[212] The African Court on Human and Peoples' Rights was established in 1998 and took effect in 2004. Similar to the Inter-American

[208] The ACHPR examines States' reports under (Article 62), retains an investigatory function (Article 46), may interpret the provisions of the charter (Article 45(3)), and draw upon relevant international and regional instruments, customary law, and relevant juridical precedents (Articles 60, 61).
[209] *African Charter on Human and Peoples' Rights ('Banjul Charter')* (n 41).
[210] George Mukundi Wachira (n 200) 10.
[211] Ibid 11.
[212] Ibid 2.

system it acts as the legally binding arm of the African system, complimentary to the protective and promotional functions of the ACHPR. It took over a decade after the adoption of the protocol establishing the African Court, for the Court to hear its first case due to a dragging ratification process and the slow establishment of logistical measures[213] – a further indication that the climate on the continent is hesitant in relation to binding human rights mechanisms.

Ten years after entry into force, in 2014, the Court is currently reviewing its first indigenous land rights claim. While the ruling of the Court is pending,[214] in 2012, it issued an interim recommendation, recognizing the dependence of the Ogiek Communities on the Mau forests in which they live, and the extreme consequences of the 30 day eviction notice by the State of Kenya on which the case is based.

> "In the opinion of the Court, there exists a situation of extreme gravity and urgency, as well as a risk of irreparable harm to the Ogiek Community with regard to violation of their rights guaranteed under the Charter to, among others:
> Enjoyment of their cultural rights and protection of their traditional values under Article 2 and 17(2) and (3);
> Protection before the law under Article 3;
> Integrity of their persons under Article 4;
> The right to property under Article 14; and
> The right to Economic, social and cultural development under Article 22."[215]

The ACHPR has established a strong foundation for the protection and promotion of indigenous land rights on the African continent. The interim measure is a positive step, but we must wait to see if the Court will follow through with an evolutionary approach to indigenous rights in Africa.

[213] George Mukundi Wachira (n 200).
[214] African Court on Human and Peoples' Rights, 'Status of Applications Received by the Court' <http://www.african-court.org/en/index.php/about-the-court/brief-history/40-cases-status/124-cases-status1> accessed 28 September 2014.
[215] *African Commission on Human and Peoples' Rights v Republic of Kenya, Order of Provision Measures* [2012] African Court on Human and Peoples' Rights 006/2012 [20].

3.2.1 Jurisprudential developments under the African Charter on Human and Peoples' Rights

The 2002 case of *The Social and Economic Rights Action Center for Economic and Social Rights v. Nigeria* (hereinafter, *Ogoni* case), involved the exploitation of oil reserves in Ogoniland in the Niger Delta through interference by the State as well as third party actors. Severe environmental degradation was reported, in violation of international environmental standards. Additionally, the State had barred scientists and environmental organizations from entering the region to conduct impact assessments. Moreover, executions of Ogoni leaders and violence against the indigenous groups were reported in response to protests; and homes, agriculture, and whole villages were destroyed by uniformed police and army officers.[216]

In this landmark case decided prior to the ruling of *Saramaka*, the ACHR recognized substantive rights not specifically recognized in the Charter. For instance, the right to not be subjected to forced evictions was nested in the right to adequate housing, which was recognized through the right to property (Art. 14), the right to the best attainable level of physical and mental health (Art 16.) the right to family life (Art. 18(1)). The right to not be subjected to forced evictions was importantly elaborated as a collective right to be enjoyed by the Ogoni peoples as a whole.[217] Additionally, the Commission recognizes the right to food, as being implicit in the right to life (Art. 4), the right to health (Art. 16) as well as the right to economic, social and cultural development (Art. 22).[218]

Further, this case is precedent-setting as the court clearly defines positive and negative obligations of the State, as well as minimum standards of protection.[219] The requirement of

[216] *The Social and Economic Rights Action Center and the Center for Economic and Social Rights v Nigeria* [2002] African Commission on Human and Peoples' Rights 155/96 [1–9].
[217] Ibid 59–63.
[218] Ibid 64.
[219] Ibid 61.

health and environmental impact assessments were recognized within the right to physical and mental health (Art. 16) and the right to a healthy environment (Art. 24).[220] The reasoning in the finding of a violation to freely dispose of wealth and natural resources (Art. 21) was built upon the devastation of the environment, the lack of material benefits of the Ogoni and the absence of inclusion in decision-making processes, which is paralleled in the decision of *Saramaka*.[221] While jurisprudence of the Inter-American Court as well as the European Court of Human Rights were referenced, the body of jurisprudential environmental protections did not exist at a level to significantly shape the Court's reasoning under article 60, as it does in the case of *Endorois*, which will be discussed next.

The ACHPR has been lauded within the human rights movement for its expansive approach to its decision in the *Centre for Minority Rights Development and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya*[222] (hereinafter, *Endorois case*). This case articulates a historical dispossession of land; in the 1970s, in favor of the creation of a game reserve, the Endorois were dispossessed of their land in the Lake Bogoria region of Kenya, with which they possessed cultural, religious, and ancestral ties. Further, in 2002, concessions of ruby mining to third parties within and surrounding Endorois ancestral land allegedly contaminated their singular water source.[223]

In view of the above, the African Commission found that the Respondent State was in violation of the Endorois' right to property in relation to land , natural resources and economic,

[220] Ibid 53.
[221] Gaetano Pentassuglia (n 110) 186.
[222] *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v. Kenya* (n 176).
[223] Ibid 14.

social and cultural development (Art. 14, 21, 22), as well as the free expression of their religion, cultural life and traditional values (Art. 8, 17).

A salient feature of the reasoning of the ACHPR in this case is that it draws almost exclusively upon the jurisprudence of the IACtHR, particularly the reasoning in *Saramaka v. Suriname*.[224] The ACHPR elaborates that the recognition of traditional communities' rights and interests in their ancestral lands as property under Art. 14, is a necessary first step in the protection of indigenous rights – a principle set forth in the case of *Saramaka*.[225] As explained above, Art. 60 of the AfrCH allows for an expansive approach in the reasoning of the Court. The development of jurisprudence in international law on indigenous land rights has evolved rapidly between the era of *Ogoni* and *Endorois*; the ACHPR, previously had a sparse approach to their judicial reasoning – a trend which reversed under article 60 in this case, drawing upon a plethora of regional and international jurisprudence.[226] This exemplifies not only the reinforcing relationship between regional and international jurisprudence, but also between supranational bodies.

In summary, examining the jurisprudence of the IACtHR and the ACHPR highlights the overlapping and mutually reinforcing nature of regional systems. While African jurisprudence has been evolutionary in its own right through its ruling in the case of the *Ogoni Peoples*, since the landmark case of *Saramaka* delivered by the IACtHR, the jurisprudence of the African Court has solidified the principles established therein by utilizing the precedential reasoning in its own case law. Additionally, regional systems clearly draw upon international norms – both of a binding and soft law nature, to ensure protections where domestic systems do not provide for

[224] Gaetano Pentassuglia (n 110) 188.
[225] *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v. Kenya* (n 176) [187].
[226] Gaetano Pentassuglia (n 110) 188–189.

them. Despite hindrances in follow-through of remedial measures due to a lack of political will in certain States, the Inter-American system remains active in its follow-up procedures, continuing to apply pressure on States and firmly establishing the significance of environmental rights of indigenous peoples as a group requiring positive State action in remedying infringements by third parties.

4 Environmental Rights of Indigenous Peoples before Domestic Courts

With the expansion of jurisprudence and specialized instruments protecting indigenous land rights on international and regional levels, we witness an increase in dialogue between supranational and domestic courts. States are under the obligation to implement indigenous rights standards to which they are bound by treaty as well as those recognized under customary law. However, judicial capacity to invoke international norms varies between States, and where restrictions are present, judicial branches of government may serve as conduits for integrating international norms into domestic practice, if not law.[227] In addition to reflecting international norms and jurisprudence, domestic courts may provide indigenous protections in their own right. Therefore, while international jurisprudence has a primary focus on current land use, domestic cases assessed below address additional issues of historical dispossession and native title, however, this section will primarily focus on the extent to which international human rights law has influenced domestic jurisprudence.

4.1 **Australian Jurisprudence**

At one end of the spectrum lies the 1992 decision of *Mabo v Queensland II,*[228] which questions the degree to which international jurisprudence can shape domestic law, taking a more restrained approach to indigenous land rights.[229] The case addresses whether the Meriam peoples could assert property rights to ancestral lands over territory owned by the State. It

[227] Anaya (n 30) 199.
[228] *Mabo and Others v Queensland (No 2)* [1992] High Court of Australia 175 CLR 1.
[229] Gaetano Pentassuglia (n 110) 194.

additionally addresses the previous international laws of acquiring sovereignty over a territory – the theory of *terra nullius,* which the Court rejects in the following passage.[230]

> "The common law does not necessarily conform with international law, but international law is a legitimate and important influence on the development of the common law, especially when international law declares the existence of universal human rights. A common law doctrine founded on unjust discrimination in the enjoyment of civil and political rights demands reconsideration. It is contrary both to international standards and to the fundamental values of our common law to entrench a discriminatory rule which, because of the supposed position on the scale of social organization of the indigenous inhabitants of a settled colony, denies them a right to occupy their traditional lands."[231]

For the above passage, the Court drew upon "selected decisions of the Human Rights Committee",[232] and in its further reasoning on Art. 5 of the Convention on the Elimination of All Forms of Racial Discrimination (CERD), drawing from it the "right to be immune from arbitrary deprivation of property".[233] Additionally, the decision drew upon Canadian jurisprudence in *R. v. Sparrow* in relation to extinguishment of Native title; this case will be discussed further in this chapter.

While *Mabo No. 2* was hailed as a positive step forward for aboriginal rights in Australia, and illustrates the manner in which international law may shape domestic jurisprudence; the extent of protections is limited. While the Court affirms Native title over the previous theory of *terra nullius,*[234] it upholds the capabilities of extinguishment by the State.[235] Furthermore, the Court states, parallel to other common law systems, that a traditional connection with the land,

[230] *Mabo and Others v. Queensland (No. 2)* (n 229) [33].
[231] Ibid 42.
[232] Ibid.
[233] *Mabo and Others v. Queensland (No. 2)* (n 229) [126].
[234] Anaya (n 30) 198.
[235] *Mabo and Others v. Queensland (No. 2)* (n 229) [128].

substantially maintained, is crucial for determining whether native title exists.[236] The concept of continued occupation is narrow in the realm of indigenous land rights, further highlighting the restrictive method of the Court.[237] However, the court does express that "traditional" occupation may change over time, traditional activities are not meant to be rigid, and modification of an indigenous community's way of life does not render title void,[238] an important broadening of the approach to recognizing and proving indigenous title.

This case did open up internal dialogue on the issue of indigenous land rights, resulting in the Native Title Act (1993), which went further than *Mabo* in creating procedures for obtaining compensation for lands lost, and limiting the possibilities of extinguishment to native title, though strengthening the concept of continued connection.[239] However, the Native Title Amendment Act (NTAA) of 1998 removed such procedural safeguards,[240] illustrating the extent to which both legislative and judicial branches play important roles in infusing international norms with domestic law. The case of the *Yorta Yorta peoples*[241] exemplifies the detrimental effects of the NTAA, after which the *onus probandi* was shifted onto the Aboriginal group whose evidence of continued occupation of their traditional lands along the Murray River, was found insufficient by the High Court. Thereby setting a precedent in which indigenous groups who were victims of historical forced removal were excluded from the possibility of attaining land title.[242] In the 2005 Concluding Observations by the CERD, the committee noted,

[236] Ibid 66.
[237] Gaetano Pentassuglia (n 110) 194.
[238] *Mabo and Others v. Queensland (No. 2)* (n 229) [150].
[239] Anaya (n 30) 199.
[240] Anaya (n 30).
[241] Members of the Yorta Yorta Aboriginal Community v State of Victoria & Ors [2002] High Court of Australia 58 M128/2001.
[242] Jérémie Gilbert, *Indigenous Peoples' Land Rights under International Law: From Victims to Actors* (1st edn, BRILL 2006) 72.

> "The Committee is concerned about information according to which proof of continuous observance and acknowledgement of the laws and customs of indigenous peoples since the British acquisition of sovereignty over Australia is required to establish elements in the statutory definition of native title under the Native Title Act. The high standard of proof required is reported to have the consequence that many indigenous peoples are unable to obtain recognition of their relationship with their traditional lands (Art. 5)."[243]

This is contrary to the study undertaken by Special Rapporteur Cobo, in which he states that land occupied by indigenous peoples should have indigenous title, and should a dispute arise, the *onus probandi* should fall on the non-indigenous populations who claim a title in the same land.[244]

Additionally, in the case of *Wik Peoples v. Queensland*,[245] the Wik and Thayorre peoples sought Native title rights over their traditional lands on Cape York, an area that included two pastoral leases belonging to third parties.[246] The Court held that Native title could coexist with a pastoral lease, contrary to the common definition of Native title which refers to exclusive use and ownership, and further, that if a legal inconsistency exists between the two land titles, a claim will be found in favor of the pastoral lease, and Native title will be extinguished.[247] In reference to this case, the Court in *Fejo*[248] describes Native title as, "the inherently fragile native title right, susceptible to extinguishment or defeasance." The description is apropos as you will see a stark contrast further in this chapter, in the jurisprudence of the Philippines regarding conflicting title rights.

[243] 'Concluding Observations of the Committee on the Elimination of Racial Discrimination: Australia' (2005) U.N. Doc. CERD/C/AUS/CO/14 para 17.
[244] José R. Martinez Cobo, 'Study of the Problem of Discrimination Against Indigenous Populations: Final Report, Third Part: Conclusions, Proposals and Recommendations' (Sub-Commission on Prevention of Discrimination and Protection of Minorities 1983) E/CN.4/Sub.2/1983/21/Add.8 para 519 <http://www.un.org/esa/socdev/unpfii/documents/MCS_xxi_xxii_e.pdf>.
[245] *Wik Peoples v Queensland* [1996] High Court of Australia [1996] HCA 40; (1996) 187 CLR 1; (1996) 141 ALR 129; (1996) 71 ALJR 173 (23 December 1996) [7].
[246] Ibid Introduction.
[247] *Wik Peoples v. Queensland* (n 246).
[248] *Jim Fejo and David Mills on behalf of the Larrakia People v Northern Territory of Australia* [1998] High Court of Australia HCA 58; 195 CLR 96; 72 ALJR 1442; 156 ALR 721 [105].

4.2 **Canadian Jurisprudence and Indigenous Rights**

At another end of the spectrum from Australia, lies the Canadian Supreme Court – with a well-developed body of indigenous environmental rights which has been referenced with frequency by domestic courts and regional systems. The Canadian jurisdiction recognizes the notion of the common law doctrine of native title,[249] alongside indigenous land tenure and property rights.[250] The 1997 case of *Delgamuukw v. British Columbia*[251] offered the Canadian Supreme Court's definitive statement on indigenous land title. It clearly defines three aspects of land title; firstly, the scope of protections afforded under the relevant law, subsection 35(1) of the Constitution Act of 1982, secondly, how aboriginal title may be proved, and lastly, a test of justification for title infringements.[252]

The Court expanded on the test established in *Van der Peet*[253] which articulates criteria for an indigenous group to successfully make a land title claim:

> (i) "the land must have been occupied prior to sovereignty,
> (ii) if present occupation is relied on as proof of occupation pre-sovereignty, there must be a continuity between present and pre-sovereignty occupation, and
> (iii) at sovereignty, that occupation must have been exclusive."[254]

There are several important aspects of this ruling for the international indigenous rights movement. Firstly, the *onus* of proving occupation clearly falls upon the indigenous groups in question. Secondly, the case expands on the "continuous" land use test established in *Mabo II*,

[249] Indigenous land title, as defined by Jérémie Gilbert, refers to the exclusive right of indigenous peoples to use lands and natural resources, until such a time that title is voluntarily extinguished, or extinguished by an act of the State.
[250] Gaetano Pentassuglia (n 110) 194.
[251] *Delgamuukw v British Columbia* [1997] Canadian Supreme Court 3 S.C.R. 1010.
[252] Mary C. Hurley Law and Government Division, 'Aboriginal Title: The Supreme Court of Canada Decision in Delgamuukw v. British Columbia' (Parliamentary Information and Research Service 1998) <http://www.parl.gc.ca/content/lop/researchpublications/bp459-e.htm>.
[253] *R v Van der Peet* [1996] Supreme Court of Canada 2 S.C.R. 507.
[254] *Delgamuukw v. British Columbia* (n 252) [143].

which stated that "substantial maintenance of the connection" of land use between pre-sovereignty and the present day must exist for proving indigenous land title.[255] The Canadian Supreme Court, however, expanded a rigid interpretation of proof of continued connection, to accepting oral history inherent to the indigenous community as evidence, the primary form of historical documentation prevalent in many indigenous communities across the globe. Specifically, the Court accepted historical songs as proof of continued connection with the territory, overturning a lower court decision which deemed the evidence inadmissible.[256] Further, the Court recognized indigenous title as communal property, affirming the existence of group rights.[257] Expanding upon the test, the Court highlights that the notion of exclusivity does not require an absence of the presence of other groups on the land, but rather it refers to the intention and the capacity of the indigenous group to retain control.[258]

The Court additionally establishes a sliding scale approach to the duty of consultation with indigenous communities, an expansion of the ruling in *R. v. Sparrow*.[259] The court states that consultation is always a duty of the state, and that such a duty will vary in "nature and scope" depending upon the degree of the rights infringement.[260] However, mere consultation must be used only for the most minor breaches of environmental rights.[261] The court further elaborates,

> "Even in these rare cases when the minimum acceptable standard is consultation, this consultation must be in good faith, and with the intention of substantially addressing the concerns of the aboriginal peoples whose lands are at issue. In most cases, it will be significantly deeper than mere consultation. Some cases

[255] *Delgamuukw v. British Columbia* (n 252).
[256] Jérémie Gilbert (n 243) 112.
[257] Ibid 111.
[258] Ibid 70.
[259] *R. v. Sparrow* [1990] Supreme Court of Canada 1 SCR 1075, 20311.
[260] *Delgamuukw v. British Columbia* (n 252) [168].
[261] Ibid.

> may even require the full consent of an aboriginal nation, particularly when provinces enact hunting and fishing regulations in relation to aboriginal lands."[262]

Here the court sets an important precedent; utilizing an expansive approach in ensuring rights to ancestral lands and traditional cultural and subsistence activities, it articulates a duty of consultation as a *minimum* standard to be only *rarely* used, as in the vast majority of cases, this duty must extend far beyond consultation.

However, Canadian jurisprudence affirms the legality of extinguishment, contrary to its obligations under the ICCPR. In its Concluding Observations, the HRC states "The Committee also recommends that the practice of extinguishing inherent aboriginal rights be abandoned as incompatible with article 1 of the Covenant."[263]

4.3 **Domestic cases in the Asia-Pacific Region**

The Asia-Pacific region[264] is an area of the world in which strong domestic jurisprudence protecting indigenous rights is paramount, as there aren't any regional mechanisms to support such claims.

In *Kayano et al v. Hokkaido Expropriation Committee*,[265] the 1997 judgment of the Sapporo district Court recognized, for the first time, an indigenous minority within the context of Japanese Law. The case turned on the government's failure to take into consideration in the building of a dam, the Ainu Community's cultural dependency on ancestral lands in the

[262] Ibid.
[263] 'Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant, Concluding Observations of the Human Rights Committee: Canada' (1999) CCPR/C/79/Add.105 para 8 <http://www.univie.ac.at/bimtor/dateien/canada_ccpr_1999_concob.pdf>.
[264] While Australia geographically falls within this region, due to the unique history of indigenous rights and judicial developments in the country, it is addressed in its own section.
[265] *Kayano et al v Hokkaido Expropriation Committee* [1997] Sapporo District Court 1598 Hanrei Jihou 33, 938 Hanrei Times 75. English translation available at 38 International Legal Materials (1999) pp. 397–429

Hokkaido region of Japan, which would be affected by the structure.[266] The Court recognized Japan's duty under Article 27 of the ICCPR to protect the Ainu peoples, a decision which paralleled an international context of the HRC actively pursuing indigenous protections under Art. 27.[267]

This case is set against a backdrop of historical Japanese denial of indigenous minorities. For instance, Japan's initial State Report upon ratifying the ICCPR stated, in regards to article 27, "minorities of the kind mentioned in the Covenant did not exist in Japan."[268] The ruling of the Sapporo District Court is the only one of its kind, and more likely articulates the rare occurrence of a Japanese Court undermining the government, than a reflection of State position. However, it did pave the way for a radical shift in Japan's stance on indigenousness in the country, as in 2007, Japan voted in favor of the DRIP. In 2008, the "*The Resolution to Acknowledge that the Ainu are Indigenous People*" was passed, to be followed by further legislation and remedies.[269] Therefore, Japan is a clear example of how an international movement can be translated into a domestic context, and the effect of soft law instruments as evolutionary highlights the importance of such mechanisms even though they are not legally binding.

In the Philippines, *Isagani Cruz and Cesar Europa v. Sec. of Environment and Natural Resources, et al.,*[270] was a case in which the Supreme Court upheld the constitutionality of the

[266] David McGrogan, 'A Shift in Japan's Stance on Indigenous Rights, and Its Implications' (2010) 17 International Journal on Minority and Group Rights 355, 358.
[267] Gaetano Pentassuglia (n 110) 191.
[268] Human Rights Committee, 'Summary Record of the 320th Meeting' (1981) CCPR/C.SR.320 <http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2fSR.320&Lang=en>.
[269] David McGrogan (n 267) 359.
[270] *Isagani Cruz and Cesar Europa v Sec of Environment and Natural Resources, et al* [2000] Republic of the Philippines Supreme Court GR No. 135385.

Indigenous Peoples Rights Act (IPRA)[271] which broadly protects environmental rights and land title of indigenous peoples in the Philippines, based on ILO Convention 169.[272] The Act was challenged on the basis of an unlawful deprivation of State owned land and resources, and a discriminatory infringement on private ownership. The case was dismissed; however, a detailed separate opinion reaffirmed the constitutionality of the IPRA on the basis of indigenous occupation of traditional lands since time immemorial, except when dispossessed through war or colonization,[273] and its compatibility with international norms.

The expansive approach of the IPRA, it should be noted, goes beyond ILO 169 by stipulating that in cases of conflict between indigenous and State or third party interests regarding ancestral lands, indigenous customary law should be applied and the outcome of such a conflict should resolve in favor of the indigenous community.[274] The IPRA additionally provides for the recognition of land title and a clear avenue for resolution in the event of displacement.[275]

It was in 1996 that the Malaysian Court ruled on the case of *Adong bin Kuwau and Ors v. Kerajaan Negeri Johor and Anor,* [276] recognizing the land rights of the Orang Asli peoples through Art. 160(2) of the Constitution of Malaysia, which allows for the application of both customary law and common law.[277] The Court furthered indigenous rights, in the case of *Sagong Tasi and Ors v Negeri Kerajaan Selangor and Ors,*[278] in which the indigenous group was

[271] Indigenous Peoples Rights Act 1997 (Republic Act No 8371).
[272] Gaetano Pentassuglia (n 79) 192.
[273] *Isagani Cruz and Cesar Europa v. Sec. of Environment and Natural Resources, et al* (n 271) [115].
[274] Jérémie Gilbert (n 243) 113.
[275] *The Indigenous Peoples' Rights Act of 1997* (n 272). Sec 7.
[276] *Adong bin Kuwau and Ors v Kerajaan Negeri Johor and Anor* [1997] High Court of Malaysia 1 M.L.J. 418.
[277] P.G. McHugh, *Aboriginal Title: The Modern Jurisprudence of Tribal Land Rights* (Oxford University Press 2011) 190.
[278] *Sagong Tasi and Ors v Negeri Kerajaan Selangor and Ors* [2002] High Court of Malaysia 2 CLJ 543.

dispossessed of their land under reserve for the purpose of building a hiway,[279] the Court drew upon the ruling of *Mabo No. 2* recognizing the extinguishment of the theory of terra nullius as an international norm.[280] Further, in a decision affirming indigenous land title to the Orang Asli community, the court accepted oral histories following the ruling in *Delgamuukw*, despite evidentiary rules against heresay evidence in their domestic law.[281] The court aligned with *Delgamuukw* stating,

> "First, [..] trial courts must approach the rules of evidence in light of the evidentiary difficulties inherent in adjudicating aboriginal claims, and second, that trial courts must interpret that evidence in the same spirit must be understood against this background. The first principle relates to the difficulties inherent in demonstrating a continuity between current aboriginal activities and the pre-contact practices, customs and traditions of aboriginal societies. Since many aboriginal societies did not keep written records at the time of the contact or sovereignity, it would be exceedingly difficult for them to produce conclusive evidence from pre-contact times about the practices, customs and traditions of their community. The second principle is to adapt the laws of evidence so that the aboriginal perspective on their practices, customs and traditions and on their relationship with the land, are given due weight by the courts. In practical terms, this requires the courts to come to terms with the oral histories of aboriginal societies, which, for many aboriginal nations, are the only record of the past."[282]

4.4 **Jurisprudential Developments in South Africa**

As in the case of *Delgamuukw*, the court in the *Richtersveld Community*[283] (2003) case expands on the collective nature of indigenous property rights.[284] In this case the Richtersveld community was seeking land title of ancestral lands from which they were dispossessed during the apartheid era. The property of the Richtersveld Community was always considered to be

[279] Ibid 1.
[280] Ibid 11.2.
[281] Ibid Appendix A.
[282] Ibid Appendix A (5).
[283] *The Richtersveld Community and Others v Alexkor Limited and the Government of the Republic of South Africa* [2003] Supreme Court of Appeal of South Africa Case No. 488/2001.
[284] Jérémie Gilbert (n 243) 111.

collective under indigenous customary law, and the court considers that such indigenous law fuses with common law over time, and must be acknowledged as integral.[285] The reasoning of the court also focused on the racially discriminatory dispossession of territory at annexation.[286]

Further, the Court elaborated on specific areas of indigenous title outlined in *Delgamuukw*. It importantly expanded upon the nature of exclusive occupation, stating that a nomadic lifestyle should not be considered inconsistent with the exclusive concept of occupation of traditional land.[287] Regarding the recognition of indigenous customary law in assessing land rights, the Court reasoned,

> "It was conceded on behalf of both respondents that at the time of annexation the Richtersveld people had a customary law interest under their indigenous customary law entitling them to exclusive occupation and use of the subject land and that this interest was akin to the right of ownership held under common law."[288]

The court thereby recognizes indigenous law within South African law, highlighting the importance of the consideration of indigenous customary law and land tenure systems in developing jurisprudence regarding ownership.[289] Further, the South African approach runs parallel to the Inter-American approach, in which customary laws are used to determine land rights and the legal application of non-discrimination supports the recognition of indigenous property rights.[290]

While the extent of protections differs, domestic courts around the world have confirmed the *sui generis* nature of indigenous land title, finding its root in the pre-existing customs and

[285] *.Alexkor Limited and the Government of South Africa v The Richtersveld Community and Others* [2003] Constitutional Court of South Africa Case CCT 19/03 [51].
[286] *The Richtersveld Community and Others v. Alexkor Limited and the Government of the Republic of South Africa* (n 284) [5].
[287] Ibid 23.
[288] Ibid 20.
[289] Jérémie Gilbert (n 243) 112.
[290] Gaetano Pentassuglia (n 110) 194.

traditions of the communities in question.[291] While the extent of legal protections differs in domestic systems, the judiciary may act as an independent check for executive and legislative branches of government, drawing upon international norms and soft law instruments to expand protections for indigenous peoples beyond the scope of domestic legislation, as exemplified by the *Kayano* case. Further, domestic systems are interconnected as one judicial body looks to others for guidance, highlighting the importance of the detailed articulation of protections in the Canadian system, for instance. However, courts are at liberty to interpret such norms narrowly, applying a restrictive approach to securing indigenous rights, as with the example of Australia.

[291] Jérémie Gilbert (n 243) 69.

5 A Critical Assessment of Environmental Protections: The Merit of Reparations and the Accountability of Non-State Actors

Previous chapters have involved an assessment of the development of jurisprudence and instruments protecting indigenous rights, with particular emphasis on the reinforcing nature of the multi-level system of international, regional and domestic protections. However, two further areas must be critically assessed in order to address how environmental rights of indigenous peoples can be more effectively protected in the future. Despite a largely progressive jurisprudential movement, there is considerable weakness in the structural component of indigenous protections; this includes the merit of reparations, their efficacy, implementation, and the nature of the backward-looking component of human rights violations (Section 5.1.). In addition, one must ask whether human rights commitments undertaken by States can offer adequate protection given the fact that the actions of non-state actors pose the primary threat to indigenous rights. Therefore advancements toward establishing accountability on the part of the non-state actor will be addressed (Section 5.2.).

5.1 **The Merit of Reparations**

Human rights violations are primarily retrospective, as established by the Human Rights Committee in *Aalbersberg v. The Netherlands* in which was stated,

> "For a person to claim to be a victim of a violation of a right protected by the Covenant, he or she must show either that an act or an omission of a State party has already adversely affected his or her enjoyment of such right, or that such an effect is imminent."[292]

[292] *Aalbersberg and 2,084 other Dutch citizens v Netherlands* [2006] Human Rights Committee Communication No. 1440/2005, U.N. Doc. CCPR/C/87/D/1440/2005 [6.3]. This point is further elaborated in 'Report of the Office of

This presents a unique problem for the protection of indigenous land rights, due to the enmeshed relationship between traditional lands and culture, once indigenous peoples have been dispossessed of their land, or it has been spoiled through resource extraction, the cultural survival of the peoples is in peril if not subsequently destroyed for present and future generations.[293] Therefore, no manner of reparation in cases of permanent dispossession can equate to the survival of the community, and it could thereby be argued that such environmental infringements could be viewed under a right to life analysis.[294] I argue that in order for mechanisms of protection for environmental rights to be truly effective, stronger emphasis must be placed on safeguards that can continue the way of life of the indigenous groups – that of the free, prior and informed consent of the community affected, as well as thorough and prior impact assessments.

To further problematize the notion of reparations, we can look at *Sarmaka v. Suriname* – a case known for its evolutionary interpretation of indigenous land rights. In this case, the Court elaborates that if a large-scale development project threatens to have a "major impact" on an indigenous group, the duty of consultation is replaced with that of free, prior and informed consent.[295] Expert witnesses in the case stated "the social, environmental and other impacts of the logging concessions are severe and traumatic", and that "large areas of standing water render the forest incapable of producing traditional Saramaka agricultural crops."[296] Moreover, the right to be justly compensated under article 21(2) is interpreted as a right for the Saramaka

the United Nations High Commissioner for Human Rights on the Relationship Between Climate Change and Human Rights' (2009) A/HRC/10/61 para 70 <http://www.ohchr.org/EN/Issues/HRAndClimateChange/Pages/Study.aspx>.

[293] See Chapter 2 of this paper

[294] Orellana (n 188) 847.

[295] *Saramaka People. v. Suriname* (n 153) [134].

[296] Ibid 151–152.

peoples to share in the monetary benefits caused by the "restriction or deprivation" of the usage of their traditional lands.[297]

The threshold for a "restriction or deprivation" that is of a "major impact" as to be essential for survival, and thereby resulting in just compensation, means that such compensation quantifies the existence of that indigenous group.[298] In this case, the full amount for pecuniary and non pecuniary damages amounts to $760,000 United States Dollars, $600,000 of which is to be funneled into a Community Development Fund managed by the State.[299]

Based on a monitoring assessment in 2011, the Court found that Suriname had only partially complied with the 2007 ruling of the Court in relation to monetary compensation,[300] however, the government had not demarcated the land and ensured legal property title to the Saramaka community, nor established legislative measures for future protections of the ancestral territories.[301] A monitoring assessment in 2013 revealed that the government of Suriname had granted mining concessions to the corporation IAMGOLD on Saramaka land without the community's consent, nor an impact assessment, and further, indigenous members of the Saramaka community had reported repeated threats and coercive measures by government officials to renounce legal representation in relation to compliance with the 2007 judgment.[302] Further, in 2011, the Court had ordered that,

> "The award of any new concession in these territories after December 19, 2007, the date of which the Judgment was notified, without the consent of the Saramaka

[297] Ibid 139.
[298] Orellana (n 188) 846–847.
[299] *Saramaka People. v. Suriname* (n 152) [198–213].
[300] Order of the Inter-American Court of Human Rights, 'Case of Saramaka People v. Suriname: Monitoring and Compliance' (2011) paras 39–46 <http://www.forestpeoples.org/sites/fpp/files/publication/2012/01/order-iachr-saramaka-nov-2011.pdf> accessed 1 November 2014.
[301] Ibid 16–17.
[302] Order of the Inter-American Court of Human Rights, 'Request for Provisional Measures and Monitoring Compliance with Judgment with Regard to the Republic of Suriname Case of the Saramaka People' (2013) paras 6–13 <http://www.corteidh.or.cr/docs/supervisiones/saramaka_04_09_13_ing.pdf>.

> and without previously conducting social and environmental impact assessments, would constitute a direct violation of the Court's ruling and, consequently, of the international treaty-based obligations of the State."[303]

The Court's application of its compliance and monitoring procedures demonstrate that it is making a concerted effort to fulfill the rights of the Saramaka Community – maintaining the significance of its 2007 decision for indigenous peoples' rights, and working toward effectively deterring further detrimental action by the Surinamese government.[304] This case draws a hard distinction between protection in theory and in fact. The case of the *Saramaka peoples* has been celebrated as one of the most prominent judicial decisions articulating environmental rights for indigenous peoples. However, despite established monitoring mechanisms, the land and thereby culture of the Saramaka peoples continues to be destroyed.

Human rights impact assessments (HRIA) importantly identify and measure the direct and indirect effects of development projects and policy changes on the enjoyment of human rights – inserting such rights into the decision-making processes of governments and corporations.[305] Environmental impact assessments involve "inter-related socio-economic, cultural and human-health impacts"[306], and both are based on meaningful participation with the affected groups, a transparent and methodical process and strict accountability.[307] As indigenous peoples are particularly dependent upon the lands which they traditionally occupy, these dual impact assessments are crucial for protecting environmental rights.

[303] Ibid 21.
[304] David Llanes, 'Surinamese Compliance with Saramaka People v. Suriname' <http://hrbrief.org/2013/11/surinamese-compliance-with-saramaka-people-v-suriname/> accessed 19 November 2013.
[305] 'Human Rights Impact Assessments: A Review of the Literature, Differences with Other Forms of Assessments and Relevance for Development' (Commissioned by the Nordic Trust Fund and The World Banks 2013) ix <http://siteresources.worldbank.org/PROJECTS/Resources/40940-1331068268558/HRIA_Web.pdf>.
[306] Convention on Biological Diversity, 'What Is Impact Assessment?' <http://www.cbd.int/impact/whatis.shtml> accessed 5 November 2014.
[307] 'Human Rights Impact Assessments: A Review of the Literature, Differences with Other Forms of Assessments and Relevance for Development' (n 306) xi.

Impact assessments involve a nine stage process, of (1) preparation, which clarifies the legal context of the project, (2) screening, a process of identifying the specific human rights which may be affected, (3) scoping the terms of reference (TORs) and outlining the processes of the assessment and responsibilities of those conducting the assessments, (4) gathering of evidence which involves a series of methodological surveys and indicators in the fields of sociology and economics among others, (5) consultation – a key area of HRIA based upon participatory methods which are conducted through the entire process including in the conclusion and recommendation stage, (6) analyzing the data for potential and perceived impacts and actual impacts on human rights norms, (7) recommendations and conclusions which are strongly rooted both in implementing corrective action and also in amplifying positive human rights effects, (8) evaluation and monitoring, involving a critical assessment of the efficacy of the HRIA itself (9) preparing the report which involves a full assessment of HRIA – a clear documentation of the process for issues of transparency and importantly, a plan for continued monitoring throughout the project's development and after it's completed.[308]

Importantly, the notion of impact assessments places a greater emphasis on avoiding human rights violations for which there exists an inadequate system of reparations. I argue that strict requirements surrounding impact assessments should therefore be a defining feature in international and regional treaties as well as incorporated into domestic legislation, as a basis for protecting future violations. Further, I will argue that non-state actors need to be held accountable for the violation of indigenous environmental rights.

[308] For an in-depth account of the processes of HRIA, see Ibid xii.

5.2 **Accountability for Non-State Actors**

Human rights are guaranteed and ensured *vis-à-vis* the State, however, in the majority of land rights cases addressed in this paper, the State was not the primary actor, violations were caused by State concessions for natural resource development to third parties. This hybrid state-corporate structure involves a mutual economic goal between the State and transnational corporations (TNC),[309] resulting in a lease agreement or even joint-venture for corporate interests to proceed in the exploitation of ancestral lands.[310] While a human rights framework relies on States as guarantor in protecting and ensuring rights to persons within its jurisdiction,[311] globalization has created a rise in transnational corporate activity, and thereby a disjuncture between those activities and their ability to be monitored and governed for compatibility with human rights and environmental norms,[312] creating a gap for corporate impunity. The growing problematic nature of this "governance gap" has sparked a lively evolution in theorizing accountability for non-state actors.[313] Therefore this section will shift focus away from the State and toward the primary violator of indigenous environmental rights: the transnational corporation. Soft law initiatives to close the governance gap rely on a voluntary framework, and include the United Nations 'Protect, Respect and Remedy framework',[314] the OECD guidelines

[309] The term transnational corporation will be used in this paper, but overlapping and additionally relevant is multinational corporation (MNC) and multinational enterprise (MNE). For working definitions see 'Code of Conduct on Transnational Corporations' (1988) UN ESCOR, U.N. Doc. E/1988/39/Add. 1.

[310] Lillian Aponte Miranda (n 2) 154.

[311] See e.g. Art 2(1) ICCPR which provides "Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant".

[312] Christiana Ochoa, 'The 2008 Ruggie Report: A Framework for Business and Human Rights' (2008) 12 Maurer School of Law, ASIL Insight 2.

[313] Philip Alston (ed), *Non State Actors and Human Rights* (Philip Alston 2005) 78 <http://www.univie.ac.at/intlaw/reinisch/non_state_actors_alston_ar.pdf>.

[314] John Ruggie, 'Protect, Respect and Remedy: A Framework for Business and Human Rightss : Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises' (UN Human Rights Council 2008) A/HRC/8/5 <http://www.refworld.org/docid/484d2d5f2.html> accessed 13 November 2014.

for Multinational Enterprises,[315] the United Nations Global Compact[316] and Norms by the United Nations Sub-Commission on Business and Human Rights, which places initial liability on the part of non-state actors:

> *"Recognizing* that even though States have the primary responsibility to promote, secure the fulfillment of, respect, ensure respect of and protect human rights, transnational corporations and other business enterprises, as organs of society, are also responsible for promoting and securing the human rights set forth in the Universal Declaration of Human Rights."[317]

While the HRC and other treaty bodies have commented that international law does not have a direct horizontal effect between non-state actors and such a legal relationship is only effective within domestic law;[318] human rights scholars have provided normative arguments on the necessary and implicit derivation of binding third party duties. Such arguments articulate that the very nature of the legal requirement that States must ensure compliance by corporations and other third parties in respecting human rights, necessarily implies a legally binding requirement on the part of third parties to respect those rights, for a State could not be required to enforce an obligation were it not at least implicitly recognized within international mechanisms.[319]

The existing mechanisms moving in the direction of corporate accountability, involve adopting a framework of codes of conduct compatible with human rights norms on a voluntary

[315] Organisation for Economic Cooperation and Development (OECD), 'OECD Guidelines for Multinational Enterprises' (2000) <http://www.refworld.org/docid/425bd34c4.html> accessed 11 October 2014.
[316] Office of the High Commissioner of Human Rights, 'United Nations Global Compact' (2000) <https://www.unglobalcompact.org/AboutTheGC/TheTenPrinciples/index.html>.
[317] 'Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights' (UN Sub-Commission on the Promotion and Protection of Human Rights 2003) U.N. Doc. E/CN.4/Sub.2/2003/12/Rev.2 <http://www1.umn.edu/humanrts/business/norms-Aug2003.html>.
[318] 'General Comment 31, Nature of the General Legal Obligation on States Parties to the Covenant' (Human Rights Committee 2004) U.N. Doc. CCPR/C/21/Rev.1/Add.13 para 8 <http://www1.umn.edu/humanrts/gencomm/hrcom31.html>.
[319] See D Bilchitz and S Deva (eds.), *Human Rights Obligations for Business: Beyond the Corporate Responsibility to Respect?* (Cambridge University Press 2013).

basis. This has been referred to as the "privatization of human rights", insofar as it is not States that are holding the corporation accountable, but accountability is privatized to the non-state actor.[320] Leading mechanisms in the trend toward self-regulation on the part of the TNCs will be discussed below.[321]

The Organization for Economic Cooperation and Development, established in 1960 (OECD) has 34 member States as of 2014, and began as a forum for governments to cohesively work to improve economic and social well-being around the world.[322] The OECD guidelines for Multinational Enterprises[323] are a comprehensive set of government supported standards of best practice for business conduct, and are not legally enforceable. They have been updated five times since their implementation in 1976, and they elaborate on principles of human rights, the environment, combating bribery and information disclosure.[324] Indigenous peoples are explicitly mentioned as a group requiring particular attention in ensuring their specified rights.[325] Further, these guidelines comprise the only multilateral corporate responsibility standards that State parties have committed to promoting both domestically and in countries within which corporations from member countries operate. However, two clear limiting factors include the non-legally binding nature of the treaty and the fact that it only has 34 member States, leaving enormous gaps in Central and South America, South East Asia and not a single African Country is a member – all areas with high concentrations of indigenous populations. Further, the

[320] Philip Alston (n 314) 43.
[321] Ibid 44.
[322] OECD, 'The Organisation for Economic Co-Operation and Development: Mission' <http://www.oecd.org/about/> accessed 15 October 2014.
[323] *OECD Guidelines for Multinational Enterprises* (2011 edn, OECD Publishing 2011) <http://www.oecd-ilibrary.org/governance/oecd-guidelines-for-multinational-enterprises_9789264115415-en>.
[324] OECD, 'About the OECD Guidelines for Multinational Enterprises' <http://mneguidelines.oecd.org/about/> accessed 15 October 2014.
[325] *OECD Guidelines for Multinational Enterprises* (n 324) 40.

procedures for supervision and enforcement involving "National Contact Points" are neither formal nor robust, leaving compliance largely unregulated.[326]

The Earth Charter is an initiative launched by the World Commission on Environment and Development with Maurice Strong (Secretary General of the Rio Summit) and Mikhail Gorbachev's Green Cross International, born out of the 1992 Rio Declaration.[327] It has not yet been formally recognized, but it has been endorsed by over 2,000 organizations including UNESCO and the International Union for the Conservation of Nature (IUCN). It uniquely represents the influence of both soft laws and NGOs,[328] and in article 10(d) requires transparency in an organization's activities and to be held accountable for *all* of their activities.[329] In my opinion, this provision is the strongest of the soft law instruments, and the need for criminal liability on the part of corporations is paramount to protecting indigenous rights.

The United Nations Global Compact, launched in 2000 to further the UN Millennium Development Goals, is the largest existing voluntary corporate initiative – with an excess of 12,000 corporate participants representing 145 countries. It is a simple instrument of ten principles, which include both respecting human rights and not being complicit in abuses of rights, in relation to the environment, such loose terms are used as, to "take a precautionary approach" to environmental challenges and promote responsibility, which does include risk

[326] Philip Alston (n 314) 52.
[327] Earth Charter International, 'Background History of the Earth Charter Initiative' <http://www.earthcharterinaction.org/content/pages/History.html>.http://www.earthcharterinaction.org/content/pages/History.html
[328] Laura Westra, *Environmental Justice and the Rights of Indigenous Peoples: International and Domestic Legal Perspectives* (Reprint edition, Routledge 2008) 258.
[329] Earth Charter International, 'The Earth Charter' <http://www.earthcharterinaction.org/content/pages/Read-the-Charter.html>.

assessment but does not require detailed impact assessments.[330] Its monitoring mechanism includes an annual report to the board as well as public disclosures.

The United States Alien Torte Statute (ATS)[331] has historically been one mechanism allowing for civil proceedings for international crimes to be adjudicated in Federal Courts in the United States regardless of whether the perpetrators or victims were United States nationals.[332] Partially following a framework of universal jurisdiction, with which national courts can adjudicate cases of extreme seriousness in which the judicial system of the origin of the dispute has failed to offer a meaningful remedy,[333] the ATS states "the district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."[334]

The Case of *Kiobel v. Royal Dutch Petroleum* was brought under the ATS on behalf of Ogoni petitioners against Dutch, British and Nigerian transnational corporations (TNC) for activities complicit with the government of Nigeria in violation of the Law of Nations (refer to the *Ogoni* case in Ch. 3).[335] The judgment spanned two Supreme Court terms, and in a grave move for indigenous rights initiatives, the decision shifted away from the concept of universal jurisdiction to the notion of extraterritoriality,[336] significantly limiting the role of the ATS in its legal capacity to reach the alleged activities of transnational corporations infringing human rights

[330] UN Global Compact, 'United Nations Global Compact: The Ten Principles' <https://www.unglobalcompact.org/AboutTheGC/TheTenPrinciples/index.html> accessed 1 November 2014.
[331] Judiciary Act of 1789, ch. 20, 1 Stat. 73, 28 U.S.C.§ 1350.
[332] Jochen von Bernstorff, Marc Jacob, John Dingfelder Stone, 'The Alien Tort Statute before the US Supreme Court in the Kiobel Case: Does International Law Prohibit US Courts to Exercise Extraterritorial Civil Jurisdiction over Human Rights Abuses Committed outside of the US?' (2012) 72 Heidelberg Journal of International Law 579 <http://www.zaoerv.de/72_2012/72_2012_3_a_579_602.pdf>.
[333] Ilya Shapiro (ed), *Cato Supreme Court Review 2012-2013* (Cato Institute 2013) 150.
[334] 28 U.S. Code § 1350 - Alien's Action for Tort 1789 (Title 28, Part IV, Chapter 85, § 1350).
[335] *Kiobel, Individually and on Behalf of Her Late Husband Kiobel, et al v Royal Dutch Petroleum Co et al* (Supreme Court of the United States).
[336] Ilya Shapiro (n 334) 152.

on territories outside of the United States.[337] In 2013, the Supreme Court decided that this case did indeed apply U.S. law extraterritorially, stating "even where the claims touch and concern the territory of the United States, they must do so with sufficient force to displace the presumption against extraterritorial application."[338] This ruling represents a significant step backward in the ability to hold corporations accountable for human rights violations.[339] While the use of the United States ATS for prosecuting claims against corporations had, until this decision, been relatively active, similar tort measures have been utilized in the UK, Australia and Canada to prosecute national corporations operating abroad, though in far fewer cases.[340]

With the set back of the ATS and a lack of domestic mechanisms to hold TNCs accountable for their violations, international frameworks become exceedingly important. John Ruggie, special representative of the Secretary-General on human rights and transnational corporations, in 2008 authored The Protect, Respect and Remedy: a Framework for Business and Human Rights Report (hereby Ruggie Report). It represents a detailed framework of minimum requirements for corporations operating in an international context. The report's framework rests on three core principles: "(1) the State duty to protect against human rights abuses by third parties, including business; (2) the corporate responsibility to respect human rights; (3) and the need for more effective access to remedies."[341] The baseline corporate responsibility to respect human rights is founded on a concept of due diligence, in which TNCs create a detailed human rights policy relevant to the country context where specific human rights vulnerabilities might

[337] Donald Earl Childress III, 'The Alien Tort Statute, Federalism, and the Next Wave of Transnational Litigation' (2012) 100 Georgetown Law Journal 714.
[338] *Kiobel, Individually and on Behalf of Her Late Husband Kiobel, et al. v. Royal Dutch Petroleum Co. et al* (n 336) [14].
[339] Robert C. Bird, Daniel R. Cahoy, Jamie Darin Prenkert (ed), *Law, Business and Human Rights: Bridging the Gap* (Edward Elgar Publishing 2014).
[340] See for a summary Philip Alston (n 314) 55–56.
[341] John Ruggie (n 315).

exist, conduct comprehensive impact assessments in advance of operations, consider the potential of complicit violations through partnering companies, and develop monitoring procedures to ensure compliance.[342] Due diligence involves compliance with the international bill of rights as well as the core conventions of the ILO.[343]

The remedial section of the report addresses both judicial and non-judicial mechanisms, including arbitration, mediation, industry-based organizations, conditional funding imposed by financial institutions and investors, however, the report states that the "patchwork" of mechanisms is both flawed and incomplete.[344] Finally, the report offers recommendations to the UN, such as closing the gap in remedial action through a permanent global ombudsman position, suggesting the Office of the High Commissioner for Human Rights (OHCHR) assist in capacity-building in states which lack the resources for implementation, as well as treaty bodies making recommendations to States during reporting on their duty to protect.[345]

The Ruggie framework must be appreciated as a comprehensive platform for *beginning* a movement toward corporate responsibility; however, it is not stringent enough. To increase the efficacy of protections of indigenous peoples against third party violations, greater protections need to be in place. First, as mentioned previously, better protection could be achieved through mainstreaming impact assessments in conjunction with a low threshold of free, prior and informed consent as a mechanism for avoiding violations for which reparations would be ineffective; secondly, direct human rights accountability should be further conceptually elaborated. It is clear that TNCs operate within a governance gap, receiving impunity in the face of human rights violations. Indigenous protections would be strengthened against such

[342] Ibid 25, 40, 57–58.
[343] John Ruggie (n 319) 58.
[344] Ibid 87.
[345] Ibid 43, 102; Christiana Ochoa (n 313) 4.

violations if, for instance, a company's country of nationality was under a legal obligation to have laws in place prohibiting the extraction of natural resources in violation of indigenous rights. Further, translating into treaty law the Earth Charter's article entailing corporate accountability for *all* activities including those in which it is complicit, is necessary to effectively strengthen protections and reparations for violations of environmental rights of indigenous peoples.

6 Conclusion

The indigenous rights movement comprises an overlapping patchwork of protections spanning a multi-level system. It is reinforced by binding mechanisms in human rights law, international labor law and environmental law, and supported by evolutionary norms articulated in soft law mechanisms and progressive jurisprudence in domestic and regional courts as well as by international bodies. Despite competing interests by States, corporations and third parties, there have been significant developments responsible for expansion in protections regarding indigenous peoples' right to property, cultural integrity and self-determination. These rights attribute to protecting indigenous peoples substantive right to own, use, enjoy and occupy their ancestral lands[346] and continue traditional land tenure systems. Actualizing these rights at an operational level, however, has proved challenging. Environmental rights for indigenous peoples have been articulated in relation to the State, however the primary violators of land and resource rights are third parties, and strong corporate interests in conjunction with inadequate accountability mechanisms for non-state actors have left indigenous peoples exposed to human rights abuses and a lack of meaningful reparation. Further, the retrospective nature of rights infringements poses particular difficulties regarding land rights due to the entrenched cultural dependency of indigenous peoples upon their traditional lands and resources, instilling the need for greater preventative action.

6.1 **Indigenous Environmental Rights in a Multi-Level System**

The multi-level system of indigenous rights comprises international, regional and domestic frameworks. As opposed to three isolated levels of protection, the system is mutually

[346] Lillian Aponte Miranda (n 2) 150.

reinforcing – the three layers interact with and complement one another. Progress on one level influences the system in its entirety as one judicial body looks to another for guidance.

The scope of international protections for indigenous peoples has been shaped by a complementary network of human rights instruments, international labor law and environmental law. At the forefront of this effort is ILO Convention 169, the first comprehensive legal instrument establishing rights for indigenous peoples which has served as a platform for expanding indigenous protections, yet the Convention is binding on only 20 countries.[347] Further, the Human Rights Committee (HRC), under the International Covenant on Civil and Political Rights and its relevant General Comments, has been a mechanism of propulsion, significantly expanding environmental rights norms. Jurisprudence of the HRC has importantly linked rights of use, enjoyment and ownership of traditional lands and resources to cultural integrity in conjunction with self-determination.[348] Such protections now extend to traditional economic activities providing for the possibility of such activities transforming over time, a concept which encompasses a non-static notion of culture. Further a minimum right was established for indigenous peoples to engage in a meaningful consultation process prior to the establishment of decisions or developments affecting their lands.[349]

Monitoring bodies supplemental to the process of indigenous rights compliance at an international level include the Committee on the Elimination of All Forms of Racial Discrimination and the Committee on the Rights of the Child. The former has utilized early action procedures to halt potentially detrimental policies and legislation for indigenous

[347] 'ILO Ratifications of C 169' (n 133).
[348] See *Apirana Mahuika et al. v. New Zealand* (n 75).
[349] See section 2.1.1 for an analysis of cases adjudicated under the HRC.

peoples.[350] Further, environmental norms provide overlapping protections for indigenous rights – including binding initiatives such as the Convention on Biological Diversity.

In regional systems, we find that juridical developments are mutually reinforcing and have expanded a normative framework of protections in their own right. A significant development from the Inter-American Court established three procedural safeguards in its *Saramaka* ruling, acknowledging that while environmental rights are capable of being restricted by the State, such restrictions must be carefully checked and limited.[351] The African Commission and Court have seen less case-law than their Inter-American counterparts due to issues such as funding, and have less stringent follow-up procedures; though the African Commission has indeed been progressive in the realm of indigenous rights protections, as in the *pre-Saramaka* case of the *Ogoni Peoples*. Further, the mutually reinforcing nature of regional systems is exemplified by the African Commission in *Endorois*, in which the African Commission almost exclusively drew upon the precedential reasoning of *Saramaka*.[352] We have yet to see whether the Court will follow the Commission's precedent or be swayed by a lack of political receptivity to such decisions. Further, regional bodies draw upon international standards to overcome a hurdle of a lack of effective domestic legislation, as exemplified in the case of *Saramaka*,[353] in which the Court drew upon articles in the International Covenant of Economic Social and Cultural Rights (ICESCR) as well as the International Covenant on Civil and Political Rights (ICCPR), and the Declaration on the Rights of Indigenous Peoples (DRIP).

The interpenetrating nature of these systems extends to the domestic level as well. National judicial bodies utilize precedent decisions from supranational bodies in conjunction

[350] Claire Charters, Andrew Erueti (n 91).
[351] *Saramaka People. v. Suriname* (n 153) [129].
[352] See Chapter 3.2.1.
[353] *Saramaka People. v. Suriname* (n 153) [92–95].

with soft law norms to circumambulate a lack of domestic legislative protections. In the case of *Awas Tingni*, international law was actually translated into domestic law after the court's ruling,[354] illustrating the mutually reinforcing nature of the multi-level systems. Further, in the Sapporo District decision in *Kayano*, after years of denial toward indigenous populations in Japan,[355] the court made a unilateral move to not only acknowledge indigenous peoples but bar the construction of a dam which would adversely impact the Ainu community's traditional lands, and thereby culture.[356] This case was a harbinger of change, as following, Japan voted in favor of the DRIP, and created domestic legislation to recognize and protect indigenous peoples. The case stands as a primary example of how international law can be translated into a domestic context.

6.2 **The Lack of Political Will and the Problem of Soft Law Instruments**

Beneath the overlay of rights progress discussed in the previous section, enforcement provisions and the implementation of remedial measures is largely dependent upon the political will of the sovereign State. The political will to address compliance is further weakened when a State is faced with only non-binding instruments. Currently, soft law norms articulate the most comprehensive set of rights for indigenous peoples, leaving large gaps in the capability to see such rights realized.

However, it must be noted that in conjunction with binding instruments and judicial decisions, soft law norms such as General Comments and the DRIP contribute to serving an evolutionary function for judicial reasoning. The United Nations Declaration on the Rights of Indigenous Peoples is the farthest-reaching elaboration of indigenous rights. While a soft law

[354] Ibid.
[355] Human Rights Committee, 'Summary Record of the 320th Meeting' (1981) CCPR/C.SR.320 (n 269).
[356] David McGrogan (n 267) 359.

instrument, it has been influential in the jurisprudence of international, regional and domestic systems. Supranational courts have referenced a State's support of the DRIP during the adoption stage of the declaration to supplement a duty of compliance with normative standards of collective indigenous rights.[357] Further, the principles have effectively taken the role of guide posts to evolve the normative framework of indigenous rights, frequently drawn upon in jurisprudential developments.

However, due to the inherent limitation of non-binding norms, the ability to establish meaningful remedies falls short when reliance on soft law instruments overlaps a lack of political will on the part of the State. We have seen through this paper that certain States have been more reluctant to afford environmental protections to indigenous peoples, even in the face of binding juridical decisions; Paraguay and Suriname have not demarcated indigenous lands per court orders but rather offered new mining concessions in violation of judicial decisions,[358] and Suriname has further engaged with intimidation tactics against indigenous representatives seeking justice.[359] New Zealand has blatantly contradicted the CERD's assessment that the Foreshore and Seabed bill discriminates against Maori populations.[360] Additionally, the remedies prescribed in the Nigerian case of the *Ogoni peoples* have yet to be fully implemented.[361] Further, the United States and Canada have stonewalled progress to the regional American Declaration on the Rights of Indigenous Peoples.

[357] See *Saramaka People. v. Suriname* (n 153).
[358] Jo M. Pasqualucci, *The Practice and Procedure of the Inter-American Court of Human Rights* (2nd edn, Cambridge University Press 2014) 313.
[359] See Chapter 6.1. on Suriname's compliance with rulings in the *case of the Ogoni Peoples*.
[360] Claire Charters, Andrew Erueti (n 91).
[361] See Open Society Initiative, 'From Judgment to Justice: Implementing International and Regional Human Rights Decisions' (Open Society Foundation 2010) <http://www.opensocietyfoundations.org/sites/default/files/from-judgment-to-justice-20101122.pdf>.

In the supranational arena, a State's political will ultimately determines compliance with international indigenous rights standards, and the gravity of binding norms are required to counter a lack of political receptivity to protecting indigenous rights. [362] Therefore, the 'fragile architecture' of soft law mechanisms requires reinforcement into binding provisions.[363] The DRIP and General Comments elaborating rights protections need to crystallize into a single, binding international treaty for greater efficacy in securing protections. Theorizing a treaty of this nature serves to link the existing patchwork of protections together, applying additional pressure even on States who were not party to the treaty as a standard-setting instrument, filling gaps in both regional and domestic systems.

However, while a comprehensive treaty articulating indigenous protections is not unforeseeable, one must consider the geopolitical realities addressed in this paper, the lengthy drafting process of the DRIP and the delaying of the drafting process of the American Declaration on the Rights of Indigenous Peoples by two powerful States; while a singular inclusive instrument would be a tremendous force of progress in the indigenous rights movement, it is unlikely to manifest in the near future.

The outlook for State compliance, however, is not entirely pessimistic as pressures of compliance grow in other avenues. In a domestic system, the legal domain still retains influence over the political domain, as *Kayano* provides an excellent example of how an international movement can be translated into a domestic context and how the judicial branch may positively expand indigenous rights regardless of the stance of the executive branch. Further, as international and regional courts uphold their precedent decisions, it increases pressure on the

[362] For an elaboration on State compliance and political will, see Section 2.1.3. on the CERD's recommendation to New Zealand; Section 3.1.3. on State Compliance in the Inter-American system and Section 5.1.1. on the Merit of Reparations.
[363] Karen Engle (n 101) 163.

State parties to comply with court rulings. Additionally, it has been theorized that as interpenetration of international, regional and domestic systems continues to grow, it will positively affect State compliance.[364]

6.3 **Structural Obstacles for an Effective Protection of Indigenous Rights**

While there has been a dynamic evolution in the development of international norms through instruments and jurisprudence, actualizing protections at an operational level, has proved challenging. Further, structural obstacles exist that impede the realization of rights. Environmental rights for indigenous peoples have been articulated *vis-à-vis* the State, and strong corporate interests in conjunction with inadequate accountability mechanisms for non-state actors have left indigenous peoples exposed to human rights abuses and a lack of meaningful reparation. The problematization of soft law mechanisms in relation to States has been elaborated in the preceding section. Such restrictions present further difficulties in relation to human rights compliance for non-state actors, as at an international level only voluntary frameworks exist. Such provisions fall short of providing meaningful accountability on the part of the third party.[365]

The backward-looking nature of human rights further affronts indigenous protections due to the deeply enmeshed relationship between ancestral lands and cultural integrity. Permanent dispossession or environmental degradation threatens the unique way of life of indigenous peoples. Once such a violation has occurred, remedial action will be inadequate for securing the cultural survival of the community, as it is likely already to have been lost. It is therefore of primary importance to utilize preventative action measures in relation to indigenous

[364] Morse H. Tan, 'Upholding Human Rights in the Hemisphere: Casting Down Impunity Through the Inter-American Court of Human Rights' (2008) 43 Texas International Law Journal <http://www.tilj.org/content/journal/43/num2/Tan243.pdf>.
[365] Lillian Aponte Miranda (n 2) 158.

environmental rights, and in relevant instruments a greater emphasis must be placed upon conducting thorough and meaningful impact assessments prior to development.

Therefore while the indigenous rights movement has provided substantive progress in the lives of indigenous peoples, and a corpus of norms have been articulated, protections remain insubstantial due to a lack of domestic implementation and binding mechanisms. Soft law norms need to be translated into a single binding international instrument, and accountability mechanisms must be in place for transnational corporations – both on a supranational and domestic level, without which, progress in the rights of indigenous peoples to enjoy, occupy and own their traditional lands stagnates.

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