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Indigenous Peoples' Land Rights
A comparative overview between Brazil and the Philippines

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Abstract

The indigenous peoples' livelihood and cultural aspects are intrinsically connected with their traditional lands, which can affect their survival and existence as indigenous. The violation of rights to territories, lands, and resources is a common and significant problem experienced by indigenous communities worldwide. This thesis aims to bring a comparative overview between Brazil and the Philippines regarding their domestic indigenous peoples' land rights. Additionally, this study aims to provide insights into the international and regional legislation regarding indigenous land provisions and clarify the standards that must be applied to protect indigenous lands. This research applies a comparative analysis method, and the data was collected through a literature study, consisting mainly of books and digital data, particularly online journals, articles, and other secondary data related to indigenous peoples' lands within the UN, the regional and the domestic system, to reach a legal opinion. International instruments discussed in this study include the ILO Convention N. 169 and the UNDRIP as the universal legal standard for constructing indigenous rights. UN International Human Rights Conventions discussed in this thesis bring the possibilities to fill the legal void and expand the reach to the protection of indigenous land by considering indigenous concepts and legal standards of other international instruments. Regional systems considered in this research, the Inter-American System and the ASEAN system, include the regional social and legal specificities applied to the indigenous communities from each region. Constitution and Infra-constitutional legislation from Brazil and the Philippines discussed in this thesis reflect the legal standard included in the international legal

framework, proving that the violation of indigenous lands is not a problem of legal inadequacy with the international instruments. The findings indicate that more than an improvement of the legal framework regarding indigenous land rights, it is necessary to improve the applicability of the existing provisions, especially in the domestic sphere. Furthermore, to properly apply the indigenous people's right to land, the system must consider the indigenous people's unique and indispensable concepts. Finally, the support from the State, which can be the indigenous people's main ally or enemy, is made necessary for the implementation of measures that effectively protect indigenous lands, without the support of the State, the legal instruments, no matter how advanced, are not enough for protection.

Keywords: indigenous peoples, land rights, international law, human rights, indigenous collective rights, traditional territories

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Introduction

The United Nations[1] estimates that there are over 476 million[2] indigenous people worldwide, dispersed over 90 nations and representing 5,000 distinct civilizations. They represent 6.2 percent of the world's population and are found in all geographic locations. Indigenous people have different social, cultural, economic, and political systems in comparison to those of the dominant cultures in which they are inserted; even though their cultures are very different from one another, indigenous peoples from all over the globe face similar challenges when it comes to the preservation of their rights as unique peoples.

One of the main problems faced by the indigenous people is the acknowledgment and preservation of their native territory and natural resources, which have been continually disregarded throughout history. There is a clear relationship between the rights of indigenous people to their lands and their survival since the lack of access to the traditional land would also mean a restriction on their means of subsistence.[3] Moreover, for the indigenous people, the land has a cultural aspect, which is connected to their existence as a collective because, through the traditional territories they inhabited, the indigenous people were able to keep alive their traditions and practices and transmit them to their descendants their spiritual and cultural ideals and preserve and develop the environment they occupied[4].

Considering the importance of indigenous peoples' land rights to the existence of indigenous peoples, this study is based on a qualitative analysis of how both Brazil and the Philippines frame, recognize, and protect the indigenous

peoples' lands, territories, and resources. Brazil and the Philippines were chosen because both states had similar early-stage colonization backgrounds. However, in the contemporary stage, they take a different approach regarding the indigenous people, especially regarding land matters, which are connected to the regional perspective and philosophy.

In analyzing both countries, this study applies a comparative analysis method. This thesis focuses on understanding the position of indigenous peoples' lands within both the international and domestic spheres. This can be achieved by understanding the international and regional frameworks alongside the national instruments and mechanisms both countries use regarding indigenous peoples' lands, territories, and resources. The study is conducted in three main phases: (1) preparation and research planning; (2) data collection through a literature study in which all the data collected in this research is categorized as secondary data. The data will be analyzed mainly from books and digital data, particularly online journals, articles, and other secondary data related to indigenous peoples' lands within the UN, the regional and the domestic system, to obtain a legal opinion. The discussion of indigenous peoples taking international relations perspective is often drawn alongside the post-colonial perspective.; (3) data analysis by reading the collected resources to find patterns or characteristics that can be interpreted based on the historical and any other context.

The first part of Chapter 1 will analyze the historical background of the Indigenous People's Land and International Law, starting from the advent of colonization until the reintroduction of the indigenous peoples as a subject under

international law with the creation of the ILO Convention N. 107. The second part will explain the term "indigenous" and the recognition of indigenous peoples as "peoples." The third part will explore the indigenous peoples' identities and their connection to their lands. The concept of Collective Property Rights will be explained in the fourth part.

Chapter 2 considers the specific international law instruments that deal with the indigenous peoples' matter, focusing on the lands, territories, and resource provisions. These instruments are considered the most important regarding the indigenous peoples, and their analysis is necessary to understand the standard protection applied to the indigenous traditional lands. The first part of the Chapter deals with the ILO Convention No. 107 and 169, which for many, are considered the essential instruments related to indigenous peoples because they are binding to their state parties. Sections 2.1.1 to 2.1.4 draw a historical overview of the construction of both conventions and explain each article regarding indigenous peoples' land. Through the historical line of both Conventions, it is possible to understand the evolution of the indigenous peoples' rights. The explanation of the articles related to lands includes the possible interpretation of each provision, which can also be used as an interpretative method to other legal instruments, as will be mentioned later on. The second part of the Chapter focuses on the analysis of the UNDRIP, considered the most developed instrument regarding indigenous peoples. Despite not being a binding instrument, the declaration is acknowledged as a standard for the indigenous peoples' rights to be followed by other international, regional, and domestic instruments and their systems.

Chapter 3 draws an overview of the protection of indigenous peoples' lands within human rights instruments that are not intended to protect the indigenous peoples directly. In this chapter, four main instruments and their systems are analyzed, the International Covenant on Civil and Political Rights, the International Convention on the Elimination of All Forms of Racial Discrimination, International Covenant on Economic, Social and Cultural Rights, and the Convention on Prevention and Punishment of the Crime of Genocide. All the instruments encompass provisions that can be used to protect indigenous peoples' lands, which are especially important for the indigenous peoples within the states that are not a party of the ILO Convention or do not have a solid internal legal document for the protection of their lands.

Chapter 4 deals with the indigenous peoples' land protection under the regional system in which Brazil and the Philippines are included. The first part of the chapter starts with analyzing the Inter-American Human Rights system, considered one of the most advanced regarding indigenous peoples' matters. It explains the main instruments that can be used to protect indigenous people's lands and the most relevant cases regarding the subject. The chapter's second part will focus on the analysis of the indigenous people in Southeast Asia. The Association of Southeast Asian Nations will be introduced, and how the indigenous peoples' matter is expressed (or not) within this regional political-economic system. The overview of the ASEAN bodies and their relation to the indigenous peoples in the region.

Chapter 5 will deal with the domestic system protection of indigenous peoples' lands in Brazil and the Philippines. The chapter starts with the investigation of the indigenous peoples' land rights under the Brazilian constitution, followed by the analysis of the subject under infra-constitutional legislation. The research regarding Brazilian protection ends with an explanation of the two leading jurisprudence about indigenous land protection, which will include the essential theories that other states can apply. The second part of the chapter brings the understanding of indigenous peoples in the Philippines, starting with the study of the subject under the 1987 Constitution. After, the issue of indigenous lands will be explored under the Indigenous Peoples Rights Act, which is considered an advanced domestic instrument, not just in comparison to the other Asian states but also concerning other states all around the world.

The conclusion of the thesis will encompass not just the comparison between the two states but also between the international and regional systems. The similarities and contradictions between the regional system and the domestic instruments will be appointed at the end, hoping to help construct an improvement regarding the indigenous peoples' protection.

Chapter 1: Historical Background and Important Concepts about Indigenous Peoples

1.1 Historical Background of Indigenous People's Land Rights and International Law

At the very beginning of European colonialism and the implementation of a new 'society' in the discovered territories, the relationship between indigenous peoples and the colonial powers was seen as international. The treaties implicitly or explicitly acknowledged that the original inhabitants of the newly discovered territories were 'nations', and matters involving conquest, the secession of land, and sovereignty should be solved using the existing mechanisms of international negotiation and treaties.[1]

However, as time passed, the devastation of native populations due to European-originated illnesses and the influx of new settlers increased the scales in favor of the incoming population, prompting a reevaluation of the indigenous peoples' legal standing as a nation.[2] For their convenience, the states one-sidedly modified the treaties with indigenous peoples from international to domestic.[3] This domestication phenomenon stripped indigenous peoples of three of the four defining characteristics of their original position as sovereign nations: their land,

[1] Niezen, Ronald. *The Origins of Indigenism: Human Rights and the Politics of Identity.* Berkeley: University of California Press, 2003, p. 29
[2] *Ibid.*
[3] Gilbert, Jérémie. *Indigenous People's Land Rights under International Law: From Victims to Actors*. Ardsley; New York: Transnational Publishers Press, 2006, p. 47.

the ability to negotiate international treaties, and the possibility to establish their government.[4]

As a result, the indigenous people were subjugated to a subordinate status, dispossessed of their resources, evicted from their ancestral territories, and consigned to restricted areas and reserves by the dominant civilization that arrived.[5] For centuries, indigenous people were subjected to forced assimilation and suffered political, economic, cultural, and religious discrimination, which still exists today.

For an extended period, after the indigenous peoples lost their status as a nation, they were excluded from the international law sphere due to the positivist conception of international law being the law between the states.[6] During this time, the states dealt with the indigenous people's matters in each state's domestic sphere. Only at the beginning of 1920, with the International Labour Organisation starting to focus on the "native workers" problem, the indigenous peoples were brought back as subjects under international law.

Regarding indigenous land rights, in 1959, the ILO Convention N. 107 was the first international instrument to discuss the matter, recognizing the right to ownership, collective or individual. The revised ILO Convention N. 169 also

[4] Martinez, Miguel *Alfonso. Final Report: Study on Treaties, Agreements and Other Constructive Arrangements between States and Indigenous Populations*, U.N. Doc. E/CN.4/Sub.2/1999/20. para. 105.
[5] Wiessner, Siegfried, "Rights and Status of Indigenous Peoples: A Global Comparative and International Legal Analysis" in Harvard Human Rights Journal, Vol. 12, 1999, p. 58.
[6] Anaya, S. James. *Indigenous Peoples in International Law*. Oxford: Oxford University Press, 2 edition. 2004, p. 28.

brought provisions about indigenous land, focusing on the ownership's collective aspect.[7]

After the creation of the ILO Convention N.107, where the indigenous were mere objects, the necessity for the inclusion of the indigenous in the discussion about their rights was evident. From that point, they became active participants and, together with states and nongovernmental organizations, joined conferences and raised concerns about the indigenous people's problem, which later resulted in the ILO Convention N. 169 in 1989 and promoted UN works on the matter until the creation of the UN Declaration on the Rights of Indigenous Peoples in 2007.

In the international scope, the rights of indigenous peoples worldwide have become very important in the last 20 years.[8] This change is noted by the United Nations Assembly declaring the First International Decade of the World's Indigenous Peoples and the Second Decade of the World's Indigenous Peoples. Also, in 2000, the Permanent Forum on Indigenous Issue was established. The following year, Rodolfo Stavenhagen was appointed as Special Rapporteur to analyze and improve indigenous people's human rights and fundamental freedoms, resulting in the 2006 Report on Indigenous Issues.[9] One of the most important

[7] Historical construction of the ILO Convention N. 107 and 169 will be further discussed in Chapter 2.

[8] International Expert Group Meeting on the Convention on Biological Diversity's International Regime on Access and Benefit-Sharing and Indigenous Peoples' Human Rights, New York, 2007, U.N. Doc PFII/2007/WS.4/4. Available at https://www.un.org/esa/socdev/unpfii/documents/workshop_CBDABS_background_paper_en.doc

[9] Stavenhagen, Rodolfo. UN. Commission on Human Rights. Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous Peoples. (2001-2008) See also: Report of the Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People, Rodolfo Stavenhagen : addendum. E/CN.4/2006/78/Add.1. Analysis of country situations and other activities of the Special Rapporteur. Available at: https://digitallibrary.un.org/record/566046

works related to the indigenous matter was the adoption of the UN Declaration of the Rights of Indigenous Peoples in 2007.

Even though indigenous peoples have received worldwide recognition in recent decades, their rights are still violated, and one of the main problems suffered by the indigenous peoples is related to their 'territory'. As the indigenous peoples are deemed to be a 'special' group and, for this reason, have specific rights, which include entitlement to lands, the recognition of an individual or a community as 'indigenous peoples' will have a direct impact on the applicability or not of these specific rights[10]. For this reason, the definition of who can be acknowledged as indigenous people is vital.

To this day, the term 'indigenous peoples' still lacks a definition at the international level.[11] At the national level, some states provide a definition in their national legislation or constitution, using objective criteria and elements of self-identification of indigenous peoples. In contrast, other states deny the existence of indigenous peoples within their territory.[12] A further discussion on the matter will be brought up in this chapter's subsection.

Another important topic regarding the indigenous people's protection is the recognition of collective rights. Because of their distinct cultural features, which relate to their way of life and their definition, indigenous people have many rights

[10] Castellino, Joshua & Doyle, Cathal, "Who Are 'Indigenous Peoples'? An examination of Concepts Concerning Group Membership in the UNDRIP", *The Declaration on the Rights of Indigenous Peoples: A commentary*. Oxford University Press, 2018, p. 18.
[11] Stoll, Peter-Tobias & Hahn, Anja von, "Indigenous Peoples, Indigenous Knowledge, and Indigenous Resources in International Law" in Silke von Lewinsk, *Indigenous Heritage and Intellectual Property: Genetic Resources, Traditional Knowledge, and Folklore*, Hague: Kluwer Law International, 2004, p. 8.
[12] Russel L. Barshi, "Indigenous Peoples and the UN Commission on Human Rights: A Case of the Immovable Object and Irresistible Force", *Human Rights Quarterly*, Vol. 18, 1996, p. 782.

with a collective nature, belonging to the community as a whole. There is much controversy about the existence of collective rights and if they are the best instruments for protecting indigenous peoples, especially when involving communal lands. However, analyzing the collective rights definition, the existing types, and international instruments containing collective rights provisions makes it possible to understand why this protection is necessary for indigenous communities.

1.2 The term "Indigenous"

Based on historical ties, customary practices, and the interconnection of land and culture, indigenous peoples are deemed to have special rights to territory and resources in the international sphere. Consequently, identifying a particular group as indigenous peoples has political and legal implications.[13] Thus, who the indigenous peoples are is a question that needs to be answered to guarantee specific rights for indigenous people to the individuals and communities included in this identification.[14]

According to Oxford English Dictionary, the term "indigenous" means:

> Of, relating to, or characteristic of the native inhabitants of a place or their language; native, vernacular; *spec.* of, belonging to, or relating to a people or group inhabiting a place before the arrival of (European) settlers or colonizers.[15]

[13] Kingsbury, Benedict, "Indigenous Peoples Rights in International Law: A Constructivist Approach to The Asian Controversy", *American Journal of International Law*, Vol. 92, 1998, p. 433.
[14] Castellino, Joshua & Doyle, Cathal, *supra* note 10, p. 18.
[15] Oxford English Dictionary.

Within the meaning above explained, two central characteristics can be noticed: *native inhabitants* and the *relation to colonialism*. From a historical standpoint, the meaning perfectly matches the history of the indigenous peoples in the Americas. The reason is that it was the place that initiated the discussions about the 'native' issues. However, from the perspective of contemporary international law, a colonialist background is not a requisite for the notion of indigenous peoples[16], and nowadays, the terminology is used beyond the Americas.[17]

Despite commonly using the term 'indigenous', due to the variety of indigenous peoples' cultural aspects and livelihood, no UN-system entity has established an official definition.[18] Indigenous peoples often reject the necessity for definitions and instead support the right to self-definition;[19] therefore, in many states, the internal rules will bring different names to identify the indigenous peoples.[20] The objection to the adoption of a rigorous definition stems from a worry that specific communities may be excluded, leaving them outside the *rationae personae* of certain indigenous rights.[21]

The sources for developing the international concept of indigenous peoples include documents from the United Nations, the International Labour Organization,

[16] MacKay, Fergus. *The Rights of Indigenous Peoples in International Law*. Berkley: California Press, 1998, p. 13.
[17] Sanders, Douglas E., "Indigenous peoples: issues of definition", International journal of cultural property, 1999, p. 4.
[18] *Factsheet: Who are indigenous peoples?*, United Nations Permanent Forum on Indigenous Issues. Available at: https://www.un.org/esa/socdev/unpfii/documents/5session_factsheet1.pdf
[19] Simpson, Tony, *Indigenous Heritage and Self-Determination: The Cultural and Intellectual Property Rights of Indigenous Peoples*, Forest Peoples Programme, International Work Group for Indigenous Affairs, Copenhagen, 1997, p. 22.
[20] Canada normally uses the names: First Nation, Métis, and Inuit, which are three categories of Indigenous peoples. Brazil, as well as many states in America, used for a long time the term "Indian", but because of the connection of this term with colonial times, it became a racial slur, and the most accepted term now is indigenous, but there are communities that prefer to be called as "native peoples" or "forest peoples".
[21] Simpson, Tony, *supra* note 19, p. 22.

and the World Bank. In the *Study of the Problem of Discrimination Against Indigenous Populations*, José Martinéz Cobo[22] provided in the Final Report the most used definition[23]:

> Indigenous communities, peoples, and nations are those which have a historical continuity with pre-invasion and pre-colonial societies that developed on their territories, consider themselves distinct from other sectors of 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.[24]

The necessity of "*historical continuity with pre-invasion and pre-colonial societies that developed on their territories*" as a characteristic for the definition of a group as indigenous suggests a narrow picture of indigenous peoples, taking into consideration only the indigenous peoples influenced by the history and impacts of European settlement, and may exclude indigenous peoples in Asia and Africa who did not experience the same colonial process.[25]

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[22] Special Rapporteur of the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities.
[23] Castellino, Joshua & Doyle, Cathal, *supra* note 10, p. 18.
[24] Cobo, Martínez, *Study on the Problem of Discrimination against Indigenous Populations*, UN Doc E/CN.4/Sub.2/1986/Add.4 (1986).
[25] Kingsbury, Benedict, *supra* note 13, p. 414.

The International Labour Organization, in Convention N. 107 and 169, referred to both "indigenous" and "tribal" individuals, but the definition of the terms differs in the Conventions. The ILO Convention N. 107 used the terms 'Indigenous, tribal and semi-tribal populations':

> ILO Convention N. 107 – Article 1. This Convention applies to:
>
> a) Members of tribal or semi-tribal populations in independent countries whose social and economic conditions are at a less advanced stage than the stage reached by the 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) Members of tribal or semi-tribal populations in independent countries which 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 and which, irrespective of their legal status, live more in conformity with the social, economic and cultural institutions of that time than with the institutions of the nation to which they belong.[26]

[26] International Labour Organization (ILO), *Indigenous and Tribal Populations Convention*, 26 June 1957, ILO Convention N. 107, Art. 1.

The difference between 'indigenous' and 'tribal' was connected to the indigenous ancestry from the pre-colonial people. In contrast, the distinction between 'tribal' and 'semi-tribal' was based on the degree to which the 'tribal population' had been incorporated into the national society.[27]

In 1989, Convention N. 169 brought a more diffuse historical requirement for its definition, which includes all tribal and indigenous peoples who resided in a specific region when the current state borders were established.[28] This definition allows the treaty to broadly apply in all regions, not just in America.[29] Since ILO Convention 169 is the only legally binding treaty on the indigenous issue, it is vital that it can encompass indigenous peoples from all parts of the globe.

> ILO Convention N. 169 - Article 1 (1) This Convention applies to:
>
> (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

[27] Castellino, Joshua & Doyle, Cathal, *supra* note 10, p. 18.
[28] Stoll, Perter-Tobias & Hahn, Anja von, *supra* note 11, p. 11. See also Kingsbury, Benedict, *supra* note 13, p. 420.
[29] Kingsbury, Benedict, *supra* note 13, p. 414.

> 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.[30]

In terms of definition, there are four significant distinctions between the two Conventions. First, the word 'semi-tribal' was dropped due to its discriminatory implications and the notion that indigenous and tribal peoples were on the path to assimilation. Second, because of international legal implications, the term 'population' was substituted with 'peoples'.[31] Third, ILO Convention 169 established self-identification as a core requirement for the definition. At last, the revised Convention introduced a softer historical requirement.[32]

Regarding the international legal implication of the adoption of the term "peoples" in the ILO Convention N. 169, many States were against it for fear that such terminology would lead to the recognition of the right to self-determination and, consequently, the authorization of the secession of the indigenous communities from the states of which they are part.[33] However, paragraph 3 of Article 1 of ILO Convention N. 169 provides that the word "peoples" shall not be understood as having an association with other international law rights that may be

[30] International Labour Organization (ILO), *Indigenous and Tribal Peoples Convention*, 27 June 1989, ILO Convention N 169, Art. 1

[31] The usage of the term "peoples" will be explained further in the following subsection of this Chapter.

[32] Doyle, Cathal, *Indigenous Peoples, Title to Territory, Rights & Resources: The Transformative Role of Free Prior and Informed Consent*, Routledge, 2015, p. 3-70.

[33] Swepston, Lee, "The ILO Indigenous and Tribal Peoples Convention (No. 169): Eight Years After Adoption", In Cynthia Price Cohen, *The Human Rights of Indigenous Peoples*, Ardsley, New York: Transnational Publishers, 1998, p. 17, 18-28.

connected to the term.[34] Thus, the addition of the term "peoples" would not mean the possibility of secession of the indigenous communities but would indeed be related to the right to self-determination regarding a certain autonomy of these communities within the boundaries of the state. [35]

In 1991, the World Bank issued the Operational Directive 4.20, also known as Indigenous Peoples Policy, an operational guide for the Bank[36], which adopted a new definition:

> The terms 'indigenous peoples', 'indigenous ethnic minorities…tribal groups', and 'scheduled tribes describe social groups with a social and cultural identity distinct from the dominant society that makes them vulnerable to being disadvantaged in the development process. For the purposes of this directive, 'indigenous peoples' is the term that will be used to refer to these groups.[37]

The World Bank adopts a 'functional view' of Indigenous Peoples, altogether avoiding criteria grounded on 'historical continuity' or the link to 'colonialism', which is present in the two preceding definitions. Instead, focus on

[34] ILO Convention N. 169, Art. 1, para. 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.
[35] Swepston, Lee, *supra* note 33.
[36] Castellino, Joshua & Doyle, Cathal, *supra* note 10, p. 21.
[37] World Bank Operational Directive 4.20 on Indigenous Peoples (1991).

indigenous peoples as groups with a social and cultural identity distinct from the dominant society, resulting in them being disadvantaged and vulnerable.[38]

In 2005, Operational Policy 4.10 on Indigenous Peoples replaced OD 4.20, and once again, the broad perspective of indigenous peoples is confirmed:

> Because of the varied and changing contexts in which Indigenous Peoples live and because there is no universally accepted definition of "Indigenous Peoples," this policy does not define the term. Indigenous Peoples may be referred to in different countries by such terms as "indigenous ethnic minorities," "aboriginals," "hill tribes," "minority nationalities," "scheduled tribes," or "tribal groups.[39]
>
> For purposes of this policy, the term "Indigenous Peoples" is used in a generic sense to refer to a distinct, vulnerable, social and cultural group possessing the following characteristics in varying degrees:
>
> (a) self-identification as members of a distinct indigenous cultural group and recognition of this identity by others;
>
> (b) collective attachment to geographically distinct habitats or ancestral territories in the project area and the natural resources in these habitats and territories;

[38] Kingsbury, Benedict, *supra* note 13, p. 420. See also: Castellino, Joshua & Doyle, Cathal, *supra* note 10, p. 21.
[39] World Bank Operational Policy 4.10 (2005), para 3.

(c) customary cultural, economic, social, or political institutions that are separate from those of the dominant society and culture; and

(d) an indigenous language, often different from the official language of the country or region.[40]

The World Bank definition, like the previous ones, raises attention to 'self-identification'. Still, instead of linking the indigenous people to colonialism, it focuses on the cultural and social aspects that differentiate the indigenous peoples from the dominant society, which puts them in an inferior place before the majority, resulting in the denial of fundamental and specific rights.

Not only do human rights treaties deal with the indigenous peoples' matter, several international environment documents and treaties.[41] However, when mentioning indigenous peoples, such instruments focus only on their traditional way of living and apply the 'functional view' in their provisions to deal with specific circumstances and environmental purposes since it is a broad concept.[42] They avoid any attempt to construct a particular definition of the term 'indigenous' by addressing them as 'indigenous and local communities'.[43] Principle 22 of the Rio Declaration states:

[40] *Ibid*, para 4.
[41] 1992 Rio Declaration on Environment and Development, UN Doc. A/CONF.151/26 (vol. I), 31 ILM 874 (1992); Agenda 21, A/CONF.151/26, vol.II, (1992), Convention on Biological Diversity, 1760 U.N.T.S. 69, (1992).
[42] Stoll, Perter-Tobias & Hahn, Anja von, *supra* note 11, p. 11.
[43] *Ibid.*

> Indigenous people and their communities and other local communities have a vital role in environmental management and development because of their knowledge and traditional practices. States should recognize and duly support their identity, culture and interests and enable their effective participation in the achievement of sustainable development.[44]

As previously mentioned, the discovery of who can be included in the scope of the indigenous peoples is vital for the implementation of specific rights. For this reason, the continuous discussion on the matter was included in articulating the UNDRIP. In 1995, the Special Rapporteur on Indigenous Peoples, Erica-Irene Daes, conducted a questionary to help build a global framework for Indigenous Peoples. As predicted, African and Asian governments argued that the concept of 'indigenous people' did not include groups inside their borders since all decolonized state members could be regarded as "indigenous" to the region.[45] Thus, for many African and Asian nations, the criteria proposed by Martinéz Cobo in 1986 and the ILO Convention N. 169 in 1989, which contain the historical necessity of pre-invasion relating to local people, would only apply to America, Australasia, and the Pacific.

A worldwide agreement over the definition of indigenous peoples took much work to attain. Regarding this topic, Kingsbury seeks to shift the focus from

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[44] 1992 Rio Declaration, Principle 22.

[45] Castellino, Joshua & Doyle, Cathal, *supra* note 10, p. 22. See also: Erica-Irene Daes, "Equality of Peoples under the Auspices of the United Nations Draft Declaration on the Rights of Indigenous Peoples", *St. Thomas Law Review*, Vol. 7, 1995, p. 493 – 520.

universally applicable criteria [46] to the construction of elements that were crucial to comprehend the concept through the prism of international law, arguing that:

> It will be argued that the constructivist approach to the concept better captures its functions and significance in global international institutions and normative instruments. In most cases, the terminology and indicative definitions in global or regional instruments are too abstract and remote to provide a sufficient basis to resolve the infinite variety of questions that arise in specific cases, and it is misguided to expect that these global instruments can even purport to resolve all such detailed problems. These instruments often contain relevant principles and criteria abstracted from the specifics of past cases and debates, and each has stimulated a body of practice concerning its scope of application and the meaning of concepts it employs. But many specific problems as to the meaning of "indigenous peoples" and related concepts can be solved only in accordance with processes and criteria that vary among different societies and institutions.[47]

The UN Working Group on Indigenous Population [48] researched the definition, and the conclusion included the views of the indigenous representatives, the governments, and the working group members. The result was the recognition

[46] Kingsbury, Benedict, *supra* note 13, p. 415. See also: Castellino, Joshua & Doyle, Cathal, *supra* note 10, p. 22.
[47] *Ibid.*
[48] Daes, Erica-Irene, *Standard-Setting Activities: Evolution of Standards Concerning the Rights of Indigenous People*, U.N. Doc. E/CN.4/Sub.2/AC.4/1996/2, p.5.

of factors and elements that can be used to understand and identify indigenous people. Still, there was no construction of a definition of the 'indigenous peoples' concept.[49] Important to mention that according to the indigenous representatives, a definition of the concept of 'indigenous peoples' is neither necessary nor Commissioner that:

> [T]here must be scope for self-identification as an individual and acceptance as such by the group. Above all and of crucial and fundamental importance is the historical and ancient connection with lands and territories.[50]

In the face of the impossibility of creating a single definition that could encompass all the differences between indigenous peoples worldwide, international organizations and legal experts have deemed the following factors relevant to the understanding of the term 'indigenous peoples:

> (a) Priority in time, with respect to the occupation and use of a specific territory;
>
> (b) The voluntary perpetuation of cultural distinctiveness, which may include the aspects of language, social organization, religion and spiritual values, modes of production, laws and institutions;

[49] *Ibid.*
[50] *Ibid*, p. 12

(c) Self-identification, as well as recognition by other groups, or by State authorities, as a distinct collectivity; and

(d) An experience of subjugation, marginalization, dispossession, exclusion or discrimination, whether or not these conditions persist.[51]

It is essential to clarify that even though the prevalent notion is that a universal legal definition is not required for the recognition and preservation of indigenous people's rights, the absence of a definition should in no way prevent UN agencies or governments from addressing the significant concerns impacting indigenous peoples[52], since the factors as mentioned above may be present, in different levels, in a variety of geographical locations, as well as in a variety of national and local settings, being able to provide some broad direction toward the process of making appropriate decisions in practice.[53]

In fact, despite the diversity of indigenous peoples across the globe, they share two main characteristics that are common to them.[54] The first relates to indigenous peoples' territorial connection to their lands, and the second is their cultural distinctiveness from the dominant society. From these elements, it was possible to draw the factors related to the term 'indigenous peoples.'

[51] *Ibid*, p. 22.
[52] United Nations Development Group Guidelines on Indigenous Peoples' Issues, 2008, available at https://unsdg.un.org/sites/default/files/UNDG_guidelines_EN.pdf
[53] Daes, Erica-Irene, *supra* note 48, p. 22
[54] Stoll, Perter-Tobias & Hahn, Anja von, *supra* note 11

The importance of indigenous people's connection to their territory is one of their defining characteristics. According to Martínez Cobo,[55] indigenous peoples' identities are inextricably linked to their lands, and *"divorced from the land, indigenous peoples cannot exist*," and this is reflected in the indigenous people's resolution *"to preserve, develop and transmit to future generations their ancestral territories, and their ethnic identity, as the basis of their continued existence as peoples."* Thus, indigenous peoples may be viewed as those who have lived, continue to live, and seek to maintain their unique relationship to a specified place.[56]

On the matter, article 13 of ILO Convention No. 169[57] already addressed the significance of the link between indigenous peoples and their ancestral lands for preserving their 'cultures and spiritual values'. In other words, the cultural uniqueness of indigenous peoples, which is crucial to the notion of 'indigenous' in current international law, is inseparable from 'lands'.[58]

The United Nations Conference on Environment and Development, in paragraph 26.1 of Agenda 21, stated that *"Indigenous people and their communities have a historical relationship with their lands and are generally descendants of the original inhabitants of those lands",* recognizing once again the

[55] Cobo, Martínez, *supra* note 24. See also: *State of the World's Indigenous Peoples: Rights to Lands, Territories and Resources*, United Nations Department of Economic and Social Affairs, Vol. 5, 2021, p. 2. Available at https://www.un.org/development/desa/indigenouspeoples/wp-content/uploads/sites/19/2021/03/State-of-Worlds-Indigenous-Peoples-Vol-V-Final.pdf

[56] Groves, Rober, "Territoriality and Aboriginal Self-Determination: Options for Pluralism in Canada", *International Yearbook for Legal Anthropology*, Vol. 8, 1996, p. 128. See also: Gilbert, Jérémie, *supra* note 3, Introduction, p. xvi.

[57] ILO Convention N. 169, Art. 13.

[58] Daes, Erica-Irene, *supra* note 48, p. 16

intrinsic connection of cultural uniqueness and territory from the concept of 'indigenous'.[59]

Cultural uniqueness is also one of the indigenous peoples' significant characteristics, based on the voluntary perpetuation throughout the years of a culture different from the one practiced by the dominant population in the state where they live.[60] This cultural distinctiveness may include a variety of aspects, such as a unique language, religion, particular rituals, and traditions, as well as the particular use of the land and its resources.[61] In this light, indigenous peoples may be seen as a subset of society that, under its own cultural norms, social institutions, and legal system, actively works to ensure its distinctive ethnic identity is maintained and passed on to future generations.[62]

In 2011, the International Law Association (ILA) released a report on the identification of indigenous peoples, focusing on the cultural distinctiveness and the territory elements and combining all the previous concepts mentioned:

> [T]he indicia that should be used in order to ascertain whether or not a given community may be considered as an indigenous people are the following:
>
> – self-identification: self-identification as both indigenous and as a people;

[59] *Ibid.*
[60] Connolly, Anthony J., *Indigenous rights*, Farnham, Surrey England; Burlington, VT: Ashgate, 2009, p. xv.
[61] *Ibid.*
[62] Castellino, Joshua & Doyle, Cathal, *supra* note 10, p. 18. See also: Cobo, Martínez, *supra* note 24.

– historical continuity: common ancestry and historical continuity with pre-colonial and/or pre-settler societies;

– special relationship with ancestral lands: having a strong and special link with the territories occupied by their ancestors before colonial domination and surrounding natural resources. Such a link will usually form the basis of the cultural distinctiveness of indigenous peoples;

– distinctiveness: having distinct social, economic or political systems; having distinct language, culture, beliefs and customary law;

– non-dominance: forming non-dominant groups within the society;

– perpetuation: perseverance to maintain and reproduce their ancestral environments, social and legal systems and culture as distinct peoples and communities.[63]

On the one hand, neither the factors proposed by Erica-Irene Daes nor the elements listed above can be considered compulsory to identify as "Indigenous peoples".[64] Thus, the absence of one of the elements or a low degree of one or more elements about a group cannot automatically exclude a group. On the other hand, two elements could be considered essential for recognizing a group as indigenous

[63] *Report of the Sofia Conference (2012) on the Rights of Indigenous Peoples*, International Law Association (ILA). Available at: https://www.ila-hq.org/en_GB/documents/conference-report-sofia-2012-10.
[64] *Ibid.*

people: self-identification and the special connection with the ancestral territory.[65] In any case, the qualification as an indigenous people must be determined on a case-by-case basis; therefore, a relatively flexible approach is required to include as many indigenous peoples as possible within the scope of indigenous peoples' protective rights.

1.2.1 Summary

To start the discussion regarding the indigenous peoples, it is necessary to answer a fundamental question: "Who are they?". The importance of this question comes from the fact that indigenous peoples have specific rights connected to their identities and features. Thus, their identification is the first step for their protection, and their special rights can be guaranteed upon identifying a group or individual as indigenous.[66]

As the discussions regarding the indigenous peoples started in the Americas, the earliest meaning of the term "indigenous" is related to the idea of "native inhabitants" and "colonialism", reflecting the experience of the indigenous peoples in that area.[67] However, it is essential to emphasize that indigenous peoples do not exist only in the Americas, they can be found worldwide, and throughout history, they have had different backgrounds. Thus, the "American" definition of who are the indigenous peoples cannot be generalized.

[65] *Ibid.*
[66] Castellino, Joshua & Doyle, Cathal, *supra* note 10, p. 18.
[67] MacKay, Fergus, *supra* note 16, p. 13.

Due to the variety of cultural aspects of indigenous peoples, tracing a unique and specific definition of indigenous that encompasses all communities around the world has always been difficult. Still, the United Nations, the International Labour Organisation, and the World Bank have attempted it.

The Rapporteur Martinéz Cobo, in the Final Report of the Study of the Problem of Discrimination Against Indigenous Populations,[68]provided a definition regarding indigenous, which incorporated the historical background of the Americas since considered as the main characteristic of the *"historical continuity with pre-invasion and pre-colonial societies"*.[69] The general recognition of this definition would lead to the restriction of the applicability of specific rights to many indigenous communities who did not go through the same background, especially the ones in Asia and Africa.[70] For this reason, such a definition should not be used when considering matters about indigenous peoples.

The ILO Convention N. 107 and 169 use the term "indigenous". Despite having different levels, both conventions include the "historical requirement" as part of the definition of indigenous,[71] which like the idea brought by Martinéz Cobo, it is evident the presence of the "American" view of indigenous, leading to the exclusion of many communities from different regions of the world.

The World Bank, on the other hand, innovated when it did not include "historical continuity" and "colonialism" as part of the definition. Embracing a concept of "functional vision", it pointed out as a definition of indigenous people

[68] Cobo, Martínez, *supra* note 24.
[69] *Ibid.*
[70] Kingsbury, Benedict, *supra* note 13, p. 414.
[71] Doyle, Cathal, *supra* note 32.

the cultural difference with the dominant society, which was the reason these communities were pushed into a situation of disadvantage and vulnerability as a result of the violations perpetrated in favor of the cultural assimilation of these peoples.[72] This view reflects the reality of indigenous peoples. For this reason, it can be considered a definition that encompasses the vast majority of indigenous communities worldwide.

However, following the view of many indigenous representatives, the UN Working Group on Indigenous Peoples concluded that, in addition to being impossible, it was not necessary to build a closed concept of indigenous peoples, as this could result in the exclusion of communities that did not fit the concept. Instead, the definition should be based on these individuals' self-identification, historical connection to the land, the perpetuation of a distinct culture, and social marginalization.[73] It is essential to clarify that such factors are not mandatory for the definition of indigenous; they may have factors that do not reflect a particular community or a given factor may have different levels in each community.

However, even though the United Nations opted for an open conception regarding the definition of indigenous people, many countries, mainly in Asia, reject any existing definition of indigenous peoples. This directly influences the protection of indigenous communities because if a state denies the recognition of a group as indigenous, that group cannot receive adequate guarantees and protection, especially regarding the rights connected to their identity as indigenous. In chapter 4, the definition of indigenous people will be addressed again, focusing on the

[72] Kingsbury, Benedict, *supra* note 13, p. 420.
[73] Daes, Erica-Irene, *supra* note 48, p. 22.

Asian perspective, which will be necessary for understanding the problems indigenous communities face in that region, especially regarding indigenous lands' rights.

1.3 The term "Peoples" and Self-Determination

The *lato sensu* concept of the term 'peoples' can be defined as *"a body of persons that are united by a common culture, tradition, or sense of kinship, that typically have common language, institutions, and beliefs, and that often constitute a politically organized group"*.[74] Using this straightforward definition, it is feasible to apply the word to refer to indigenous since they consist of distinct groups with their own social, cultural, and political characteristics deeply anchored in ancestral knowledge. [75] However, in the international law scope, the term "peoples" is related to the principle of self-determination, which creates controversy regards the application of the term to indigenous groups.[76]

Article 1 of the International Covenant on Civil and Political Rights states that peoples' right to self-determination refers to their ability to freely select their political status and pursue economic, social, and cultural development.[77] Although the principle of self-determination is recognized as a *"right" of [all] peoples*"[78] and its benefits reach all human beings, its association with the term 'peoples' in

[74] Webster's Collegiate Dictionary 860 (10th ed. 1993) in Anaya, S. James, *supra* note 6, p. 117
[75] *Ibid*, p. 100
[76] Anaya, S. James., & James E. Rogers, *International Human Rights and Indigenous Peoples*, Austin: Wolters Kluwer Law & Business, 2009, p. 137- 138.
[77] International Covenant on Civil and Political Rights (ICCPR), UN General Assembly, 16 December 1966, Art. 1.
[78] Anaya, S. James, *supra* note 6, p. 99.

international law demonstrates the collective or group nature of the principle.[79] Self-determination concerns human beings as autonomous individuals and as social beings involved in forming and maintaining communities.[80]

In international law, self-determination is a fundamental premise in the formation and dissolution of nations.[81] The traditional concept of the principle of self-determination has two aspects. While the internal aspect refers to the right of the people of a state already recognized by international law to determine their own form of government, the external aspect consists of the right of a people to determine their nationality and statehood.[82]

From the international legal perspective, the term "peoples" is connected to the right to self-determination; the mere application of this terminology could lead to the immediate recognition of the right to self-determination and to the permission of secession of the group known as "peoples" from the states they are within the borders.[83] Regarding the indigenous communities, the applicability of such a term regarding them aroused discussions. The states feared that calling them indigenous peoples would prevent the indigenous communities from creating their own states. However, as explained in the following paragraphs, the term "peoples"

[79] *Ibid*, p. 100.
[80] *Ibid.*
[81] Summers, James J., "The Right of Self-Determination and Nationalism in International Law", *International Journal on Minorities on Group Rights*. Vol, 12, No. 5, 2005, p. 325 – 354. Available at: https://www.jstor.org/stable/24675307
[82] Mustafa, Zubeida, "The Principle of Self-Determination in International Law", *The International Lawyer*, Vol. 5, No. 3, 1971, p. 479 - 487. Available at: http://www.jstor.org/stable/40704674.
[83] Swepston, Lee, *supra* note 33.

did not give indigenous communities all the features included in self-determination.[84]

The term 'peoples' was first officially connected to the indigenous in ILO Convention N. 169,[85] but not without opposition, since the controversy surrounding the term comes from its close connection with self-determination and the governments have been reluctant to recognize indigenous groups as 'peoples', fearing demands for secession or substantial internal autonomy.[86] For this reason, Article 1(3) of the Convention states:

> ILO Convention N. 169 – Article 1 (3). The use of the term 'peoples' in this Convention shall not be constructed as having any implications as regards the rights which may attach to the term under international law.[87]

During the drafting and negotiation of UNDRIP, there were discussions on applying the term 'peoples' and adopting self-determination for indigenous groups. On the UN Commission on Human Rights to study the draft declaration on indigenous rights, Canada claimed to:

> Accepts a right of self-determination for indigenous peoples which respects the political, constitutional and territorial

[84] ILO Convention N. 169, Art. 1, para. 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.
[85] The term "peoples" can be found in the title of the Convention, which was named as ILO Convention concerning Indigenous and Tribal Peoples in Independent Countries
[86] Xanthaki, Alexandra, *Indigenous Rights and United Nations Standards: Self-Determination, Culture and Land*, Cambridge, UK; New York: Cambridge University Press, 2007, p. 45. See also: Anaya, S. James., & James E. Rogers, *supra* note 76, p. 138
[87] ILO Convention N. 169, Art. 1 (3).

> integrity of democratic states. In that context, exercise of the right involves negotiations between states and the various indigenous peoples within those states to determine the political status of the indigenous peoples involved, and the means of pursuing their economic, social and cultural development. These negotiations must reflect the jurisdictions and competence of governments and must take account of the different needs, circumstances and aspirations of the indigenous peoples involved.[88]

In 2001, the United States also expressed a favorable understanding regarding the right to self-determination for indigenous:[89]

> [U]se of the term "internal self-determination" in both UN and OA declarations on indigenous rights, defined as follows: Indigenous peoples have a right of internal self-determination. By virtue of that right, they may negotiate their political status within the framework of the existing nation-state and are free to pursue their economic, social, and cultural development. Indigenous peoples, in exercising their right to internal self-determination have the internal right of autonomy or self-government in matters relating to their local affairs, including determination of membership, culture, language, religion,

[88] Canadian Statement to the UN Commission on Human Rights Working Group on the Draft Declaration on the Rights of Indigenous Peoples, Oct. 31, 1996 in Anaya, S. James, *supra* note 6, p. 111.
[89] *Ibid.* p. 111-112.

> education, information, media, health, housing, employment, social welfare, economic activities, lands and resources management, environment and entry by non-members, as well as ways and means for financing these autonomous functions.[90]

The crescent tendency towards recognizing indigenous groups as "peoples" and the right to internal self-determination was clear, even if contained. The result was the inclusion of both terms in the United Nations Declaration on the Rights of Indigenous Peoples, stating that:

> 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.[91]

However, most governments may not accept the idea of internal self-determination as the freedom to decide the form of government and individual involvement in the process of power. On the other hand, self-determination as a right to provide limited autonomy from the state on the indigenous special rights to cultural, economic, social, and political practices seems to carry a higher approvability of the nations.[92]

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[90] Memorandum of Jan. 18, 2001, by Robert A. Bratke, Executive Secretary, National Security Council in Anaya, S. James, *supra* note 6, p. 111-112.
[91] United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), UN General Assembly, A/RE/61/295, 2 October 2007, Art. 3.
[92] Wiessner, Siegfried, *supra* note 5, p. 58.

It is essential to mention that, for many indigenous leaders, the right to self-determination is connected to collective territorial property rights and an effective way for indigenous people to obtain recognition of the right to live in their territories.[93] On this matter, Erica-Irena Daes declared that *"a fundamental aspect of the true spirit of self-determination is respect for the land without which indigenous peoples cannot fully enjoy their cultural integrity".*[94] Thus, the recognition of the right to self-determination can grant limited autonomy from the state to protect the cultural integrity of the indigenous communities and their way of living, which is associated with their lands. This can indicate that such limited autonomy from the state regarding the indigenous lands could be translated as the indigenous communities having collective property rights.

At last, despite the UNDRIP being a non-legally binding instrument, its provisions can be regarded as a product of customary international law.[95] The acknowledgment of indigenous peoples as "peoples" and their right to self-determination has far-reaching implications and great importance regarding other legally binding instruments because it confirms that rights that are entitled to all peoples also apply to indigenous peoples.[96]

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[93] Gilbert, Jérémie, supra note 3, p. 200. See also: Buchana, Allen, *The Role of Collective Rights in the Theory of Indigenous Peoples' Rights*, Transnational Law & Contemporary Problems, Vol. 3, Issue 1, 1993, p. 89-108.

[94] Erica I. Daes, "The Spirit and Letter of the Rights to Self-Determination of Indigenous Peoples: Reflections on Making of the United Nations Draft Declaration," in Gilbert, Jérémie, *supra* note 3, p. 200.

[95] Hohmann, Weller, & Weller, M. *The UN Declaration on the Rights of Indigenous Peoples : A Commentary*, Oxford University Press, 2018, p. 64.

[96] *The UN Declaration on the Rights of Indigenous Peoples, Treaties and the Right to Free, Prior and Informed Consent: The Framework For a New Mechanism for Reparations, Restitution and Redress*, submitted by the International Indian Treaty Council as a Conference Room Paper for the United Nations Permanent Forum on Indigenous Issues Seventh Session (UNPFII7), March 9, 2008, p. 7-8.

1.3.1 Summary

The term "peoples" is another crucial concept applied to the indigenous that, in addition to reflecting the idea of "common culture" and "distinctive group",[97] connects the indigenous with the principle of self-determination, which gives the indigenous peoples autonomy regarding their political, economic, social and cultural practices.[98]

The applicability of the term "peoples" regarding indigenous is a very controversial topic since, under the international law perspective, the terminology is associated with the formation and dissolution of nations;[99] thus, many states feared that considering indigenous as "peoples" would allow them to seek for secession and internal autonomy, disrupting the territorial integrity of the states.[100]

The ILO Convention N. 169 applies the term "peoples" to the indigenous but explains that the meaning of the term regarding the indigenous was not attached to the international law meaning;[101] thus, the Convention rejects the possibility for the indigenous to seek secession from the states where they live. However, the term "peoples" gives the indigenous some autonomy about their way of life in their territory.

In conclusion, the self-determination principle, in addition, reinforces the collective characteristic of indigenous rights, such as land rights, and also gives

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Available at: www.un.org/esa/socdev/unpfii/documents/E_C19_2008_CRP_12.doc&cd=3&hl=pt-BR&ct=clnk&gl=kr

[97] Anaya, S. James., & James E. Rogers, *supra* note 76, p. 100.

[98] Wiessner, Siegfried, *supra* note 5, p. 58.

[99] Summers, James J., *supra* note 81.

[100] Xanthaki, Alexandra, *supra* note 86, p. 45.

[101] ILO Convention N. 169, Art. 1 (3).

autonomy to the indigenous through the right to pursue their distinct cultural way of life in their lands because the cultural and livelihood aspects of indigenous are intrinsically connected to their lands, this can be translated in reinforcement to the indigenous right to live in their territories, creating an additional guarantee to the indigenous to their collective territorial property rights.[102]

1.4 Collective Rights

The collective rights under the human rights framework have raised much debate over their existence, their content, and the link between individual rights and collective rights. Collective land rights are one of the fundamental collective rights claimed by the indigenous peoples, and it is an example of how the human rights system can defend collective rights.[103]

To fully understand the matter of collective rights and how it is applied to indigenous peoples, it is first necessary to understand what collective rights are and their features, in what situation a right should be considered as collective instead of individual, and what is the importance of collective rights on the protection of indigenous people's lands.

1.4.1 Collective Rights and Indigenous Peoples

There are many theories regarding the existence and the features of collective rights. According to Jones, there are two circumstances that a group can

[102] Gilbert, Jérémie, *supra* note 3, p. 200. See also: Buchana, Allen, *supra* note 93.
[103] *Ibid*, p. 102.

claim collective rights.[104] First, if the good has a collective form, that cannot be split into several rights wielded individually by the group's members. For example, minorities have the right not to have a sacred site desecrated, and this cannot be considered an individual right because the site is the property of the faithful as a group. Thus, the violation is against the group as a whole, not only the individual second, if the individual's claim is insufficient to substantiate a right.[105] For example, a person has the right to use their language. Still, an individual's claim to have official papers issued in a minority language would not be substantiated since the burden would outweigh the benefit. However, if the advantages outweighed the expense of realizing it, the group's claim to the right would be supported.[106]

Allen Buchanan[107] affirms the existence of two types of collective rights: *"Collective Rights in the Strong Sense and the Dual-Standing Collective Rights."*[108] On the one hand, in the strong sense, collective rights can be claimed when an individual, acting solely, cannot exercise the right to their own authority. In this scenario, the right can only be exercised non-individually, either by a group through a collective decision or by an individual acting on behalf of the group.[109] On the other hand, dual-standing collective rights can be claimed by a group member, to their own authority, or on behalf of another group member; the right may also be exercised by a group or by an individual representing the group. Thus, this type of collective right can be exercised by any member in the group,

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[104] Jones, Peter, "Individuals, Communities and Human Rights", *Review of International Studies 26*, No. 5, 2000, p. 211–14.
[105] *Ibid*.
[106] Xanthaki, Alexandra, *supra* note 86, p. 31-32
[107] Buchana, Allen, *supra* note 93.
[108] Buchana, Allen, *supra* note 93, p. 93 - 94
[109] *Ibid.*

individually or non-individually, by a collective decision or by a group representative.[110]

It is important to note that although dual-standing collective rights and individual rights have similar characteristics, there is a vital difference regarding the ability of people to wield them. Individual rights can be invoked only by the person whose right is infringed, while any group member can exercise the dual-standing collective right, even if that person has not been harmed.[111]

Despite many authors affirming the importance and the existence of collective rights, this topic has been controversial since many states reject the idea of collective rights in the scope of international law.[112] France frequently declared that *"collective rights did not exist in international human rights law, and therefore [France] had reservations about those articles that aimed to establish collective rights."*[113] However, the claim that international law does not recognize collective rights is false.[114] Although the human rights system's primary concern is individual rights, collective rights are acknowledged[115] since they are included in several international agreements, including the International Covenants and the African Charter on Human and Peoples' Rights.[116]

Although recognizing the existence of collective rights, many states fear that adopting collective rights will result in a restriction and a potential threat to

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110 *Ibid.*
111 *Ibid.*
112 France, Japan and Sweden in UN Doc. E/CN.4/1997/102, para. 108–13
113 *Report of the Working Group established in accordance with Commission on Human Rights Resolution*, 1995/32, UN Doc. E/CN.4/1997/102, para. 108
114 Xanthaki, Alexandra, *supra* note 86, p. 107
115 *Ibid*, p. 29.
116 African Charter on Human and Peoples' Rights. Arts. 20, 22 and 24.

individual rights[117] and ultimately lead to the weakening of the respective right.[118] For liberals, collective rights are unnecessary since individual rights may accomplish the same objective.[119] For example, the right to culture may be effectively safeguarded[120] by the individual right to association.[121]

In the 1995 Working Group on Indigenous People, the United States[122] justified its disapproval of indigenous collective rights because characterizing a right as belonging to a community, or collective rather than an individual, can be interpreted in a way to limit the exercise of that right because only a group can invoke it, which may result on the refusal of the individual right.[123] This approach stems from their domestic experience, which has shown that the rights of all people are best ensured when the rights of each individual are well safeguarded.[124]

However, individual rights often were ineffective in protecting the indigenous people against human rights violations of collective character since the offense reaches the indigenous communities as a whole.[125] An example was the 1887 General Allotment Act,[126] which permitted reservation lands in the United States to be distributed between the indigenous members of a community, allowing

[117] Jovanovic, Miodrag A., *Collective Rights: A Legal Theory*, Cambridge, UK, Cambridge University Press, 2012, p. 140.
[118] Report of the 1996 session, UN Doc. E/CN.4/1997/102, paras. 108–13.
[119] J. Donnelly, 'Human Rights' in J. Dryzek, B. Honig and A. Phillips (eds.), *Oxford Handbook of Political Theory*, Oxford University Press, 2006. Available at: http://www.du.edu/~jdonnell/papers/oxford_ handbook.pdf
[120] Tamir, Yael, *Liberal Nationalism*, Princeton: Princeton University Press, 1993, p. 45-53. See also: Tamir, Yael, "Who do you Trust?", *Boston Review* 22, 1997.
[121] Kukathas, C., "Are there any Cultural Rights?" *Political Theory* 20 (1), 1992, p. 105–139.
[122] US Delegation comments on Section 1 of the draft Declaration in the 1995 working group on indigenous peoples.
[123] Xanthaki, Alexandra, *supra* note 86, p. 32.
[124] *Ibid.*
[125] *Ibid*, p. 31.
[126] General Allotment Act of 1887. An Act to provide for the allotment of lands in severalty to Indians on the various reservations, and to extend the protection of the laws of the United States and the Territories over the Indians, and for other purposes. February 8, 1887.

each member to sell their own land allotment; the result was the massive reduction of the reservation land to less than one-third of its original size.[127] On this matter, Kymlika[128] states that the best method for the protection of indigenous lands is through a system where the lands are common, thus, not being able to be alienated by the individual, only in agreement with the community.[129]

Liberals would justify that the right to land was guaranteed to the indigenous, and no indigenous land violation happened because each individual member of the indigenous community had the free choice to sell their allotment. However, land rights were granted to the individual because they were part of the indigenous community; if they were not indigenous, they would not have the right to that land. Furthermore, the indigenous land has a collective nature; they do not belong to individuals but to the community as a whole.[130] In the 1998 representation,[131] ILO stated that when the indigenous and tribal peoples' communal lands are distributed to each member, the protection of the indigenous land rights tends to be undermined, to the point that the indigenous peoples end up losing all or a large part of their lands.[132]

Even the strongest objectors to collective rights agree that in exceptional cases, individual rights are not enough to safeguard the vulnerable effectively.

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[127] Hutt, Sherry, "If Geronimo was Jewish: Equal Protection and the Cultural Property Rights of Native Americans", *Northern Illinois University Law Review 24*, 2003, p. 527–62.
[128] Kymlika, Will, *Multicultural Citizenship: A Liberal Theory of Minority Rights*, Oxford: Claredon Press, 1995, p. 43.
[129] *Ibid.*
[130] Xanthaki, Alexandra, *supra* note 86, p. 31
[131] *Report of the Committee set up to examine the representation alleging nonobservance by Peru of the Indigenous and Tribal People's Convention, 1989* (No. 169), made under Article 24 of the ILO Constitution by the General Confederation of Workers of Peru (CGTP), Submitted 1997, Documents: GB.270/16/4 and GB.273/14/4
[132] CEACR, Individual Observation concerning Convention No. 169, Indigenous and Tribal Peoples, 1989, Peru, Published: 1999, para. 3–6.

There is an understanding that indigenous people are an "emerging exception".[133]. Because the dominant legal and social institutions conflict with indigenous peoples' distinct way of life, collective rights are needed to protect them.[134]

The main difficulty for the prevailing human rights system is to avoid imposing individual rights on group claims and, instead, to address the violation and protection of rights in a way that preserves the core elements of individual rights and collective rights.[135] There will be conflicts between collective and individual rights, just as there are conflicts between individual rights. The solution for the matter should not be the complete exclusion of one to the detriment of the other since this would violate the principle of necessity[136] but apply the prevalence of one right over the other. The instances must be resolved on an ad hoc basis, using the principles of necessity, proportionality, reasonableness, and objectivity as standards[137].

In conclusion, international law recognizes the claims of indigenous peoples regarding the recognition of their collective rights.[138] However, the recognition of indigenous collective rights does not necessarily imply that indigenous collective rights will always take precedence over the individual rights of indigenous community members. Still, it certainly provides indigenous

[133] J. Donnelly, *supra* note 119.
[134] *Ibid.*
[135] Eisenberg, Avigail, '" Review of Context, Cultural Difference, Sex and Social Justice by Martha C. Nussbaum", *Canadian Journal of Political Science* 35, No. 3, 2002, p. 624. Available at: http://www.jstor.org/stable/3233117.
[136] Thornberry, Patrick. *Indigenous Peoples and Human Rights*. Manchester University Press, 2002, p. 154-60.
[137] Xanthaki, Alexandra, *supra* note 86, p. 38.
[138] Oestreich, J. E, "Liberal Theory and Minority Group Rights", *Human Rights Quarterly*, 1999, p. 108–33.

communities and their cultures with a better instrument of protection against violations of their rights.[139]

1.4.2 Summary

One of the most important concepts included in the protection of indigenous lands is collective rights. Discussions about collective rights are controversial, as many states reject the existence of this type of right for fear it can cause restrictions to the application of individual rights.[140] However, the existence of collective rights cannot be denied, especially about indigenous peoples, since the very collective nature of indigenous peoples reflects in many rights that belong to the community as a whole. Therefore, more than mere individual protection would be needed to guarantee the right of the community effectively.

Regarding the indigenous lands, their collective nature comes from the idea that the land belongs to the whole community, not to the indigenous as individuals. Thus, its protection also needs to be collective. For example, in circumstances where indigenous people have individual rights towards their lands, they are allowed to individually deal with those lands, which can result in the collective violation of those lands since it does not belong just to one individual but to the entire community.

The following chapters contain the legal analysis of international instruments that have provisions for protecting indigenous lands. Therefore, the above concepts will be essential for understanding and interpreting these devices.

[139] Xanthaki, Alexandra, *supra* note 86, p. 38-39.
[140] *Ibid*, p. 32.

In summary, the definition of "indigenous" is necessary for those who will receive this special protection. The term "peoples" connects indigenous peoples to collective characteristics and the principle of self-determination. The application of collective rights is linked to the very nature of indigenous peoples and therefore presents itself as the best method of protecting indigenous lands.

Chapter 2: Specific International Law Instruments for the Protection of Indigenous Peoples' Rights

In Chapter 2, the most relevant international instruments for protecting indigenous peoples will be examined, and these documents form the foundation of the protection of indigenous peoples and specifically address indigenous rights. For this thesis, only the provisions about indigenous lands will be analyzed in more depth.

2.1 The ILO and Indigenous Lands

The International Labour Organisation was the first international entity to raise topics regarding indigenous peoples' matters under the international law perspective, and to this day, continues to be one of the most important international organizations to address indigenous peoples' rights, having only two binding Conventions which specifically provide for indigenous peoples' rights. This section will bring a historical overview of the construction of indigenous rights under the International Labour Organisation, addressing the creation of the ILO Convention No. 107 and 169. It will contain a legal analysis of the provisions on indigenous peoples' lands.

2.1.1 The creation of ILO Convention No. 107

The International Labour Organization was created in Post-World War I and soon after initiated discussions concerning the 'native workers' problem.[141] In the early 1920s, they were focused on the labor condition of the indigenous, and by 1926 they established a Committee of Experts on Native Labour, which served as support for the adoption of several conventions[142] for the protection of native workers in overseas territories of colonial powers.[143]

Having survived the Second World War, ILO was considered a consistent organization with years of experience in the field of indigenous workers, so it was only natural that ILO began to discuss the indigenous issue in its entirety.[144] In 1952 the Andean Indian Programme was created by the UN, and ILO was the administrator.[145] In the subsequent year, ILO published the *Indigenous Peoples*[146], a book based on global research on these people's living and working conditions.

The next step was the creation of a draft text about the indigenous population in independent countries, which was discussed at the 39th Session of the International Labour Conference in 1957.[147] The adoption of the Convention concerning the Protection and Integration of Indigenous and Other Tribal and

[141] Swepston, Lee, *supra* note 33, p. 18.
[142] The Proceedings of the 39th Session of the Conference Relating to Indigenous Populations in Independent Countries. Report VIII (1), p. 5.
[143] Swepston, Lee, *supra* note 33, p. 18
[144] *Ibid.*
[145] The Andean Indian Programme worked from 1952 to 1972. See also: Piñero-Rodríguez, Luis. *Indigenous peoples, postcolonialism, and international law. The ILO Regime (1919-1989),* 2005, p. 98 – 112.
[146] *Indigenous Peoples: Living and Working Conditions of Aboriginal Populations in Independent Countries*, International Labour Office, Geneva, 1953.
[147] Xanthaki, Alexandra, *supra* note 86, p. 49.

Semi-Tribal Populations in Independent Countries No. 107 and the Indigenous and Tribal Population Recommendation No. 104 happened in the same year during the 40th Session of the ILC, and it is regarded as a landmark on the indigenous rights.[148]

The discussion sessions about Convention No. 107 and Recommendation No. 104 included the participation of important international bodies[149], such as the United Nations Educational, Scientific and Cultural Organization (UNESCO), the Food and Agriculture Organization (FAO), and the World Health Organization (WHO), as well as several States.

The ILO Convention No. 107 has been ratified by twenty-seven countries[150], establishing itself as the first binding international instrument on indigenous peoples. Despite being closed for ratification, it is still applicable for countries that ratified Convention No. 107 but not Convention No. 169; therefore, the analysis of this convention is still critical nowadays. Furthermore, Recommendation No. 104 is not subject to ratification, thus, not binding, serving merely as a detailed guideline for protecting indigenous peoples.[151]

Despite bringing an innovative view of indigenous people from a human rights perspective, the construction of ILO Convention No. 107 lacks the inclusion of representatives of indigenous peoples, which reflects on the basic philosophy of

[148] Ibid. See also: Piñero-Rodríguez, Luis, *supra* note 145, p. 211.
[149] Report VIII (2) 39th Session
[150] ILO Convention No. 107 entered into force on 2 June 1959.
[151] Xanthaki, Alexandra, *supra* note 86, p. 50.

the provisions, considering the indigenous only from the distant view of outsiders, as mere *"objects of social intervention, and not as subjects of rights."*[152].

As the title announces, Convention No. 107 was based on the *integration* and the *programme of protection*, a direct result of the non-inclusion of the indigenous peoples in the discussion of their conditions, reflecting mainly:

> […] the dominant political elements in national and international circles at the time of the convention's adoption. The universe of values that promoted the emancipation of colonial territories during the middle part of the last century simultaneously promoted the assimilation of members of culturally distinctive indigenous groups into dominant political and social orders that engulfed them.[153]

The Western/European ideology of 'life' is imposed under Convention No. 107, not recognizing that the interests of indigenous peoples and the countries where they live may differ. In fact, because of the idea of integration, despite the convention guaranteeing protection to indigenous peoples, it also makes it clear that there is protection only for elements that are not incompatible with the national legal system and the integration program.[154]

[152] Piñero-Rodríguez, Luis, *supra* note 145, p. 206.

[153]Anaya, S. James, *supra* note 6, p. 55.

[154] ILO Convention N. 107, Art. 7(2): These populations shall be allowed to retain their own customs and institutions where these are not incompatible with the national legal system or the objectives of integration programmes. See also: Piñero-Rodríguez, Luis, *supra* note 145, p. 205.

The convention's main objective is focused on the integration program; therefore, the protection program is linked to it, and there can be no conflict between them. According to Piñero[155], the protection program has no autonomy, representing another integration method. As the protection of indigenous land tenure is under the *protection programme*, it is necessary to analyze the indigenous land provisions from an integration point of view.

2.1.2 Indigenous Peoples' Lands Rights in ILO Convention No. 107

The articles regarding land rights are included in Part II of ILO Convention No. 107. They are considered an important milestone for the indigenous peoples' rights, as these provisions were the first internationally binding norms that restricted the practices of states about 'indigenous lands.' [156] According to Rodríguez-Piñero, the most significant provisions are Article 11, [157]which gives recognition to indigenous peoples' right of ownership of their traditional land, and Article 12,[158] which regulates the terms of removal of indigenous peoples from their traditional territories.[159]

A heated debate sparked regarding the inclusion of land provisions in the Convention. On the one hand, concerns were raised about the organization's lack of competence over the matter.[160] On the other hand, the land tenure's main role in the

[155] *Ibid*, p. 206.
[156] Xanthaki, Alexandra, *supra* note 86, p. 50.
[157] ILO Convention N. 107, Art. 11.
[158] ILO Convention N. 107, Art. 12.
[159] Piñero-Rodríguez, Luis, *supra* note 145, p. 206.
[160] *Ibid*, p. 129 – 133.

indigenous peoples' living and working circumstances, as well as the value given to the land by governments in their own integration plans, justified the approach to the subject. [161]

As the ownership and use of traditional land by indigenous peoples were deemed to be crucial for indigenous material survival, it was necessary the creation of a safeguard norm against the negative effects created by the expropriation of indigenous from their land because of the 'natural' interaction action or dominant state policies.[162] For this reason, Article 11 is considered one of the convention's most innovative clauses,[163] providing:

> The right of ownership, collective or individual, of the members of the populations concerned over the lands which these populations traditionally occupy shall be recognised.[164]

Although the inclusion of land provisions in Convention N. 107 and Recommendation N. 104 was considered a significant step forward for the indigenous peoples, the provisions followed the objectives of 'protection' and 'integration'. [165] This is evident when the article does not establish a strict obligation for the States, only establishing goals for state policies concerning indigenous peoples[166] and placing governments in charge of indigenous policy.

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[161] *Ibid*, p. 208.
[162] *Ibid*, p. 208.
[163] Bennett, Gordon, *Aboriginal Rights in International Law*, London: Anthropological Institute for Survival International, 1978, p. 33.
[164] ILO Convention N. 107, Art 11.
[165] Piñero-Rodríguez, Luis, *supra* note 145, p. 206, p. 208.
[166] Bennett, Gordon, *supra* note 163, p. 33.

Bennet points out that *"[a]boriginal land tenure raises issues of immense complexity, yet article 11 is one of the shortest provisions of the Convention."*[167] In addition to the lack of detail on the subject, the norm is not self-executing, depending on the legislative act of the State.[168] Such hesitance to impose firmer collective rights resulted in criticism by indigenous peoples and activists. [169] ILO's explanation for the issue was:

> [I]t would be inappropriate to lay down rules that would be too detailed when it adopted Convention N. 107, because of the varied circumstances under which indigenous and tribal populations live, making it impossible to formulate a general rule.[170]

On a positive note, article 11 states that if the land is "traditional", the occupation must turn into ownership.[171] On the matter, ILO explains:

> The right of ownership grants full proprietary status which is superior to the present situation of many indigenous peoples in both ratifying and non-ratifying countries. The Article also uses the term 'recognised' rather than the term 'grant'. It thus implicitly accepts that the rights of ownership already accrue

[167] *Ibid.*
[168] Piñero-Rodríguez, Luis, *supra* note 145, p. 209.
[169] Swepston, Lee & Plant, Roger, "International Standards and the Protection of the Land Rights of Indigenous and Tribal Populations", *International Labour Review*, 1985, p. 97.
[170] 1986 ILO Note to the working group on indigenous populations, p. 63.
[171] Xanthaki, Alexandra, *supra* note 86, p. 61.

> to indigenous populations, and are not ceded to them through the action of nation States[172]

The Committee of Experts on the Application of the Convention issued a report on India in 1990, noting that occupation did not need to be authorized by the government:[173]

> [T]raditional occupation, whether or not it has been recognised as authorised, does create rights under [Convention No. 107]. In addition, use of forests or waste lands, title of which is held by the Government, or hunting and gathering – again, whether or not this has been authorised – satisfies the use of the term 'occupation', and if it is traditional it meets the requirement of [Article 11 of the Convention 107]. The term 'traditional occupation' is imprecise, but it clearly conveys that the lands over which these groups' land rights should be recognised are those whose use has become part of their way of life[174]

Although article 11 of Convention N. 107 consolidates indigenous peoples' ownership rights, article 12 introduces the possibility of removing indigenous

[172] 1986 ILO Note to the working group on indigenous populations, p. 62.
[173] Xanthaki, Alexandra, *supra* note 86, p. 61.
[174] CEARC, Individual Observation concerning Convention No. 107 Indigenous and Tribal Populations, India, published 1990, para. 16.

peoples from their ancestral lands due to general state policy, demonstrating the unstable nature of their rights to the land.[175] Article 12 (1) provides:

> ILO Convention N. 107 – Article 12 (1): The populations concerned shall not be removed without their free consent from their habitual territories except in accordance with national laws and regulations for reasons relating to national security, or in the interest of national economic development or of the health of the said populations.[176]

According to Thornberry, unlike Article 11, Article 12 in the Convention did not cause much debate or controversy since most states were content with adding broad exceptions to the principle of non-removal.[177] The protection against the removal of indigenous peoples from their land without free consent loses effectiveness when confronted with the extensive language of the exceptions to the rule of non-removal and the normative preference associated with these exceptions.[178] Furthermore, 'national security' and 'national development' are common expressions used by the states when practicing arbitrary removal of indigenous people from their lands[179] since these are situations that place society in general at a higher level of importance than the maintenance of lands for indigenous peoples.

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175 Piñero-Rodríguez, Luis, *supra* note 145, p. 210.
176 ILO Convention N. 107, Art. 12 (1).
177 Thornberry, Patrick, *International Law and the Rights of Minorities*, Oxford: Oxford University Press, 1991, p. 360.
178 Swepston, Lee & Plant, Roger, *supra* note 169, p. 100.
179 Thornberry, Patrick, *supra* note 177, p. 360-361.

The second and third sections of Article 12 bring the requirement for compensation for indigenous peoples' land loss as well as any other 'loss or injury' as a result of forcible removal:

> ILO Convention N. 107 – Article 12:
>
> 2. When in such cases removal of these populations is necessary as an exceptional measure, they shall be provided with lands of quality at least equal to that of the lands previously occupied by them, suitable to provide for their present needs and future development. In cases where chances of alternative employment exist and where the populations concerned prefer to have compensation in money or in kind, they shall be so compensated under appropriate guarantees.
>
> 3. Persons thus removed shall be fully compensated for any resulting loss or injury.[180]

The above norm establishes compensation for displaced indigenous peoples with *"lands of at least equal quality to those previously occupied by them, suitable to provide for their present needs and future development",* [181] and according to the Committee of Experts on the Application of the Convention, the expression *"would create a presumption that displaced tribals should receive agricultural lands for lost agricultural lands, and forest lands for lost forest*

[180] ILO Convention N. 107, Art. 12 (2) (3).
[181] ILO Convention N. 107, Art. 12 (2).

lands." [182] However, the requirement was unattainable in rapid industrial development and densely populated areas.[183]

Furthermore, the possibility of compensation 'in money or in kind' expressed the concern for equality with non-indigenous members of society[184], grounded on the principle of due compensation of economic injury, [185] not considering the indigenous peoples' specific connection with their lands and the possibly harmful effect on their physical and cultural existence when removed from their traditional territories.[186]

Article 13 brings the requirement for respect to indigenous customs in the transmission of ownership:

ILO Convention N. 107 – Article 13:

> 1. Procedures for the transmission of rights of ownership and use of land which are established by the customs of the populations concerned shall be respected, within the framework of national laws and regulations, in so far as they satisfy the needs of these populations and do not hinder their economic and social development.

[182] CEARC, Individual Observation concerning Convention No. 107 Indigenous and Tribal Populations, India, published 1990, para. 23.
[183] M. Ferch, " Indian Land Rights: An International Approach to Just Compensation", *Transnational Law and Contemporary Problems*, 1992, p. 322 in Doyle, Cathal, *supra* note 32, p. 77.
[184] Piñero-Rodríguez, Luis, *supra* note 145, p. 211.
[185] ILO, International Labour Conference, 40th session (Geneva, 1957): Living and Working Conditions of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries. Report VI (2) (1957), p. 121.
[186] Doyle, Cathal, *supra* note 32, p. 77.

> 2. Arrangements shall be made to prevent persons who are not members of the populations concerned from taking advantage of these customs or of lack of understanding of the laws on the part of the members of these populations to secure the ownership or use of the lands belonging to such members.

The transfer of land ownership and usage rights is conditional on indigenous communities' needs being met and their economic and social growth not being hampered. Unfortunately, indigenous people are again seen as a passive element under state power since the decision on whether indigenous customs hinder their own economic and social development belongs to the government.[187]

The provision also seeks to safeguard indigenous peoples from selling their territories for a fraction of their full worth by requesting that governments establish measures to avoid such scenarios. However, the exceedingly paternalistic tone of the norm resulted in similarly paternalistic governmental action from several states, imposing prohibitions and controls on the sale or lease of any indigenous territory.[188]

ILO No. 107 was the first international instrument to regulate indigenous and tribal peoples, recognize their fundamental rights on pertinent matters, and oblige states to make *systematic and coordinated*[189] efforts to safeguard them.[190] The inclusion of provisions regarding land rights was one of the significant contributions of the ILO Convention N. 107.

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187 Xanthaki, Alexandra, *supra* note 86, p. 63.
188 *Ibid.*
189 ILO Convention N. 107, preamble, para 6; Art. 2 (1).
190 Xanthaki, Alexandra, *supra* note 86, p. 280.

Unfortunately, the provisions sometimes sacrifice indigenous cultural survival for 'integration', a nebulous concept that may be exploited to void the Convention's protection, as shown with land rights.[191] However, despite all the criticism regarding the paternalist approach of the Convention and the explicit exclusion of the indigenous on the construction of their protection norms, the study of ILO Convention N.107 is crucial given that it is still enforceable in eighteen states, the majority of which have a sizable indigenous population. In these nations, the Convention is the sole legally enforceable treaty that incorporates governments' duties concerning land rights, an important problem to indigenous peoples even to this day.[192]8

2.1.3 The creation of ILO Convention No. 169

One of the main criticism regarding the ILO Convention N. 107 was the lack of indigenous representation during the decision-making process.[193] After the convention's adoption, indigenous peoples expanded their role in the international human rights agenda, supporting a human rights approach that honored their unique cultures and ethnic identities.[194] Despite bringing innovative provisions to the indigenous peoples, ILO Convention N. 107 was deemed anachronistic and 'integrationist', leading to the necessity of a revision.[195]

In 1972, the United Nations conducted a study on the Problem of Discrimination against Indigenous Peoples, resulting in a series of three reports by

191 Xanthaki, Alexandra, *supra* note 86, p. 66.
192 *Ibid.*
193 Anaya, S. James., & James E. Rogers, *supra* note 76, p. 133 – 134.
194 Xanthaki, Alexandra, *supra* note 86, p. 67.
195 Anaya, S. James., & James E. Rogers, *supra* note 76, p. 134.

Matinez Cobo[196]. This study made recommendations for the revision of Convention No. 107[197] and became a reference for the discussion of indigenous rights.[198] In favor of the revision, in 1977, the NGO Conference on Discrimination against Indigenous Populations in the Americas stated that ILO Convention 107 should be revised to exclude the integrationist view and strengthen norms protecting indigenous peoples.[199]

In 1985, ILO initiated the Convention N. 107 revision in response to requests from indigenous and tribal peoples, NGOs, and the United Nations.[200] In 1986, the International Labour Office stated at the Meeting of the Experts the main reason for the revision of Convention N. 107:

> [I]n the light of developments since the adoption of the Convention in 1957 – most particularly, the views which are frequently expressed by organisations of indigenous peoples themselves at the national and international levels, the basic orientation towards integration should be removed from the Convention. Recognition should be given to indigenous and tribal populations to determine the extent and pace of the economic development affecting them, to maintain lifestyles different from those prevailing for the remainder of national populations, and to retain and develop their own institutions,

196 Cobo, Martínez, *supra* note 24.
197 Swepston, Lee, *supra* note 33.
198 Anaya, S. James, *supra* note 6, p. 62.
199 *Report of International NGO Conference on Discrimination against Indigenous Peoples in the Americas*, Palais des Nations, Geneva, 1977, p. 22.
200 Swepston, Lee, *supra* note 33.

languages and cultures independently of the dominant societal groups.[201]

The integrationist features of Convention No. 107 were regarded *'destructive in the modern world'*.[202] The influence of an integrationist view regarding indigenous rights meant eliminating their unique way of life and their assimilation into the dominant society. Furthermore, incorporating such a perspective created suspicion among the indigenous and tribal peoples concerning other provisions contained in the Convention, even those that offered protection for them.[203]

The revision was completed in 1989, leading to the adoption of the Convention concerning Indigenous and Tribal Peoples in Independent Countries (Convention No. 169), which came into force in 1991[204] and represented a substantial departure from the ILO's previous approach to dealing with indigenous and tribal peoples.[205]

It rejects the integrationist and condescending mentality included in Convention N. 107, which assumed that indigenous and tribal communities would eventually vanish as they were increasingly absorbed into the nations in which they

[201] ILO Working Document for 1986 Meeting Experts, p. 1.
[202] *Ibid*, p. 10.
[203] *Ibid*.
[204] The ILO Convention N. 169 was ratified by 24 states: Argentina, Bolivia, Brazil, Central African Republic, Chile, Colombia, Costa Rica, Denmark, Dominica, Ecuador, Fiji, Germany, Guatemala, Honduras, Luxembourg, Mexico, Nepal, Netherlands, Nicaragua, Norway, Paraguay, Peru, Spain, Venezuela. The last state to ratify the ILO Convention N. 169 was Germany on 23 June 2021.
[205] Xanthaki, Alexandra, *supra* note 86, p. 67.

lived.[206] Instead, adopting respect for the indigenous and tribal people's identity, traditions, customs, and ways of life was one of the guiding principles.[207]

The basic philosophy adopted by the Convention N. 169 presumes that indigenous peoples have the right to continued existence and development grounded on their view[208] and the right to be involved in the decision-making process of issues that affects them.[209] The Convention N.169 brings provisions that ensure recognition of indigenous control over their affairs and the evident respect for indigenous distinctiveness more extensively than any other instrument available to indigenous peoples' protection.[210]

The legal instrument's construction involved representatives from indigenous communities, the states, and the assistance of the United Nations system.[211] To avoid the past problem of lack of indigenous participation in the debates about themselves, ILO had to take measures to allow the indigenous peoples to be included as observers.[212] At the 1988 General Conference, indigenous representatives could interfere directly at specific points in the conversation, advocate for their position, and convey their views throughout the proceedings.[213]

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206 Swepston, Lee, *supra* note 33.
207 Swepston, Lee, "A New step in the International Law on Indigenous and Tribal Peoples: ILO Convention No. 169 of 1989", *Oklahoma City University Law Review*, Vol. 15, no.3, 1990, p. 677.
208 ILO Convention N. 169, Art. 7.
209 Swepston, Lee, *supra* note 33. See also: ILO Convention N. 169 , Art. 6, 7, 12, 15, 17, 20, 23, 25, 27, 28, and 33. See also: Lee Swepston, "Indigenous Peoples in International Law and Organizations", in castellino, Joshua & Walsh, Niamh (eds), *International Law and Indigenous Peoples*, Leiden, The Netherlands: Martinus Nijhoff, 2005, p. 55
210 Xanthaki, Alexandra, *supra* note 86, p. 70
211 Swepston, Lee, *supra* note 33.
212 Xanthaki, Alexandra, *supra* note 86, p. 68.
213 Swepston, Lee, *supra* note 33.

Another arrangement adopted by ILO to increase active indigenous participation was to recommend that governments consult indigenous peoples when writing their replies for the Conference.[214] In addition, the government, employer, and worker delegations made efforts to include indigenous representatives in their benches.[215] It was the first time the indigenous representatives actively participated in discussions of legal instruments that impacted their lives.[216]

However, their participation was restricted to expressing their opinions without actively drafting the text since the national and community organizations could not vote.[217] The lack of direct participation in the standard-setting process[218] prompted concerns regarding indigenous peoples' effective involvement and engagement in the revision.[219]

Convention N.169 has also been criticized for granting an excessive amount of autonomy to a particular group within the national boundaries, failing to grant indigenous and tribal peoples full decision-making power, and avoiding the recognition of the right of indigenous peoples to self-determination.[220]

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[214] 'International Action concerning Indigenous and Tribal Populations' in International Labour Office, Report VI(1). Partial Revision of the Indigenous and Tribal Populations Convention, 1957 (No. 107), International Labour Conference, 75th Session (1988), p. 2

[215] Swepston, Lee, *supra* note 33.

[216] *Ibid.*

[217] Berman, H. R, "The International Labour Organization and Indigenous Peoples: Revision of ILO Convention N. 107 at the 75th Session of the International Labour Conference, 1988", *The Review 41*. International Commission of Jurists, 1998, p. 51

[218] Sambo, D., "Indigenous Peoples and International Standard-setting Processes: Are State Governments Listening?" *Transnational Law and Contemporary Problems*, Vol. 3, no. 1, 1993, p. 13.

[219] Berman, H. R, *supra* note 217, p. 48.

[220] Alfredsson, Gudmundur, "Autonomy and Indigenous Peoples' in Markku Suksi" in *Autonomy: Applications and Implication*, The Hague: Kluwer Law International, 1998, p. 125

Despite this, Convention No. 169 is considered *"the most comprehensive instrument of international law"*[221] regarding indigenous peoples' rights. It brings essential provisions about land rights, which is a significant problem for the indigenous communities, reaffirms the rights to traditional territories, and for the first time in international law, recognizes the right to the natural resources associated with these territories. [222]

Although the Convention's implementation is under the ILO's jurisdiction, its provisions are linked to the human rights framework. Its effect has gone beyond the state parties, even being applied as a tool to widen the interpretation of other treaties.[223] Furthermore, it has also contributed as a significant source for forming indigenous rights inside national jurisdictions and an interpretive standard for non-indigenous domestic law.[224]

2.1.4 Indigenous Peoples' Lands Rights in ILO Convention No. 169

Indigenous land rights were a much-criticized topic in Convention No. 107, considered a significant reason for the revision, for being a weak and inadequate legal provision to guarantee the complete protection of rights to indigenous

[221] "Application of the Indigenous and Tribal Peoples Convention 1989 (No. 169)" in International Labour Conference, *Report of the Committee of Experts on the Application of Conventions and Recommendations*, 87th Session (1999), Report III (Part 1A), Geneva, paras. 98–107.
[222] Mackay, Fergus, "The rights of Indigenous Peoples in the International Law" in Lyuba Zarsky, *Human Rights & the Environment – Conflicts and Norms in a Globalizing World*, London: Earthscan Publications, 2002, p. 16.
[223] Swepston, Lee, *supra* note 33.
[224] The 1997 Indigenous Peoples Rights Act (Philippines) follows the ILO Convention N. 169 standards.

lands.[225] The weight of indigenous land rights in national constitutions and the significance of the topic for the indigenous communities' survival ensured a contentious debate for the adoption of Convention N. 169.[226] According to Swepston:

> Discussions were so tense that at one point certain members of the Conference Committee went away with this whole section and came back with a 'take-it-or-leave-it' text. No records were kept of the discussion in that special working group. So the legislative history here is almost a blank[227]

Despite the intense discussion, mainly because of 'terminological' issues,[228] the section on land rights was adopted following the Chairman's recommendation to consider the articles as a "package" text.[229] The Convention brings provisions about the connection of territories and spiritual values of indigenous peoples, rights of ownership, management of natural resources, and removal of indigenous from their lands.[230] Compared with other human rights agreements, Convention N. 169 contains stronger provisions about land rights.[231]

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[225] Xanthaki, Alexandra, *supra* note 86, p. 80
[226] Swepston, Lee, *supra* note 33.
[227] Swepston, 'Economic, Social and Cultural Rights', p. 43
[228] Piñero-Rodríguez, Luis, *supra* note 145, p. 306.
[229] *Statement of the Chairman of the Committee on the Convention No 107*, Bolivian Ambassador España-Smith, Fourth Intern Item on the Agenda: Partial Revision of the Indigenous and Tribal Populations Convention, 1957 (No 107): Report of the Committee on Convention No 107.
[230] ILO Convention N. 169, Art. 13-16
[231] Xanthaki, Alexandra, *supra* note 86, p. 80

i. Article 13 of Convention No. 169: Lands and Territories and the Spiritual Relationship [232]

Article 13 brings concepts that help to understand the following articles.[233] The article recognizes the special connection between the indigenous peoples' *"cultural and spiritual values"*[234] and their land. Furthermore, it answers the discussions about the terms 'land' and 'territory'.[235]

For indigenous peoples, the land is more than a subsistence source; it is where their ancestors lived and where their history, knowledge, traditions, and cultural and spiritual practices were developed.[236] The special bond that indigenous people have with the land they inhabit does not provide only for their physical survival but also is necessary for the cultural existence of the group.[237] In the UN Study of the Problem of Discrimination against Indigenous Populations, the Special Rapporteur Martínez Cobo[238] emphasizes that for indigenous peoples, the land does not only have a function as a means of production, but it is a fundamental part of their existence as such and to all their beliefs, customs, traditions, and culture, and therefore, the land would not be a mere element that can be

[232] Swepston, Lee, *supra* note 232, p. 229
[233] *Ibid.*
[234] ILO Convention N. 169 Art. 13 (1).
[235] ILO Convention N. 169 Art. 13 (2).
[236] *Indigenous and Tribal Peoples' Rights in Practice: A Guide to ILO Convention No. 169*, International Labour Standards Department, 2009, p. 91. Available at: https://www.ilo.org/global/publications/ilo-bookstore/order-online/books/WCMS_171810/lang--en/index.htm (hereinafter 'A Guide to ILO').
[237] Davis, Michael, "Law, Anthropology, and the Recognition of Indigenous Cultural Systems", *Law & Anthropology: International Yearbook for Legal Anthropology,* Vol. 11, 2001. P. 299.
[238] Cobo, Martínez, *supra* note 24.

commodified, but a component of the way of life of indigenous peoples to be freely enjoyed by all individuals in that community.[239]

On the application of the ILO Convention N. 169 land rights provision, Article 13 affirms that states:

> [S]hall respect the special importance for the cultures and spiritual values of the peoples concerned of their relationship with the lands or territories, or both as applicable, which they occupy or otherwise use, and in particular the collective aspects of this relationship.[240]

In 1998, in a representation against Peru, the Committee used the provision above. At the occasion, Peru passed legislation allowing members of an indigenous community to sell their lands, despite the land being claimed as belonging to the community.[241] The Committee applied Article 13 as a way to recognize the unique connection between indigenous peoples and their lands, focusing on the collective aspect of the land and mentioning the negative effects for the indigenous peoples upon the loss of their territory, which is reflected in damages as a group and also as an individual.[242] It was explained that when indigenous lands are separated and

[239] *Ibid*, para. 196 - 197.
[240] ILO Convention N. 169, Art. 13 (1).
[241] Xanthaki, Alexandra, *supra* note 86, p. 81.
[242] Report of the Committee set up to examine the representation alleging non-observance by Pery of the Indigenous and Tribal People's Convention, 1989 (No, 169), made under article 24 of the ILO Constitution by the General Confederation of Workers of Peru (CGTP), para. 30.

handed to individual members, the exercise of indigenous land rights is undermined, and they end up losing all or most of their land.[243]

Discussing the terms 'lands' and 'territories' was also important during the drafting process. In Report IV (1) for the 1989 Session,[244] the Office noted opposing arguments. On the one hand, the indigenous representative argued that the term "lands" was limited and did not include flora and fauna, water, and other elements of the environment, which are fundamental aspects of the relationship between indigenous peoples and their territories.[245] Therefore, for indigenous peoples, while territory would encompass all the elements included in the environment in which they are inserted, the land would only indicate the ground on which they live. On the other hand, several governments expressed preoccupation regarding the inclusion of the term 'territory' on the ground that many states have domestic legislation that uses the term "territory" as the state's integral area, which could create concerns regarding national sovereignty.[246]

Regarding the first part of Article 13, many governments argued that the term "territory" is related to national territory; thus, using such a term would mean a threat to state sovereignty.[247] Governments stated that if the term "territories" were to be applied, it would create conflicts with countries' domestic and constitutional legislation, which could harm the Convention's ratification.[248] However, it was considered that "territories" could be included if "and" was

[243] Xanthaki, Alexandra, *supra* note 86, p. 81
[244] 76th Session. Report IV (1).
[245] *Ibid*, para. 4.
[246] *Ibid*, para 5.
[247] 76th Session. Report IV (2A), para 135.
[248] *Ibid*, para 111.

substituted by "or".[249] The text of Article 13 adopted the terminology *"lands or territories, or both as applicable"*.[250]

The International Labour Office argued that the terminology conflict would be solved if the term *"lands" were used in connection with the establishment of legal rights, while "territories" could be used when describing a physical space, when discussing the environment as a whole or when discussing the relationship of these peoples to the territories they occupy".*[251] Following this approach, the second part of Article 13 states that the term "lands" contain "*the concept of territories, which covers the total environment of the areas which the peoples concerned occupy or otherwise use."*[252] The inclusion of the "territory" as part of the "land" expand the concept, stretching the protection of Articles 16 and 17, which talks about the remotion of indigenous peoples from their lands and the transmission of land rights.[253]

ii. Article 14 of Convention No. 169: Rights of Ownership and Possession[254]

On the one hand, Article 14 is the most contentious article regarding land rights. On the other hand, it is the central provision since it establishes a robust legal basis for indigenous peoples' ownership of their lands and territories. It

[249] *Ibid.*
[250] ILO Convention N. 169, Art. 13 (1).
[251] 76th Session. Report IV (1), para 4
[252] ILO Convention N. 169, Article 13 (2).
[253] Xanthaki, Alexandra, *supra* note 86, p. 81.
[254] Swepston, Lee, *supra* note 232, p. 237.

provides that *"the rights of ownership and possession of the peoples concerned over the lands which they traditionally occupy shall be recognized"*.[255]

Despite not expressly indicating the collective or the individual aspect of the ownership, the article includes the term "peoples" instead of "members of populations", implying the acknowledgment of the collective nature of indigenous lands.[256] The provision also applies the word 'shall', which gives a more substantial legal imposition.[257] Furthermore, the norm does not mention that States have to "grant" lands of traditional occupation; instead, it uses the term "recognizes", which means the rights already exist for the lands that have been traditionally occupied.[258]

The term "traditionally" was also the reason for discussions because of its conflicting interpretations. One interpretation recognizes rights over lands whenever occupied, including lands that are occupied or not at the present moment, while the other only observes the right on lands presently occupied.[259] The Guide to ILO Convention N. 169 affirms that the term 'traditionally' does not depend upon present occupation;[260] however, it mentions the necessity to show the link with the present, like cases of expulsion or recent loss of title.[261]

The provision indicates that the land rights can be of ownership, possession, or both. The mention of both types of rights can undermine the recognition of full

[255] ILO Convention N. 169, Art. 14.
[256] Gilbert, Jérémie, *supra* note 3, p. pg. 103.
[257] Xanthaki, Alexandra, *supra* note 86, p. 81 – 82.
[258] Swepston, Lee, *supra* note 33.
[259] A Guide to ILO, *supra* note 236, p. 94.
[260] *Ibid.*
[261] Thornberry, Patrick, *supra* note 136, p. 353.

title to indigenous lands since the States will mostly prefer the recognition of possession or a restricted version of ownership.[262] However, adopting a mandatory recognition of full title by the States would negatively affect the ratification of the Convention.[263] The ILO Committee of Experts explained that full title is mandatory as long as possession is secure.[264]

The provision can also be applied in cases where different communities or peoples share lands.[265] This normally refers to communities that do not have a land title[266] but use the lands on a seasonal basis, such as the nomadic, pastoralists, hunters, or cultivators.[267] In this case, governments must identify the land of traditional occupation[268] and recognize non-exclusive land rights to guarantee the resources necessary for their survival.[269]

The third part of the Article[270] imposes that governments create adequate procedures to solve conflicts related to land claims. The provision does not fix a time limit nor define the type of land claim the procedures should refer to. Despite not reaching all indigenous lands conflicts, the addition of this obligation on states is still considered relevant since it regards the convention implementation, going a step further than ILO Convention N. 107.[271]

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[262] Xanthaki, Alexandra, *supra* note 86, p. 83.
[263] *Ibid.*
[264] Swepston, Lee, *supra* note 33. See also: Ulfstein, Geir, "Indigenous Peoples' Rights to Land", *Max Planck Yearbook United Nations Law*, Vol. 8, 2004, p. 17 – 23.
[265] A Guide to ILO, *supra* note 236, p. 94.
[266] Swepston, Lee, *supra* note 33.
[267] A Guide to ILO, *supra* note 236, p. 94.
[268] Swepston, Lee, *supra* note 33.
[269] A Guide to ILO, *supra* note 236, p. 94.
[270] ILO Convention N. 169, Art. 14 (3).
[271] Xanthaki, Alexandra, *supra* note 86, p. 83.

iii. Article 15 of Convention No. 169: Natural Resources[272]

The legal content of Article 15 was first added by the ILO Convention N.169. The provision involves the subject of rights to the subsoil and other natural resources; however, the definition of natural resources is very diverse between the states, so the discussion about the matter was complex. The adoption was preceded by heated debate.[273] According to the ILO Guide:

> Generally speaking, sub-surface resources are those not exposed on the ground, such as water, air and plants. They usually include minerals, gems and oil, but definitions vary. Some countries distinguish instead between renewable and non-renewable resources. In most countries, governments retain ownership of subsurface resources, whoever owns the land itself.[274]

The first paragraph of Article 15 implements protection measures for the indigenous peoples' rights to surface resources of their lands.[275] On the one hand, the indigenous representatives mentioned the necessity of control over natural resources, and the Meeting of Experts mentioned that when governments held full control of the rights to natural resources, many times it resulted in negative effects on the indigenous lifestyle; many times leading to the dispossession of indigenous

[272] Swepston, Lee, *supra* note 232, p. 266.
[273] Report of the Meeting of Experts, from Report VI (1), para 112-113. See also: *Ibid.*
[274] A Guide to ILO, *supra* note 236, p. 94.
[275] Report of the Meeting of Experts, from Report VI (1), para. 53 – 54.

communities and also environmental damage to the land.[276] On the other hand, the majority of States argued that only States could obtain the ownership of natural resources and that in most domestic legislations, such resources could be given to private individuals on a concessionary basis.[277]

The controversy surrounding using natural resources mainly originated from its economic repercussions.[278] Governments, as the major holders of natural resources and being able to use these resources freely, were obviously against the control and recognition of natural resources for the indigenous people, as this would represent an economic loss for the states. [279] However, indigenous representatives pointed out that exploiting natural resources could negatively affect their quality of life. An example is when oil and gold are exploited in indigenous lands and damage the environment, damaging the indigenous life and culture.[280]

Ultimately, the ILO decided to deny recognizing the full right to property regarding natural resources within indigenous peoples' territories.[281] However, it established a right of use connected with a right to participate in managing natural resources. [282] The final text of Article 15 (1) provides:

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[276] Revision of the Indigenous and Tribal Populations Convention, 1957 (No. 107), Report VI (1), International Labor Conference, 75th Session, at 58. See also: Swepston, Lee, *supra* note 232, p. 267.
[277] Gilbert, Jérémie, *supra* note 3, p. 106. See also: Working Party: International Labor Conference, Partial Revision of the Indigenous and Tribal Populations Convention, 1957 (No. 107), Provisional Record 25, 76th session.
[278] Erica-Irene Daes, "Indigenous Peoples Rights to Land and Natural Resources", in Ghanea, Nazila & Xanthaki, Alexandra, *Minorities, Peoples, and Self-determination: Essays in Honor of Patrick Thornberry*. Leiden: Martinus Nijoff Publishers, 2005, p. 75 -112.
[279] Geir Ulfstein, Geir, *supra* note 264, p. 27.
[280] Swepston, Lee, *supra* note 33.
[281] Gilbert, Jérémie, *supra* note 3, p. 105.
[282] *Ibid*, p. 106.

> The rights of the peoples concerned to the natural resources pertaining to their lands shall be specially safeguarded. These rights include the right of these peoples to participate in the use, management and conservation of these resources.[283]

The second paragraph of Article 15 addresses the exploration for or exploitation of mineral and other subsoil resources.[284] The provision states:

> 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.[285]

Despite acknowledging State ownership over resources, the norm establishes the requirement for indigenous peoples' prior consultation and participation in decision-making activities involving natural resources. Thus, the article affirms that regarding land and environmental matters, there is a necessity to

[283] ILO Convention N. 169, Art. 15 (1).
[284] Report of the Meeting of Experts, from Report VI (1), para. 53 – 54.
[285] ILO Convention N. 169, Art. 15 (2).

apply the general principles contained in Articles 6, 7, and 11 of Convention N. 169.[286]

The participation of indigenous communities 'in the benefits of such activities' and 'fair compensation for any damages which they may sustain' is also included in the article.[287] However, the terms for participation in the benefits are not clarified, and there is no mention of specific obligations or supervision for the profit grant.[288] Furthermore, the provision included the expression 'wherever possible', which can be regarded as a restriction and a motive to exclude the indigenous communities from participation.[289]

In 1999, in a representation against Bolivia for approving administrative decisions allowing concessions in indigenous territories without prior consultation, the Committee acknowledged the violation of Articles 15, 6, and 7 of the Convention, mentioning that governments must ensure the previous consultation of indigenous communities regarding activities to the exercised in their lands.[290]

iv. Article 16 of Convention No. 169: Removal from Their Land[291]

Given the major significance of lands and territories for indigenous peoples, their displacement can result in negative consequences for their means of subsistence, but also their survival as a distinct cultural community.[292] For many

[286] A Guide to ILO, *supra* note 236, p. vi.
[287] ILO Convention N. 169 Art. 15 (2).
[288] Xanthaki, Alexandra, *supra* note 86, p. 84.
[289] *Ibid.*
[290] Swepston, 'Economic, Social and Cultural Rights', p. 42.
[291] Swepston, Lee, *supra* note 232, p. 280.
[292] A Guide to ILO, *supra* note 236, p. 97.

centuries the indigenous communities have been removed from their traditional territories, usually motivated by the "progress" of the dominant populations.[293] The prohibition of indigenous people's displacement was first included in Article 12 of Convention N. 107, but this provision received much criticism for including a number of exceptions that allowed the states to remove them without their consent.[294]

Article 16, paragraph 1 affirms that *"the peoples concerned shall not be removed from the lands which they occupy",*[295] which clearly states a prohibition to the displacement. Paragraph 2 of the article acknowledges the possibility of relocation of the indigenous peoples, but only as an exceptional measure for circumstances understood as necessary.[296] The provision states that relocation must be preceded by "free and informed" consent from the indigenous peoples. According to the Guide to ILO Convention N. 169:

> Free and informed consent means that the indigenous peoples concerned understands fully the meaning and consequences of the displacement and that they accept and agree to it. Obviously, they can do so only after they have clear and accurate information on all the relevant facts and figures.[297]

In case consent cannot be reached, for the relocation to happen, the state must observe *"appropriate procedures established by national laws and*

[293] Swepston, Lee, *supra* note 33.
[294] 1986 Report of the Meeting of Experts, in Report vi (1), p. 113.
[295] ILO Convention N. 169, Art. 16 (1).
[296] ILO Convention N. 169, Art. 16 (2).
[297] A Guide to ILO, *supra* note 236, p. 98.

regulations, including public inquiries where appropriate, which provide the opportunity for effective representation of the peoples concerned". [298] The provision does not give the indigenous people veto power; however, their views and opinions should be considered during the decision process. [299]

It is significant to mention that the term "relocation" was used instead of "removal", including a state obligation to place the indigenous people in a different location. [300] On this matter, paragraph 3 provides that where the relocation is required, it is guaranteed to indigenous people the right to return to their traditional lands as soon as the reason for the relocation disappears.[301] For example, when indigenous people were displaced because of a war, they could return to their territories when the situation was no longer present.[302]

Paragraph 4 determines that in the circumstance of impossibility to return to the original territory, the indigenous people have the right to *"lands of quality and legal status at least equal to that of the lands previously occupied",* [303] appropriate to afford their current necessities and future improvement. The provision also affirms that the state does not solely make the decision about the possibility or not to return; it is determined *"by agreement or, in the absence of*

[298] ILO Convention N. 169, Art. 16 (2).
[299] Xanthaki, Alexandra, *supra* note 86, p. 86.
[300] *Ibid.*
[301] ILO Convention N. 169, Art. 16 (3): Whenever possible, these peoples shall have the right to return to their traditional lands, as soon as the grounds for relocation cease to exist.
[302] A Guide to ILO, *supra* note 236, p. 98.
[303] ILO Convention N. 169, Art. 16 (4): When such return is not possible, as determined by agreement or, in the absence of such agreement, through appropriate procedures, these peoples shall be provided in all possible cases with lands of quality and legal status at least equal to that of the lands previously occupied by them, suitable to provide for their present needs and future development. Where the peoples concerned express a preference for compensation in money or in kind, they shall be so compensated under appropriate guarantees.

such agreement, through appropriate procedures".[304] Furthermore, the article stipulates that indigenous can opt for *"compensation in money or in kind".*[305] At last, paragraph 5 guarantees that in case of any loss or injury resulting from the relocation, the indigenous peoples have the right to receive full compensation.[306]

Different from Article 12 of ILO Convention N. 107, which mentions *"national security, or in the interest of national economic development or of the health of the said population"*[307] as the reason for the removal of indigenous peoples from their land, the Convention N. 169 decided not include any specific reason, for fear that this would minimize the prohibition and be considered an explicit grant for the relocation.[308]

2.1.5 Summary

The ILO Convention N. 107 and 169 are the only binding international instruments directed to the matter of the indigenous right. Through the legal analysis of both conventions, it is possible to understand the evolution of indigenous rights. Despite being created for integration purposes, the ILO Convention N. 107 was innovative and brought necessary standards for protecting indigenous lands, upgraded in the ILO Convention N. 169 and later in the UNDRIP.

Since the earliest debates about indigenous rights, the topic of indigenous lands has raised a heated discussion between the indigenous representatives and the

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304 ILO Convention N. 169, Art. 16 (4)
305 *Ibid.*
306 ILO Convention N. 169, Art. 16 (5): Persons thus relocated shall be fully compensated for any resulting loss or injury.
307 ILO Convention N. 107, Art. 12 (1).
308 Swepston, Lee, *supra* note 33.

states. For the indigenous, the lands are necessary not only for their survival as individuals but also as a cultural group, which is connected to their collective identity as indigenous; thus, the protection of their lands is directly connected to their protection as indigenous. However, granting land rights to the indigenous would mean a restriction to the governments and private sector regarding the use and exploitation of that land.

One of the most common violations suffered by the indigenous communities was the dispossession of their lands. Their traditional lands are a fundamental part of their cultural features, so taking them from their lands would consequently erase their indigenous identities and result in the assimilation of that community to the dominant society. Thus, indigenous land protection was a core provision in both conventions.

In ILO Convention N. 107, the central provision for protecting indigenous lands is Article 11, which recognizes the indigenous peoples' rights to their traditional lands. However, Article 12, which provides for the cases that it is allowed to remove indigenous peoples from their traditional lands, undermines the previous article's protection. Despite considering the removal as an exception, the broad concept connected to the exceptional circumstances gives many possibilities for the governments and private sector to dispossess the indigenous communities from their lands. Paragraphs 2 and 3 of Article 12 included the compensation in case of removal. However, it is evident that the indigenous perspective was not considered, and the compensation included takes into account the dominant society's view of the types of compensation. These provisions are a clear example

of the lack of participation of the indigenous representatives during the draft of the ILO Convention N. 107, which is one of the main criticisms of this instrument.

During the revision of the ILO Convention N. 107, to avoid the same mistakes being made, the participation of indigenous representatives was inserted in the writing stages of Convention N. 169. The rejection of the integrationist vision and the inclusion of the indigenous peoples during the discussions showed positive results. The revised convention brought provisions capable of effectively offering protection to indigenous rights, taking into account the reality and the problems they faced since they were part of the draft.

As the view of indigenous lands is different from the dominant society, the ILO Convention N. 169 included a provision that explains the concept of land for the indigenous peoples, the spiritual relationship, and the collective nature.[309] Thus, Article 13 is essential for the interpretation of the other norms about indigenous lands. The following article is the central provision for protecting indigenous lands and establishing the legal basis for ownership and possession of their traditional lands.[310] Article 15 was an innovative norm in the ILO Convention N. 169 and provided about natural resources matters. During the draft, this was a complex topic to be decided because of the economic repercussions regarding natural resources. In the end, the indigenous peoples were denied the full right to property regarding natural resources, but it was granted to them the right to participate in the use, management, and conservation of the resources,[311] which, many times, the

[309] ILO Convention N. 169, Art. 13.
[310] ILO Convention N. 169, Art. 14.
[311] ILO Convention N. 169, Art. 15.

governments failed to provide. Like the ILO Convention N. 107, the revised convention included a norm about the cases in that indigenous peoples can be removed from their lands.[312] The significant difference between the two provisions is that the previous one specified in which cases the removal could happen, and the new article decided not to include specific reasons to avoid the grant o removal in those specific cases.

Although the ILO Convention N. 107 has assimilationist features, it brings some essential legal provisions still applicable to 18 states. The ILO Convention also has a low ratification rate, binding only to 24 states. However, its provisions are the legal standard for creating indigenous domestic instruments, like the Philippines Indigenous Peoples Rights Act, and international instruments, like the United Nations Declaration on the Rights of Indigenous Peoples (UNRIP).

In conclusion, despite the critics of both conventions, they still provide essential standards for protecting indigenous lands, mainly because of the binding feature of the instruments. When comparing both conventions, it is evident that the inclusion of indigenous peoples in the discussions about their own matters is the most effective way to reach high levels of protection. As the indigenous peoples and the rights connected to them have features and nature different from the dominant society, it is crucial to construct a legal basis that considers their specificities.

[312] ILO Convention N. 169, Art. 16.

2.2 UNDRIP and Indigenous Lands

Despite being considered the next step after the ILO Convention N. 169, the discussions about the United Nations Declaration of the Rights of Indigenous Peoples (Declaration) started at the same time as the revision of the ILO Convention N. 107. It is the most advanced international document regarding indigenous rights, and although not legally binding, it includes important provisions that can be used as interpretative instruments.

2.2.1 The creation of UNDRIP

The adoption of the UN Declaration on the Rights of Indigenous Peoples (Declaration),[313] as well as other important international instruments and the development of indigenous people's subject in the jurisprudence and practice of the international human rights system, have influenced the advance of the conceptual, political, and moral foundation of international human rights.[314]

The creation of the United Nations draft Declaration on the Rights of Indigenous Peoples was initiated in 1985, with the establishment of the Working Group on Indigenous Populations under the Sub-Commission on Prevention of Discrimination and Protection of Minorities.[315] This working group became a major UN human rights meeting, which settled the presence of indigenous

[313] United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), UN General Assembly, A/RE/61/295, 2 October 2007.
[314] Hohmann, Weller, & Weller, M. *supra* note 95, p. 38.
[315] UN Doc. E/CN.4/Sub.2/1985/22, Annex II.

people [316] in the organization and provided a space for the indigenous representatives to express their opinion.[317]

The draft Declaration was created in three phases. The first phase was in 1985 when the Working Group's chairperson submitted a basic composition of seven draft principles based on protecting indigenous cultural identity and collective existence.[318] The second phase was in 1988 when Erica-Irene Daes proposed the "Draft Universal Declaration on Indigenous Rights" to the Working Group, including the unprecedented term "peoples" to refer to indigenous and recognize collective autonomy rights.[319] The last phase was the agreement and adoption of the draft Declaration. In 1993, the Working Group members confirmed the final text,[320] followed by the adoption of the draft by the Sub-Commission in 1994.[321]

Important to mention that the Working Group of Indigenous Peoples (WGIP) had two significant influences on the indigenous peoples and the construction of the Declaration.[322] First, by the late 1990s, the indigenous people's presence in the international law scenario was firmly established, reinforcing the necessity of an appropriate legal instrument on the rights of indigenous peoples.[323]

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[316] Wiessner, Siegfried, *supra* note 5, p. 103.
[317] Xanthaki, Alexandra, *supra* note 86, p. 102.

[318] Report of the Working Group, 4th Sess (n 55) paras 71–84.
[319] Draft Universal Declaration on Indigenous Rights, reproduced in Report of the Working Group on Its Sixth Session, UN Doc E/CN.4/Sub.2/1988/24 (1988) Annex II.
[320] Draft Declaration as Agreed upon by the Members of the Working Group at Its Eleventh Session, reproduced in Report of the Working Group on Indigenous Populations on Its Eleventh Session, UN Doc E/CN.4/Sub.2/1993/29 (1993) Annex I.
[321] Draft United Nations Declaration on the Rights of Indigenous Peoples, UN Doc E/CN.4/Sub.2/2 (1994).
[322] Hohmann, Weller, & Weller, M. *supra* note 95, p. 48.
[323] *Ibid.*

Second, the provisions included in the draft text were, since the beginning, being used by the international human rights system to protect indigenous peoples, meaning that the norms in the 2007 Declaration have been put to the test since 1994.[324]

During the entire drafting process, indigenous people had a strong presence in the discussions and decision-making. The inclusion of indigenous peoples by Working Group Indigenous Population helped to modify the norms regarding the participation of non-governmental organizations.[325]In 1994, the General Assembly adopted Resolution 49/214,[326] which called for the indigenous representative to participate in the Commission Drafting Group on the ground of the procedures fixed by them.[327]

The *ad hoc* working group was created by the Human Rights Commission for inter-States discussion *"with the sole purpose of elaborating a draft declaration*".[328] During negotiations, the incisive presence of indigenous people organizations resulted in a *de facto* bipartite body.[329] The end of the International Decade of Indigenous Peoples (2004) was settled as the deadline for the negotiations[330].

The Working Group drafting process had two stages. The first stage happened from 1995 to 2004 and was defined by its slow and frustrating

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[324] *Ibid.*
[325] *Ibid*, p. 49.
[326] UN Doc. A/RES/49/214, 17 February 1995.
[327] Xanthaki, Alexandra, *supra* note 86, p. 103.
[328] Commission on Human Rights Res 1995-32 (3 March 1995).
[329] Hohmann, Weller, & Weller, M. *supra* note 95, p. 49.
[330] Commission on Human Rights Res 1995-32 (3 March 1995), para 2.

negotiations. In the First Session of the Working Group, the indigenous representative took a 'no-change' posture[331], proposing the adoption of the integral text of the draft Declaration adopted by the Sub-Commission in 1994 on the ground that it *"reflected the minimum standards for the survival of indigenous peoples".*[332]

However, the majority of States were against some essential provisions of the Draft Declaration, such as the absence of a definition of indigenous peoples, the inclusion of collective rights, recognition of self-determination, and rights to land and resources.[333] On the one hand, the States pressured for modification of the text language, considering their objections and excluding any non-agreed provision. On the other hand, the indigenous representatives maintained an irreducible stance, arguing that the text contained their minimum objectives.[334] The constant disagreement between indigenous representatives and the States obstructed any further negotiation.

In 2004, at the Tenth Session Working Group, there was a posture change between the indigenous representatives and the States, which restarted the progress in the negotiation.[335] Despite both parties' disagreement regarding the proposals, a middle ground was stated to be reached. The indigenous representatives agreed to adapt the text if the proposals were:

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[331] Henriksen, JB, "The UN Declaration on the Rights of Indigenous Peoples: Some Key Issues and Events in the Process", *IWGIA document*, (127), 2009, p. 78-84.
[332] Report of the Working Group Established in Accordance with Commission on Human Rights Resolution 1995/32 of 3 March 1995, UN Doc E/CN.4/1996/84 (1996), para 25.
[333] Hohmann, Weller, & Weller, M. *supra* note 95, p. 53.
[334] Xanthaki, Alexandra, *supra* note 86, p. 104.
[335] Hohmann, Weller, & Weller, M. *supra* note 95, p. 54.

> [R]easonable, necessary and improve or strengthen the text, and that they should be consistent with the fundamental principles of equality, non-discrimination and the prohibition of racial discrimination.[336]

The final Declaration's text recognized the indigenous self-determination, excluded any definition regarding self-identification, and despite the strong opposition of the States, incorporated relevant provisions about the right to lands and resources.[337]In 2006, despite the lack of consensus regarding the Declaration language, the Working Group chairperson sent the text to the Human Rights Council[338]. The text was adopted with 30 states voting in favor, two states against, and 12 abstentions.[339]

The UN Declaration on the Rights of Indigenous Peoples represents an important landmark to the international human rights system, reaffirming universal and fundamental human rights and including both collective and individual rights of indigenous peoples.[340]

The Declaration is composed of a preamble and 46 articles. The UNDRIP dispositive provides for: rights to non-discrimination, self-determination, equality, participation in life of the State, nationality, self-government, maintain the distinct

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[336] Report of the 1999 session, E/CN.4/2000/84, para. 124; also repeated in the 2000 Session, See also: Draft Report of the 2000 Session, E/CN.4/2000/WG.15/ CPR.1, para. 34.
[337] Hohmann, Weller, & Weller, M. *supra* note 95, p. 55.
[338] Report of the working group established in accordance with Commission on Human Rights Resolution 1995/32 of 3 March 1995 at its 11th session, UN Doc. E/CN.4/2006/79.
[339] Report to the General Assembly on the First Session of the Human Rights Council, UN Doc. A/HRC/1/L/10, pp. 52–6.
[340] Hohmann, Weller, & Weller, M. *supra* note 95, p. 60.

political, legal, social, and cultural institutions;[341] cultural, mental and physical integrity, non-assimilation, identity, free, prior and informed consent;[342] revitalize, use, develop and transmit their spiritual, language and cultural identity;[343]education, information and labour rights;[344] participation in decision-making, development, rights and needs of elders, women, youth, children and person with disabilities, health, economic and social programs; [345] lands, territories and natural resources;[346]self-identification, self-government, promote, develop and maintain indigenous institutions;[347] measures to achieve the Declaration objectives, access to financial and technical assistance, just and fair procedures for the resolution of conflicts, limitations to indigenous rights according to international human rights instruments, general provisions.[348]

The UNDRIP is acknowledged as a non-binding legal instrument establishing the basic criteria for protecting indigenous people.[349] Despite being a soft law, the UNDRIP can be applied as a model to State parties when creating domestic legislation regarding indigenous peoples and can serve as an interpretation dispositive for the States while applying other international human rights instruments.[350]

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[341] UNDRIP, Arts. 1 – 6.
[342] UNDRIP, Arts. 7 – 10.
[343] UNDRIP, Arts. 11 – 13.
[344] UNDRIP, Arts. 14 – 17.
[345] UNDRIP, Arts. 18 – 24.
[346] UNDRIP, Arts. 25 – 32.
[347] UNDRIP, Arts. 33 – 36.
[348] UNDRIP, Arts. 37 – 46.
[349] Panzironi, Francesca, "Indigenous Peoples' Rights to Self-Determination and Development Policy", Doctor Thesis, Faculty of Law University of Sydney, 2006.
[350] "The Rights of Indigenous Peoples", Report of the United Nations High Commissioner for Human Rights, U.N. Doc. A/HRC/10/51, 2009, para. 16

2.2.2 Indigenous Peoples' Rights to Lands, Territories, and Resources

i. Article 25 of UNDRIP: Spiritual Relationship with Traditionally Owned, Occupied, and Used Lands, Territories, and Resources[351]

Article 25 focuses on indigenous peoples' spiritual relationship with their lands, territories, and resources, pointing to the necessity for protecting this special connection. The provision reaffirms the content of Article 13 (1) of the ILO Convention N. 169,[352] which recognizes the existence of the spiritual relationship with the lands and its importance for the existence of indigenous peoples. However, unlike the ILO Convention N. 169, the Declaration comprehends the spiritual relationship as an independent right, setting out *"the right of Indigenous peoples to maintain and strength their distinctive spiritual relationship",* [353] not only an interpretative instrument to the rights to land, territories, and resources.[354]

Article 25 does not mention the expression 'cultural values', but considering the Declaration as a whole and its clear focus on the indigenous people's cultural aspects and the connection to the lands, it can be implied that the provision also encompasses cultural values regarding land, territories, and resources. Moreover, the preamble states:

[351] UNDRIP, Art. 25: Indigenous peoples have the right to maintain and strengthen their distinctive spiritual relationship with their traditionally owned or otherwise occupied and used lands, territories, waters and coastal seas and other resources and to uphold their responsibilities to future generations in this regard.
[352] ILO Convention N. 169, Art. 13 (1).
[353] UNDRIP, Art. 25.
[354] Hohmann, Weller, & Weller, M. *supra* note 95, p. 410.

> [C]ontrol by indigenous peoples over developments affecting them and their lands, territories and resources will enable them to maintain and strengthen their institutions, cultures and traditions, and to promote their development in accordance with their aspirations and needs.[355]

Furthermore, the indigenous people's spiritual relationship with lands, territories, and resources must be analyzed considering *"their cultures, spiritual traditions, histories and philosophies".*[356] It can be conveyed in different ways, constrained only by limitations imposed by the law and following international human rights obligations, as stated by Article 46 (2).[357]

Analyzing the text of Article 25, it is implied that such provision can be applied to lands, territories, and resources *"no longer in indigenous peoples' possession or control"*[358] since the norm uses the expression *"traditionally owned or otherwise occupied",*[359] which clearly refers to a past possession or occupation. Such interpretation follows what is determined in article 13 of the ILO Convention N. 169[360], which indicates the right to occupied lands and lands otherwise used.

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[355] UNDRIP, preamble, para. 9.
[356] UNDRIP preamble, para. 6: Recognizing the urgent need to respect and promote the inherent rights of indigenous peoples which derive from their political, economic and social structures and from their cultures, spiritual traditions, histories and philosophies, especially their rights to their lands, territories and resources.
[357] UNDRIP, Art. 46 (2): In the exercise of the rights enunciated in the present Declaration, human rights and fundamental freedoms of all shall be respected. The exercise of the rights set forth in this Declaration shall be subject only to such limitations as are determined by law and in accordance with international human rights obligations. Any such limitations shall be non-discriminatory and strictly necessary solely for the purpose of securing due recognition and respect for the rights and freedoms of others and for meeting the just and most compelling requirements of a democratic society.
[358] Hohmann, Weller, & Weller, M. *supra* note 95, p. 411.
[359] UNDRIP, Art. 25.
[360] ILO Convention N. 169, Art 13.

During the negotiation, the term 'material' relationship was not included in the final text of the provision because of the fear of some States[361] that such expression could be interpreted as establishing a right for the indigenous people to take physical possession of land, territories, and resources that at the present moment are owned or possessed by others.[362]

There are circumstances where indigenous peoples do not have possession or control over lands, territories, and resources but must access the lands to maintain the spiritual relationship. Despite the term "access" not being mentioned in the text, the discussion on the matter during the negotiation process can be understood as including the access to lands in the Article[363] since it was mentioned that:

> The State shall, in conjunction with Indigenous peoples, take measures to facilitate the access of Indigenous peoples concerned to lands or territories not exclusively occupied or used by them, for carrying out their spiritual traditional activities. In this respect, particular attention shall be paid to the situation of nomadic peoples and shifting cultivators.[364]

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[361] Australia, Canada, New Zealand, and the United States 'raised the question of third party interests' with regard to Art 25. However, Indigenous peoples and a number of States were comfortable with the inclusion of 'material' in the text of Art 25. UNCHR, Report of the Working Group Established in Accordance with Commission on Human Rights Resolution 1995/32, UN Doc E/CN.4/2003/92 (6 January 2003) paras 28, 29.

[362] Fitzmaurice, Malgosia, "The 2007 United Nations Declaration on the Rights of Indigenous Peoples", *Austrian Review of International and European Law 17*, 2012, 139-266, at p. 230. See also International Law Association, Interim Report on the Rights of Indigenous Peoples, The Hague Conference (2010), at 52.

[363] Hohmann, Weller, & Weller, M. *supra* note 95, p. 412.

[364] UN, United Nations Declaration on the Rights of Indigenous Peoples: Annex to Human Rights Council Resolution 2006/2 (Chair's Text), adopted by Human Rights Council (29 June 2006).

Another essential term included in the provision was 'strengthen', which expresses a positive obligation by the States to apply active measures to fulfill the rights established in Article 25.[365] Furthermore, there is also a discussion about how the explicit mention of 'waters', 'coastal seas', and 'other' resources could suppress the applicability of the article since other provisions only refer to "resources". However, taking into consideration the draft Declaration, the indigenous spiritual relationship reaches all resources, as was stated during the negotiations:

> Additionally, regarding the aspects over which Indigenous peoples have a right to maintain and strengthen their own spiritual and material relationship, there was a proposal to include the phrase "among others", in order to indicate that it is an illustrative and not a limitative list. [366]

ii. Article 26 of UNDRIP: Rights to Own, Use, Develop, and Control Lands, Territories, and Resources[367]

The rights to land and natural resources, because of their importance not only for the indigenous peoples but also to the State, was a major contradictory topic during UNDRIP deliberations. The question of land ownership includes the problem of historical colonization and dispossession of indigenous peoples'

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[365] Hohmann, Weller, & Weller, M. *supra* note 95, p. 412.
[366] UNCHR, Working Group Established in Accordance with Commission on Human Rights Resolution 1995/32, International Workshop on the Draft United Nations Declaration on the Rights of Indigenous Peoples: Patzcuaro, Michoacan, Mexico 26–30 September 2005, UN Doc E/CN.4/2005/WG.15/CRP.1 (29 November 2005).
[367] UNDRIP, Art. 26.

territories. The focus of the discussion was the rights to lands possessed in the past and their ownership by indigenous peoples now.[368]

Article 26 UNDRIP is the main dispositive in the Declaration regarding rights to own, use, develop, and control their lands, territories, and resources.[369] The first paragraph establishes the basic line for the indigenous peoples and stipulates as follows:

> Indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired.[370]

The contradictory views of indigenous representatives and many States regarding the recognition of indigenous peoples' rights to lands, territories, and resources, which at the present time are possessed, controlled, or owned by a third party, did not allow the parties to reach a consensus on the matter.[371] The text adopted, despite highlighting the rights to the lands indigenous peoples *"traditionally owned, occupied or otherwise use or acquired"*,[372] includes a broad expression to the provision that can cause hardship to the interpretation of the norm on how the right can be understood and applied, to the point that is not possible to

[368] Fitzmaurice, Malgosia, *supra* note 362, p. 229.
[369] Hohmann, Weller, & Weller, M. *supra* note 95, p. 413.
[370] UNDRIP, Art. 26 (1).
[371] UN, United Nations Declaration on the Rights of Indigenous Peoples: Annex to Human Rights Council Resolution 2006/2 (Chair's Text), adopted by Human Rights Council (29 June 2006).
[372] UNDRIP, Art. 26 (1).

immediately imply that indigenous peoples have rights to lands, territories, and resources now in third-party ownership.[373]

The indigenous peoples' right to lands not occupied by them at the present moment was already mentioned in the ILO Convention 169. According to Anaya*: "a sufficient present connection with lost lands may the established by continuing cultural attachment to them, particularly if dispossession occurred recently".*[374] The Declaration cannot fall back on the indigenous people's protection; thus, Article 26 (1) should be interpreted as recognizing rights to traditional lands, territories, and resources now owned by others.

Another point that needs to be clarified regarding the provision is if the rights to such lands also encompass the right to own, use, develop, and control the lands, territories, and resources. For an accurate interpretation of the provision, it is necessary to consider the Declaration as a whole instrument; thus, it is necessary to take into account the indigenous peoples' background; on this matter, the preamble mention:

> [T]hat indigenous peoples have suffered from historic injustices as a result of, inter alia, their colonization and dispossession of their lands, territories and resources, thus preventing them from exercising, in particular, their right to

[373] Hohmann, Weller, & Weller, M. *supra* note 95, p. 414.
[374] Anaya, S. James, *supra* note 6.

> development in accordance with their own needs and interests.[375]

Historically, indigenous people suffer from discrimination, often leading to dispossessing of their lands. As the Declaration is regarded as a human rights instrument, upon the interpretation of the norm, it is necessary to contemplate the principles of equality and non-discrimination[376] to avoid and lessen the historical discrimination perpetually against the indigenous peoples and the inequality resulting from the loss of the land.

In conclusion, Article 26 (1) acknowledges the right to access traditional lands, territories, and resources now in possession of a third party when the indigenous people have maintained a spiritual relationship with the land. Furthermore, it recognizes that indigenous peoples have the right to ownership, usage, development, and control of the lands, territories, and resources presently controlled by others, depending on the situation[377].

Paragraph 2 of article 26 refers to indigenous peoples' lands, territories, and resources currently possessed by them due to traditional occupation or use along with those lands they secured in any other way. It is provided that:

> 2. Indigenous peoples have the right to own, use, develop and control the lands, territories and resources that they possess by

[375] UNDRIP, preamble, para. 5.
[376] Hohmann, Weller, & Weller, M. *supra* note 95, p. 415.
[377] Case of the Mayagna (Sumo) Awas Tingni Community v Nicaragua, IACtHR Series C No 79 (21 August 2001). See also: Case of the Indigenous Community Sawhoyamaxa v Paraguay (Merits, Reparations, and Costs), IACtHR Series C No 146 (29 March 2006); Case of the Indigenous Community Yakye Axa v Paraguay (Merits, Reparations, and Costs), IACtHR Series C No 125 (17 June 2005).

> reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired.[378]

Paragraph 3 of article 26 imposes the obligation to States to establish legal recognition and protection of the lands cited in paragraphs 1 and 2 of the provision. It is stipulated that:

> 3. States shall give legal recognition and protection to these lands, territories and resources. Such recognition shall be conducted with due respect to the customs, traditions and land tenure systems of the indigenous peoples concerned.[379]

Article 26 (2) does not mention any requirement related to legal recognition from the State for the indigenous people's possession of lands, territories, and resources to be acknowledged. The international jurisprudence on rights to lands can be used for the appropriate interpretation of the provision. The Inter-American Court of Human Rights (IACHtHR),[380] as well as the African Commission,[381] issued decisions clarifying that recognition of indigenous peoples'

[378] UNDRIP, Art. 26 (2).
[379] UNDRIP, Art. 26 (3).
[380] Case of the Mayagna (Sumo) Awas Tingni Community v Nicaragua, IACtHR Series C No 79 (21 August 2001), para 128. See also: Case of the Indigenous Community Sawhoyamaxa v Paraguay (Merits, Reparations, and Costs), IACtHR Series C No 146 (29 March 2006); Case of the Indigenous Community Yakye Axa v Paraguay (Merits, Reparations, and Costs), IACtHR Series C No 125 (17 June 2005).
[381] Centre of Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya (4 February 2010) ACommHPR 276/2003.

possession of lands, territories, and resources does not depend on the existence of land title issued by the State.[382]

The obligation to States to legally acknowledge lands, territories, and resources possessed by indigenous is stated in paragraph 3; however, it is not mentioned in the mentioned provision or the previous one how to decide which areas must be recognized. On this matter, legal recognition needs to consider the indigenous people's customs, traditions, and land tenure systems. In conclusion, despite the demarcation of the land being a state's obligation, the identification and extent of the lands to be recognized is decided following the distinct traditions and views of the indigenous community.[383]

iii. Article 27 of UNDRIP: Process to Recognize and Adjudicate Lands, Territories, and Resources.[384]

According to Article 27, the States are required to:

> [E]stablish and implement, in conjunction with indigenous peoples concerned, a fair, independent, impartial, open and transparent process, giving due recognition to indigenous peoples' laws, traditions, customs and land tenure systems, to recognize and adjudicate the rights of indigenous peoples pertaining to their lands, territories and resources, including

[382] Hohmann, Weller, & Weller, M. *supra* note 95, p. 418. See also: Gilbert, Jérémie, "Indigenous Rights in the Making: The United Nations Declaration on the Rights of Indigenous Peoples", *International Journal on Minority and Group Rights* (14), 2007, p. 225-226.
[383] Fitzmaurice, Malgosia, *supra* note 362, p. 228. See also A Guide to ILO, *supra* note 236, p. 94. m
[384] UNDRIP, Art. 27.

those which were traditionally owned or otherwise occupied or used. Indigenous peoples shall have the right to participate in this process.[385]

The content of this provision was first included in the final text of the draft Declaration, and its inclusion was a partial exchange during the negotiation for not adopting explicit rights to lands, territories, and resources not in possession of indigenous peoples.[386]

A similar provision can be found in Article 14 (3) of the ILO Convention N. 169, which imposes that States shall create *"adequate procedures shall be established within the national legal system to resolve land claims by the peoples concerned".*[387] Moreover, this dispositive does not mention if it can be applied to claims regarding land, territories, and resources no longer in indigenous peoples' possession, despite being able to be interpreted to encompass such circumstances. Differently, Article 27 expressly extends its applicability to lands, territories, and resources traditionally owned or otherwise occupied or used by indigenous peoples, not limited to the presently possessed lands. [388]

Another analogous provision in the ILO Convention is Article 16 (2), which imposes an obligation to States to formulate *"appropriate procedures established by national laws and regulations, including public inquiries where appropriate, which provide the opportunity for effective representation of the*

385 UNDRIP, Art. 27.
386 Hohmann, Weller, & Weller, M. *supra* note 95, p. 422-423.
387 ILO Convention N. 169, Art. 14 (3).
388 UNDRIP, Art. 27.

peoples concerned",[389] being related exclusively to cases of indigenous people's removal or impossibility to return to their traditional lands. On the other hand, Article 27 of UNDRIP is not limited to such circumstances since its text uses broad language that implies the establishment of the process for general situations aiming "*to recognize and adjudicate the rights of indigenous peoples pertaining to their lands, territories and resources".*[390]

Furthermore, while Article 16 (2) of the ILO Convention only provides for *"opportunity for effective representation"*[391] of indigenous peoples on matters related to relocation, the Declaration dispositive[392] includes a general right to participate in an adjudicatory process, not limited to removal or relocation circumstances.

iv. Article 10 of UNDRIP: Removal from Lands, Territories, and Resources[393]

Article 10 of the Declaration establishes that:

> Indigenous peoples shall not be forcibly removed from their lands or territories. No relocation shall take place without the free, prior and informed consent of the indigenous peoples

[389] ILO Convention N. 169, Art. 16 (2).
[390] UNDRIP, Art. 27.
[391] ILO Convention N. 169, Art. 16 (2).
[392] UNDRIP, Art. 27.
[393] UNDRIP, Art. 10.

> concerned and after agreement on just and fair compensation and, where possible, with the option of return.[394]

The language adopted by Article 10 raises questions regarding its interpretation and the circumstances in which it can be applied. The main uncertainty is if the provision is related exclusively to the present or future removal or relocation of indigenous peoples [395] or whether it also reaches past circumstances.[396] This ambiguity comes from the fact that article 10 uses only present and future tenses, while other provisions in the Declaration related to the indigenous right to land, territories, and resources, such as Articles 25, 26, and 27, use expressions like *"traditionally owned or otherwise occupied or used",*[397] which denotes past circumstances.

This lack of clarity has been present since the negotiations of the draft Declaration. In 1994, the secretariat of the Working Group on Indigenous Populations mentioned:

> It appears that article 10 as currently drafted is open to interpretation. It is not clear whether the provision only applies to lands and territories for which indigenous peoples have obtained a legal title or whether it applies to lands and

[394] UNDRIP, Art. 10.
[395] UNDRIP, Art. 10: Expressions on the present and future tenses: "shall not be removed", "no relocation", "their lands and territories".
[396] Hohmann, Weller, & Weller, M. *supra* note 95, p. 407.
[397] UNDRIP, Arts. 25, 26 (1), 27.

territories which have traditionally been owned, occupied or used by them[398]

Considering the plain interpretation of the text applied to Article 10, the provision is undoubtedly related to present and future removals and relocation of indigenous peoples. However, since Articles 8, 27, and 28 of the Declaration[399] expressly allow redress regarding historical removals and relocations of indigenous peoples from their traditional lands, it can be interpreted that in specific cases, Article 10 would also permit the retrospective application of this provision.[400]

Another controversy related to Article 10, raised in the negotiation phase, was the "absolute" character of the ban on removals and relocations since the provision does not mention any exception to the prohibition.[401] On the one hand, the indigenous representatives agreed with adopting an absolute prohibition based on their historical and recurrent experience of forced removal and relocation from their traditional lands. On the other hand, many States were against these imposing provisions on the ground that they could be too hard to be fulfilled.[402]

A similar provision can be found in Article 16 of the ILO Convention N. 169; however, the norm does not adopt an absolute prohibition; paragraph 2 mentions the possibility of an exception to the ban, stating that *"where the relocation of these peoples is considered necessary as an exceptional measure*,

[398] UNCHR, Sub-Commission on Prevention of Discrimination and Protection of Minorities, Technical Review of the United Nations Draft Declaration on the Rights of Indigenous Peoples, Note by the Secretariat, UN Doc E/CN.4/Sub.2/1994/2 (5 April 1994).
[399] UNDRIP, Arts. 8, 27, 28.
[400] Hohmann, Weller, & Weller, M. *supra* note 95, p. 408. See also: Fitzmaurice, Malgosia, *supra* note 362, p. 230.
[401] Hohmann, Weller, & Weller, M. *supra* note 95, p. 409.
[402] UNCHR, Report of the Working Group (4 January 1996) (n 1).

such relocation shall take place".[403] As the Declaration dispositive omits any possibility of removals or relocation, it can be understood that such actions are not allowed under any circumstances.[404]

2.2.3 Summary

The discussion during the conception of the UNDRIP once again was marked by the antagonism between the indigenous representatives and the states. The debates included a strong representation of the indigenous peoples, which resulted in the most advanced international human rights instrument for them, especially regarding their lands. The UNDRIP included provisions regarding indigenous lands following similar subjects, which were already contemplated in the ILO Convention N. 169. The main difference between the two instruments is the text language applied to the Declaration, which added further details and concepts about indigenous lands, improved the interpretation, and widened the reach of the rights.

The UNDRIP provisions about indigenous lands start with Article 25, which addresses the spiritual relationship between indigenous peoples and their traditional lands. The innovation on the matter comes with the Declaration not only considering the spiritual relationship a feature of the indigenous lands but also as an independent right, which connects with the lands, territories, and resources, and refers to a present and also a past occupation, meaning that for the good of the

[403] ILO Convention N. 169, Art. 16 (2).
[404] Hohmann, Weller, & Weller, M. *supra* note 95, p. 409.

spiritual relationship, the indigenous have the right to access the lands that they do not possess in the present moment.

Article 26 provides the ownership, use, development, and control of the lands, territories, and resources, and it is the main dispositive for protecting indigenous lands. On this matter, an essential difference from the ILO Convention N. 169 is that indigenous acquired more than the mere right to participation regarding the natural resources exploited in their lands; the Declaration recognized the right to ownership, use, development, and control of these natural resources directly by the indigenous peoples.

Article 27 states that states must establish and implement a process to recognize and adjudicate the rights of indigenous peoples pertaining to their lands. The broad language applied to this provision implies that indigenous peoples can use this process in any circumstances related to their lands, even when they do not occupy the land at the present moment.

Article 10 of UNDRIP addresses a subject previously mentioned in the ILO Convention N. 107 and 169, and by many, was considered a dispositive that undermined the protection of indigenous peoples' lands. Like the ILO norms, free, prior, and informed consent was included for the relocation to take place. However, the UNDRIP does not include possibilities for the removal or relocation of indigenous peoples, implying that such acts are impossible without their agreement.

Regarding its content, the UNDRIP includes stronger provisions for protecting indigenous lands than the ILO Convention N. 169. The reason is mainly

that the document is not legally binding, which opened the door for the states to be more flexible about the indigenous peoples' requests. The subjects related to the indigenous lands included in the UNDRIP tried to fix the gaps of the ILO Convention N. 169, and despite being a soft law, its applicability as an interpretative instrument is growing in the domestic and international human rights system. The next Chapter will bring cases where the UNDRIP and the OLO Conventions were used as a standard interpretation, allowing human rights instruments that did not mention the indigenous right to reach them.

Chapter 3: Protection of Indigenous Peoples' Land Rights under UN Human Rights Instruments

Land rights are a core matter for the improvement of the protection of indigenous communities. The concern is due to indigenous people's unique connection with their traditional lands, a relationship acknowledged by the UN Human Rights Committee,[405] the UN Special Rapporteur on Indigenous Issues,[406] and ILO Convention No. 169.[407]

However, the land rights issue has not been a focal point for international human rights. Unquestionably, ILO Conventions No. 107[408] and No. 169[409] are the most useful international instruments for indigenous people's protection. Sadly, many states with indigenous peoples within their borders have not ratified the conventions. Despite the lack of ratification, both Conventions have served as crucial political instruments for improving indigenous rights. [410] Therefore, intending to fill the gap, a trend has emerged to adapt human rights treaties to include indigenous rights in provisions relating to their issues.[411] As a result, the United Nations have filled the legal void in the protection of indigenous land rights

[405] Human Rights Committee, General Comment No. 23(50), UN Doc. CPR/C/21/ Rev.1/Add.5, para. 7
[406] Cobo, Martínez, *supra* note 24, paras. 196 - 197
[407] ILO Convention N. 169, Art. 15
[408] International Labour Organization (ILO), Indigenous and Tribal Populations Convention, 26 June 1957.
[409] International Labour Organization (ILO), Indigenous and Tribal Peoples Convention, 27 June 1989
[410] Xanthaki, Alexandra, *supra* note 86, p. 242 - 243
[411] Thornberry, Patrick, "The Convention on the Elimination of Racial Discrimination, Indigenous Peoples and Caste/Descent-Based Discrimination" in *International Law and Indigenous Peoples*, Ed. by Joshua Castellino and Niamh Walsh, Martins Nijhoff Publishers, Leiden, 2005, p. 17.

with provisions contained in general human rights treaties,[412] particularly the ones including the prohibition of discrimination, the right of minorities to their culture, and property right.

Thus, despite not mentioning in its legal text either collective property rights or indigenous rights, the International Covenant on Civil and Political Rights,[413] the International Covenant on Economic, Social, and Cultural Rights,[414] the International Convention on the Elimination of All Forms of Racial Discrimination,[415] and the Convention on the Prevention and Punishment of Genocide[416] all encompass provisions that can be used for the safeguard of indigenous land rights.

Article 27 of the ICCPR has been applied by the Human Rights Committee to address the infringement of indigenous land rights.[417] In addition, the Committee on the Elimination of All Forms of Racial Discrimination has also urged recognizing and protecting indigenous peoples' rights to own, develop, control, and

[412] The UN bodies have applied international human rights instruments such as the International Covenant on Civil and Policial Rights, the International Covenant on Econimic, Social and Cultural Rights, the International Convention for the Elimination of All Forms of Racial Discrimination and the Convention on the Prevention and Punishment of Genocide. The UN have also applied Environmental International Agreements to the indigenous peoples matter, like the Rio Declaration and the Convention on the Biological Diversity. See also: Xanthaki, Alexandra, *supra* note 86, p. 243.

[413] International Covenant on Civil and Political Rights, 16 December 1966, UN General Assembly, United Nations, Treaty Series, vol. 999, p. 171, available at: https://www.refworld.org/docid/3ae6b3aa0.html

[414] International Covenant on Economic, Social and Cultural Rights, 16 December 1966, UN General Assembly, United Nations, Treaty Series, vol. 993, p. 3, available at: https://www.refworld.org/docid/3ae6b36c0.html

[415] International Convention on the Elimination of All Forms of Racial Discrimination, 21 December 1965, UN General Assembly, United Nations, Treaty Series, vol. 660, p. 195, available at: https://www.refworld.org/docid/3ae6b3940.html

[416] Convention on the Prevention and Punishment of the Crime of Genocide, 9 December 1948, UN General Assembly, United Nations, Treaty Series, vol. 78, p. 277, available at: https://www.refworld.org/docid/3ae6b3ac0.html

[417] Lubicon Lake Band v. Canada, Communication No. 167/1984 (26 March 1990), U.N. Doc. Supp. No. 40 (A/45/40).

use their traditional lands, territories, and resources.[418] Furthermore, the ESC Committee has requested states where indigenous people have been deprived of their lands and territories without their free and informed consent to return the lands to the indigenous communities.[419] This chapter overviews how these human rights instruments are applied to protect indigenous land rights.

3.1 International Covenant on Civil and Political Rights

At the forefront of the legal adaptation movement, the International Covenant on Civil and Political Rights[420] (ICCPR) poses as a major instrument for protecting indigenous peoples' lands. The Human Rights Committee, which is a body under the ICCPR to oversee its application[421] through the General Comments, opinions of state's reports[422], and individual communication decisions,[423] offers significant insights into the developing understanding of indigenous peoples' land rights under the ICCPR.[424]

The ICCPR does not reference indigenous rights, but Article 27 has been the most applied provision by the HRC in reports and individual communications dealing with indigenous matters. The article states:

[418] General Recommendation XXIII (51) concerning Indigenous Peoples of 18 August 1997, CERD/C/51/Misc.13/Rev.4, para. 5
[419] General comment no. 21, Right of everyone to take part in cultural life (art. 15, para. 1a of the Covenant on Economic, Social and Cultural Rights), UN Committee on Economic, Social and Cultural Rights (CESCR), 21 December 2009, E/C.12/GC/21.
[420] International Covenant on Civil and Political Rights (ICCPR).
[421] ICCPR, Art. 28.
[422] ICCPR, Art. 40.
[423] ICCPR, Art. 41.
[424] Panzironi, Francesca, *supra* note 349.

> ICCPR - Article 27. In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language.[425]

Although the text of Article 27 addresses "minorities" and not indigenous people, both share the characteristic of non-dominance,[426] which alludes to their need for protection against the dominant society in the state. Thus, the terms 'minorities' and 'indigenous peoples' overlap since most indigenous peoples are minorities in their countries. [427]

Lovelace v. Canada[428] was a pioneer case under the Optional Protocol and addressed the rights of an indigenous person in connection with the concept of cultural membership. The central allegation was that Sandra Lovelace had lost her status and rights as an indigenous person under the Indian Act of Canada[429] due to her marriage to a non-indigenous in 1970.[430] She accused the Indian Act of being a discriminatory legal dispositive, containing provisions violating the Covenant.[431]

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425 ICCPR, Art. 27.
426 F. Capotorti, *Study on the Rights of Persons Belonging to Ethnic, Religious and Linguistic Minorities*, New York, United Nations, 1991, para. 568.
427 Scheinin, Matirn, "Indigenous Peoples' Rights under the International Covenant on Civil and Political Rights" in *International Law and Indigenous Peoples*, Ed. by Joshua Castellino and Niamh Walsh, Martins Nijhoff Publishers, Leiden, 2005, p. 4.
428 Sandra Lovelace v. Canada, Communication No. R.6/24, U.N. Doc. Supp. No. 40 (A/36/40) at 166-75 (1981).
429 Section 12(1)(b) of the Indian Act of Canada.
430 Sandra Lovelace v. Canada, para 1.
431 Sandra Lovelace claimed violation of the Articles 2(1), 3, 23(1), 23(4), 26 and 27 of the Covenant.

According to the Committee's opinion on the case, *"persons who are born and brought up on a reserve, who have kept ties with their community and wish to maintain these ties must normally be considered as belonging to that minority within the meaning of the Covenant".*[432] Thus, groups identifying as indigenous peoples and constituting minorities in a nation can be protected under Article 27 as 'minorities'. The dynamic application of this clause by indigenous communities and individuals has significantly increased the growth of Article 27's comprehension.[433]

3.1.1 Indigenous Peoples' Land Rights and the International Covenant on Civil and Political Rights

The Human Rights Committee has established one of the most sophisticated approaches to indigenous peoples' right to use their lands, territories, and resources as part of their traditional way of life. Its jurisprudence has been progressive regarding indigenous peoples' rights to live their own way.[434] The relationship between culture and traditional or otherwise characteristic methods of subsistence was established by the Human Rights Committee in its 1988 decision in Ivan Kitok v. Sweden. According to the Committee's interpretation of Article 27:

> The regulation of an economic activity is normally a matter for the State alone. However, where that activity is an

[432] Sandra Lovelace v. Canada, para 14.
[433] Swepston, Lee, *supra* note 209, p. 60.
[434] Stavenhagen, Rodolfo, "Culture Rights: A Social Science Perspective in Economic, Social, and Cultural Prights – A textbook" in *Economic, Social and Cultural Rights*, Brill Nijhoff, 2011, p. 85 - 109.

> essential element in the culture of an ethnic community, its application to an individual may fall under article 27.[435]

This concept was affirmed in Bernard Ominayak, Chief of the Lubicon Band v. Canada. It was the first time the Committee found a breach of Article 27 regarding the threat of traditional indigenous lands by industrial activities, in this case, oil and gas drilling, as well as a proposal for a pulp mill and logging approved by provincial authorities.[436]

> The applicants alleged that the government of the province of Alberta had deprived the Band of their means of subsistence and their rights to self-determination, Although initially couched in terms of alleged breaches of the provision of article 1 of the Covenant, after cautious consideration, the Committee characterized the claim as one of the minority rights under Article 27 and found that historic inequities and more recent developments, including the oil and gas exploitation, were threatening the way of life and culture of the Band and thus were in violation of Article 27. [437]

Furthermore, the Committee acknowledged that the rights protected by article 27 encompass the rights of individuals in community with others to participate in economic and social activities that are part of the community's

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[435] Ivan Kitok v. Swenden, Communication No. 197/1985, CCPR/C/33/D/197/1985 (1988), para. 9.2.
[436] Schein, Martin, "The Right to Enjoy a Distinct Culture: Indigenous and Competing Uses of Land" in Theodore S. Orlin, Allan Rosas & Martin Scheinin, *The Jurisprudence of Human Rights Law: A Comparative Interpretative Approach*, Turku, Filand: Institute for Human Rights , Abo Akademi University; New York: Syracuse University Press 2000.
[437] Lubicon Lake Band V. Canada.

culture.[438] Furthermore, the Committee decided that past inequalities, to which the State party alludes, and recent changes endanger the Lubicon Lake Band's way of life and culture.[439] Thus, the Lubicon Band case demonstrates that enabling the exploitation of natural resources in an indigenous people's traditional land may constitute a breach of Article 27 regarding a State obligation.[440]

In 1994, the Human Rights Committee issued General Comment No 23 stating that:

> With regard to the exercise of the cultural rights protected under Article 27, the Committee observes that cultural 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 rights may include such traditional activities as fishing or hunting and the rights 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. [441]

Human Rights Committee messages and General Comment No. 23 recognized the connection between culture and traditional subsistence methods via the application of Article 27 of the covenant to land use issues.

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[438] *Ibid*, para 32.2.
[439] *Ibid*, para 33.
[440] Schein, Martin, *supra* note 436.
[441] General comment No. 23 (2016) on the right to just and favourable conditions of work (article 7 of the International Covenant on Economic, Social and Cultural Rights), UN Committee on Economic, Social and Cultural Rights (CESCR), 7 April 2016, E/C.12/GC/23, para. 7.

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

The International Convention on the Elimination of All Forms of Racial Discrimination is the primary human rights treaty dedicated to racial discrimination.[442] The General Assembly adopted the ICERD on December 21, 1965, by a vote of 106 to 0, [443] and entered into force in January 1969. By November 2022, 182 States were parties to the Convention.[444] The implementation of the ICERD is monitored by the Committee on the Elimination of Racial Discrimination (CERD), which has as the main activities the examination of state reports, [445] the analysis of individual [446] and group communications, and the consideration of inter-State complaints. [447] During the reporting procedure, in addition to the recommendations given to individual states, the CERD also provides General Recommendations, which are directed to all state parties. In 1999 they issued the General Recommendation XXIII concerning indigenous peoples.[448]

In addition, the Convention follows a group perspective insofar as the concepts of 'advancement', 'development', and 'protection' are applied to individuals and groups. This group-orientation view ultimately allows the collective concerns of indigenous peoples to be addressed within the limits of the

[442] Thornberry, Patrick, *supra* note 136, p. 199.
[443] General Assembly Resolution 2106 (XX).
[444] Two ASEAN States did not ratified nor signed the ICERD, Brunei Darussalam and Malaysia. Available at: https://indicators.ohchr.org/.
[445] The reporting procedure is obligatory (Article 9). Consolidated General Guidelines for the submission of reports are found in CERD/C/70/Rev.4, 14 December 1999.
[446] Only thirty-four States' parties accepted the individual communications procedure under Article 14 of ICERD.
[447] ICERD, Arts. 11, 12, 13. The inter-State procedure have never been used.
[448] HRI/GEN/1/Rev. 5, 18 August 1997; also CERD/C/365 – a compilation of General Recommendations, 11 February 1999.

Convention.[449] Also, under the Convention, the State parties agree not to participate in any *"act or practice of racial discrimination against people, groups of persons, or institutions"*[450] and to make it illegal to instigate prejudice against *"any race or group of persons of another color or ethnic origin."*[451]

3.2.1 Indigenous Peoples' Land Rights and the International Convention on the Elimination of All Forms of Racial Discrimination

The International Convention on the Elimination of All Forms of Racial Discrimination may seem an unsuitable legal instrument for protecting indigenous rights since its focus is on eradicating discrimination rather than acknowledging diversity.[452] However, even if indigenous peoples are not expressly considered in its text, the variety of human groups covered under the category of racial discrimination, the *"discrimination against indigenous peoples falls under the scope of the Convention".*[453] For this reason, the CERD has been concerned with indigenous peoples under the ICERD for many years.[454]

Land rights are one of the main subjects related to indigenous peoples that the Committee often addresses. On the examination of Guatemala's report, the Committee emphasized *"the significance of land for indigenous peoples and their cultural and spiritual identity, including the fact that they have a distinct*

[449] Thornberry, Patrick, *supra* note 177, p. 268.
[450] ICERD, Art. 2 (1.a).
[451] ICERD, Art. 4 (a).
[452] Thornberry, Patrick, *supra* note 411, p. 18.
[453] CERD/C/365 (1999), *supra* note 448, para. 1.
[454] Thornberry, Patrick, *supra* note 136, p. 210.

understanding of land usage and ownership". [455] Beyond the mere acknowledgment of the importance of lands for the indigenous peoples, the Committee has frequently expressed concern regards violations and threats to indigenous lands, which can occur in several ways, such as expropriation, displacements, and the denial of the right to return to their traditional lands,[456] mining activities and tourism,[457] as well as the lack or inefficiency of the measures for the demarcation of indigenous lands.[458] As a result of this increasing tendency to discuss indigenous issues under the ICERD, the Committee was compelled to create a detailed General Recommendation[459] on the subject.

In the General Recommendation XXIII, the Committee discusses the various forms of discrimination experienced by indigenous peoples, noting that *"they have lost their land and resources to colonists, commercial companies and state enterprises"*[460] and that *"consequently the preservation of their culture and their historical identity has been and still is jeopardized"*.[461] The Committee explicitly urges states to acknowledge, respect, and preserve indigenous culture, tradition, history, language, practice, religion, and livelihood to enhance and strengthen the nation's cultural identity.[462] Aside from preventing discrimination, States are requested to facilitate the establishment of a sustainable economy and social development in agreement with indigenous peoples' cultural aspects. [463]

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455 A/52/18, para. 93.
456 In the case of the Philippines, A/52/18, para. 425.
457 Panama, A/52/18, paras. 338 and 350.
458 Tenth, Eleventh, Twelfth and Thirteenth reports of Brazil, CERD/C/263/Add.10, in A/51/18, especially para. 303.
459 CERD/C/365 (1999), *supra* note 448.
460 *Ibid*, para. 3.
461 *Ibid*, para. 3.
462 *Ibid*, para. 3.a.
463 CERD/C/365 (1999), *supra* note 448, para. 3.c.

Furthermore, the Committee asks the states to create and ensure more opportunities for indigenous peoples to engage in public affairs as stated in the Article 5 (c) of the ICERD,[464] and to guarantee that decisions directly affecting indigenous rights or interests are taken with their free, prior, and informed consent.[465] In addition, CERD urges states to "*recognise and protect the rights of indigenous peoples to own, develop, control and use their common lands, territories and resources",*[466] and on matters related to indigenous lands rights, participation and consultation are especially important.[467]

Using the expression 'participation', 'consultation', and 'consent' caused significant debate, with arguments emphasizing the dangers of allowing indigenous peoples the power of veto. Diaconu[468] mentioned that giving the right to veto to indigenous peoples would conflict with the ILO Convention N. 169, and such power could allow a minor community to create impediments to a decision that could be beneficial for the State or the dominant society.[469] However, the Committee's discussions majorly suggest that indigenous peoples have veto authority.[470]

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[464] ICERD, Art. 5 (c): Political rights, in particular the right to participate in elections-to vote and to stand for election-on the basis of universal and equal suffrage, to take part in the Government as well as in the conduct of public affairs at any level and to have equal access to public service;

[465] CERD/C/365 (1999), *supra* note 448, para. 3.d.

[466] *Ibid*, para 5.

[467] Xanthaki, Alexandra, *supra* note 86, p. 253

[468] Member of the Committee on the Elimination of All Forms of Racial Discrimination

[469] CERD/C/SR.1235, paragraph 69: Mr. DIACONU raised the point that the idea of consent implied the right to veto, which was not in conformity with the spirit of ILO Convention No. 169, which was based, rather, on the idea of consultation through the appropriate channels. In some cases, such as the one cited by Mr. Wolfrum, there was cause to insist on prior consensus but there were many other cases where a small community could hinder the taking of decisions that would be of benefit to all citizens. The Committee should be careful not to innovate in that regard.

[470] CERD/C/SR.1235, paragraph 72: CERD member Aboul-Nasr - 'In the recommendation there needed to be a distinction between two situations: one concerning all the citizens of a country and

Although the General Recommendation lacks the legal force of a treaty or convention and is constrained by the wording of the ICERD, the Recommendation is considered an essential exposition of standards,[471] and its application can be verified in the Committee's activities. In many cases, CERD pointed out that the mere participation of indigenous peoples was insufficient to ensure nondiscrimination. This issue was a motive of concern by the Committee regarding the Australian Native Title Amendment Act 1998.[472] CERD advised against limiting indigenous title holders' ability to negotiate non-indigenous land uses, precisely the amount of discussions between the government and indigenous groups before the enactment of the Act.[473]

In 2000, on the Concluding Observations regarding Australia's report, the states were recommended to guarantee adequate participation of indigenous peoples in matters that involve their traditional lands *"as required under article 5(c) of the Convention and General Recommendation XXIII of the Committee, which stresses the importance of ensuring the 'informed consent' of indigenous peoples.*[474] In 2005, in the Concluding Observations on Nigeria's report, the Committee reiterated its view on the consent and reprimanded governments for

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another concerning indigenous persons directly. In the latter case, they should have the right of veto and the text, as drafted, dealt adequately with the issue'

[471] Although, as one member pointed out, 'the text under discussion was a general recommendation which did not have the legal implications of a treaty or convention' (Diaconu, SR.1235, para. 77).

[472] CERD 1998 Decision 1 (53) was adopted on 11 August 1998, UN Doc. A/53/ 18, para. IIB1; CERD 1999 Decision 2(54) was adopted on 18 March 1999, UN Doc. A/54/18, para. 21(2), see UN Doc. CERD/C/54/Misc.40/Rev.2 (18 March 1999), 8; also CERD 1999 Decision 2 (55) was adopted on 16 August 1999, UN Doc. A/54/18, para. 23 (2).

[473] Xanthaki, Alexandra, *supra* note 86, p. 253 – 254.

[474] Concluding Observations by the Committee on the Elimination of Racial Discrimination: Australia. 24/03/2000, CERD/C/56/Misc.42/rev.3. (Concluding Observations/Comments), para. 9. See also: Concluding Observations by the Committee on the Elimination of Racial Discrimination: Botswana: 23/08/ 2002, UN Doc. A/57/18, paras. 304.

their insufficient engagement with indigenous peoples about the impacts of oil extraction in their regions.[475]

The Committee's understanding of the consulting requirement is compatible with Article 6 of the ILO Convention N. 169, which provides that states must consult indigenous peoples about matters that affect them directly through suitable methods, especially via their representative institutions.[476] Furthermore, Convention N. 169 also acknowledges the indigenous peoples' rights to decide their own priorities and exercise control over their development as much as possible, for this is requested their participation in formulating, implementing, and evaluating development programs that affect them.[477]

The displacement and relocation of indigenous peoples from their traditional territories is an additional critical concern for the indigenous peoples. The General Recommendation XXIII recognized the indigenous peoples' rights to return to their traditional lands and the right to compensation. It stated that:

> General Recommendation XXIII - 5. […] where they have been deprived of their lands and territories traditionally owned or otherwise inhabited or used without their free and informed consent, to take steps to return those lands and territories. Only when this is for factual reasons not possible, the right to restitution should be substituted by the right to just, fair and

[475] Concluding Observations of the Committee on the Elimination of Racial Discrimination, Nigeria, UN Doc. CERD/C/NGA/CO/18 of 1 November 2005, para. 19.
[476] ILO Convention N. 169, Art. 6, para 1 (a).
[477] ILO Convention N. 169, Art. 7, para 1.

> prompt compensation. Such compensation should as far as possible take the form of lands and territories.[478]

In 2005, in the Concluding Observations on Laos report, the Committee emphasized the responsibility of nations regarding relocations:

> The Committee recommends that the State party […] study all possible alternatives with a view to avoiding displacement; that it ensure that the persons concerned are made fully aware of the reasons for and modalities of their displacement and of the measures taken for compensation and resettlement; that it endeavour to obtain the free and informed consent of the persons and groups concerned; and that it make remedies available to them […] The preparation of a legislative framework setting out the rights of the persons and groups concerned, together with information and consultation procedures, would be particularly useful.[479]

As can be seen from the Committee's recommendations mentioned above, the interpretation regarding the right of indigenous peoples to return to their traditional lands follows what is provided in Article 16 of Convention N. 169, which authorizes the relocation of indigenous communities as an exceptional measure, but always preceded of their free and informed consent.[480]

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[478] CERD/C/365 (1999), *supra* note 448, para 5.
[479] Concluding Observations of the Committee on the Elimination of Racial Discrimination, Laos, UN Doc. CERD/C/LAO /CO/15 of 18 April 2005, para. 18.
[480] ILO Convention N. 169, Art. 16, para 1.

Another issue stressed by the Committee is related to the concept of native title, which according to the UN Special Rapporteur Daes, *"is itself discriminatory in that it provides only defective, vulnerable and inferior legal status for indigenous land and resource ownership".*[481] Article 5 of the ICERD expressly provides for nondiscrimination regarding *"the right to own property alone as well as in association with others",* [482] and the native title many times can conflict with this provision.

The Committee repeatedly pointed out concerns about discriminatory provisions under the Australian legislation. CERD first raised concerns about the 1993 Native Title Act, [483] which tried to balance indigenous rights to their traditional lands and third-party interests. The Act had a provision authorizing the validation of past transactions of indigenous lands, which was considered a discriminatory procedure. However, as a result of the indigenous representatives' consultations, the Act also included two procedures for the recovery of indigenous land rights which would stand as a countermeasure: the freehold standard, which mandated that native title be handled similarly to freehold title, and the ability of indigenous peoples to negotiate future land use.[484] The Committee recognized that the consultation of indigenous communities was sufficient, and the countermeasures established were considered provisions that gave power to the indigenous peoples to negotiate and deal with the matter related to their own lands.

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[481] Daes, Erica-Irene, Report of Indigenous Peoples' Permanent Sovereignty over Natural Resources, U.N. Doc. E/CN.4/Sub.2/1986/872 and Add.1-4, p. 11.
[482] ICERD, Art. 5 (c) and (d) (v).
[483] Report of Ms G. McDougall, Country Rapporteur to the Committee on the Elimination of All Forms of Racial Discrimination (CERD). Available at: www. faira.org.au/cerd/racial-discrimination.html.
[484] G. Triggs, "Australia's Indigenous Peoples and International Law: Validity of the Native Title Amendment Act 1998 (CTH)", *Melbourne University Law Review* (23), 1999, p. 372–415.

In 1998, with the Native Title Amendment Act, the Committee once again expressed concern about Australian indigenous peoples' legislation. The 1998 Act limited the countermeasures established in the previous Act and extinguished native title to private land, residential, commercial, and other leases in areas where public works were built.[485]

The Committee has ruled three times against the Native Amendment Act of 1998, [486] deeming it a discriminatory legal framework as other land rights instruments are more effective in protecting against interference and forcible alienation. [487] However, recently other states have increased their native title protection. An example is Malaysia, which through its jurisprudence, established that other interests should not overrule the native title. [488]

3.3 International Covenant on Economic, Social and Cultural Rights

Just like the two previous human rights instruments discussed, the Covenant on Economic, Social and Cultural Rights (ICESCR)[489] does not have particular provisions for indigenous peoples. Unlike the other covenants, the ICESCR does not focus on a specific theme or issue but is organized as a

[485] *Ibid.*
[486] CERD, Findings on the Native Title Amendment Act 1998, UN Doc. ERD/C/ 54/Misc.40/Rev.2 (28 March 1999), 6–8 and CERD 1998 Decision 1 (53) adopted on 11 August 1998, UN Doc. A/53/18; CERD Decision 2 (54) adopted on 18 March 1999, UN Doc. A/54/18; and Decision 2 (55) adopted on 16 August 1999, UN Doc. A/54/18.
[487] Thornberry, Patrick, *supra* note 136, p. 218–23.
[488] Colchester, MacKay, Griffiths and Nelson, *A Survey on Indigenous Land Tenure: a report for the Land Tenure Service of the FAO*, 2001, p. 17. See also: Xanthaki, Alexandra, "Land Rights of Indigenous Peoples in Southeast Asia", *Melbourne Journal of International Law* (2), 2003, p. 467–96.
[489] International Covenant on Economic, Social and Cultural Rights, 16 December 1966, UN General Assembly United Nations, Treaty Series, vol. 993, p. 3.

programmatic or promotional human rights convention.[490] According to the Covenant, each state party must commit to taking all feasible measures, to the extent of its available resources, to attain progressively the full realization of the rights recognized in the covenant, including the adoption of legislative measures.[491] Furthermore, they must ensure that the rights enumerated in the present Covenant are exercised without discrimination.[492]

The ICESCR is mainly implemented via the ESC Committee's consideration of State reports.[493] Similarly to the ICCPR Human Rights Committee, the ESC Committee adopts concluding observations on the reports and General Comments.[494] Several times, the Committee on Economic, Social, and Cultural Rights (CESCR) has expressed concern over the living circumstances of indigenous peoples, and in this section, we will check how the Committee interprets the indigenous peoples' lands rights and what legal bases under the ICESCR are used for its protection.

3.3.1 Indigenous Peoples' Land Rights and the International Covenant on Economic, Social and Cultural Rights

The ESC Committee has made numerous remarks about the link between Article 11 of the ICESCR and indigenous peoples, especially those related to land

[490] Select Bibliography of Published Material Relating to Economic, Social and Cultural Rights, E/C.12/1989/L.3/Rev.3, 3 October 2000.
[491] ICESCR, Art. 2, para 1.
[492] ICESCR, Art. 2, para 2.
[493] Thornberry, Patrick, *supra* note 136, p. 183
[494] Alston, P, "The International Covenant on Economic, Social and Cultural Rights", in *Manual Rights Reporting*, Geneva, United Nations, 1997, p. 65 – 169 at 161. See also: ICESCR, Arts. 16 to 20.

rights. Paragraph 1 recognizes that everyone has the right to an appropriate quality of life, which includes sufficient food, clothes, and habitation, and to the progress of living circumstances.[495] Paragraph 2 addresses everyone's right not to starve and emphasizes the responsibility of States to increase food production through various procedures; an example would be the creation or reform of agrarian systems to reach a better level of development and use of natural resources.[496] Both paragraphs can be used for the protection of indigenous lands. The first provides protection related to housing,[497] which involves the lands where the indigenous communities live, the second refers to the right to adequate food,[498] and this includes the lands used for the indigenous livelihood.

On the right to adequate food, the Manual on Human Rights Reporting demands that the States provide information on the condition of *"especially vulnerable or disadvantaged groups"*, including indigenous peoples.[499] Moreover, regarding the right to adequate housing, the Manual requires information about the States legislation on land use and distribution, community participation, security of tenure, protection from eviction, etc.[500] These legislations can directly impact the indigenous lands.

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[495] ICESCR, Art. 11, para 1: The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international co-operation based on free consent.

[496] *Ibid*, para 2.

[497] Manual on Human Rights Reporting, United Nations, 1997, p. 121

[498] *Ibid.*

[499] *Ibid.*

[500] *Ibid*, p. 125.

In 1991, the ESC Committee issued General Comment N. 4 on the right to adequate housing,[501] which addresses concerns related to the legal security of tenure [502], availability of services, materials, facilities, and infrastructure, [503] affordability, [504] habitability, [505] accessibility, [506] location, [507] and cultural adequacy.[508] It is important to emphasize that the 'cultural adequacy' paragraph addresses the housing construction and policy through the cultural perspective and states that:

> [M]ust appropriately enable the expression of cultural identity and diversity of housing. Activities geared towards development or modernization in the housing sphere should ensure that the cultural dimensions of housing are not sacrificed.[509]

With the help of the Convention, the General Comment, and the Manual, the Committee was able to link the right to adequate housing and the right to adequate food to the issue of violation of indigenous land rights, especially those related to forced eviction.

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501 *Ibid*, p. 124 – 132.
502 *Ibid*, p. 129, General Comment No. 4 (1991), para. 8 (a).
503 *Ibid*, p. 129, General Comment No. 4 (1991), para. 8 (b).
504 *Ibid*, p. 129, General Comment No. 4 (1991), para. 8 (c).
505 *Ibid*, p. 129, General Comment No. 4 (1991), para. 8 (d).
506 *Ibid*, p. 130, General Comment No. 4 (1991), para. 8 (e).
507 *Ibid*, p. 130, General Comment No. 4 (1991), para. 8 (f).
508 *Ibid*, p. 130, General Comment No. 4 (1991), para. 8 (g).
509 *Ibid*.

In 1996, Panama's report included a section specific to cases related to indigenous territories.[510] On the matter, the ESC Committee pointed out that the main request of the indigenous communities in the region was the demarcation of their traditional territories, which they have been fighting for many decades.[511] The Committee also mentioned the entrance of mining corporations into the indigenous territories, whose operations endanger the indigenous people's existence. Furthermore, the Committee referred to the indigenous representatives' appeal for the ratification of ILO Convention No. 169.[512] In the end, combining Article 11 and General Comment N. 4, the ESC Committee recommended that the Panamanian government stop the displacement of indigenous areas[513] and consider becoming a state party to ILO Convention N. 169, as sought by the indigenous peoples.[514]

In the Concluding Observation on Paraguay's report[515] regarding matters involving general resources and subsistence, the ESC Committee referred to the main concerns about the indigenous people's situation,[516] pointing out that deprivation to access traditional and ancestral lands is the primary cause of famishment and malnutrition among indigenous populations, as well as the denial of their rights.[517] For this reason, the Committee recommended special care for the indigenous land issue in Paraguay.[518]

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[510] Report on the Twelfth and Thirteenth Sessions of the Committee, E/1996/22; E/C.12/1995/18, annex V, p. 120 (paras. 66–70).
[511] *Ibid*, p. 120, paras. 68.
[512] *Ibid*, p. 120, paras. 69-70.
[513] *Ibid*, p. 122, para. 79 iii.
[514] *Ibid*, p. 122, para. 79 iv.
[515] Report of Fourteenth and Fifteenth Sessions.
[516] *Ibid*, para 71.
[517] *Ibid.*
[518] *Ibid*, para 83.

In Russia's report,[519] once again, the Committee linked the indigenous people's poverty and lack of food to violating land rights. The Committee pointed out the violations by oil and gas companies concerning the indigenous peoples' economic rights and the lack of State protection against the illegal exploitation of indigenous lands.[520] Furthermore, the ESC Committee expresses its concern with environmental destruction and pollution, which causes harm to the indigenous communities whose livelihood depends on fishing and hunting.[521]

In Canada's report,[522] the ESC Committee expressed disapproval of the vast difference in ICESCR applicability between indigenous peoples and the rest of Canadian society.[523] Similarly to the appointment made in Paraguay's report, the Committee once again mentioned the link between indigenous marginalization and the dispossession of indigenous peoples from their territories. It emphasized that the Canadian government should not pursue extinction, conversion, or surrender of indigenous land rights and titles.[524] The Committee recommended establishing measures to restore and protect the indigenous land and resources, which will be essential to developing an indigenous economy and culture.[525]

[519] Third Periodic Report, E/1994/104/Add.8, discussed at the 16th and 17th Sessions of the ESC Committee, E/1998/22; E/C.12/1997/10, ECOSOC OR, 1998, Supplement No. 2, paras. 87–129
[520] *Ibid*, para. 100.
[521] *Ibid.*
[522] Report on the Eighteenth and Nineteenth Sessions of the Committee, E/1999/22; E/C.12/1998/26, ECOSOC OR, 1999, Supplement No. 2, Third Periodic Report of Canada, E/1994/104/add.17, paras. 376–435.
[523] *Ibid*, para. 392.
[524] *Ibid*, para. 393.
[525] *Ibid*, para. 418

In 1999, the ESC Committee issued General Comment N. 12 on the right to adequate food.[526] It states that food accessibility includes economic and physical accessibility,[527] and food availability refers to feeding from productive land or other natural resources.[528] Regarding indigenous lands and resources, it is essential to emphasize that physical accessibility denotes that everyone must have access to adequate food, including the indigenous people, who are vulnerable because of the prevention of access to their ancestral lands.[529]

The General Comment recommends that the States establish measures to improve people's access to and use resources and means to ensure their livelihood.[530] Furthermore, it commands the States to create means to secure that the private business sector and civil society activities do not conflict with protecting people's resource base for food.[531] Moreover, it calls for the States to ensure equal and unlimited economic resources, which include the right to land ownership and natural resources.[532] The General Comment mentions the link to adequate food and access to the lands and resources, which can be applied to the indigenous communities. The frequent violation of indigenous territory is remembered in the comment that breaches of the right to food might arise via direct action of States or other organizations.[533]

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[526] General Comment N. 12 on the Right to Adequate Food (Article 11) Twentieth session Geneva, 26 April-14 May 1999.
[527] *Ibid*, para. 13.
[528] *Ibid*, para. 12.
[529] *Ibid*, para. 13.
[530] *Ibid*, para. 15.
[531] *Ibid*, para. 15.
[532] *Ibid*, para. 18.
[533] *Ibid*, para. 19.

In 2009 the ESC Committee issued General Comment N. 21[534] on the right of everyone to participate in cultural life, provided in article 15 of the ICESCR,[535] and expressly mentions the UNDIPR[536] and includes a section on indigenous peoples' cultural rights.[537] The Committee highlights the special bond indigenous people have with their traditional lands and resources and its link with the communal features of their cultural lives.[538] Furthermore, emphasize that such connection extends to the lands they have traditionally owned, occupied, or otherwise used or acquired, following the understanding of Article 26 of the UNDRIP.[539] On the matter of the protection of indigenous people's lands and resources, General Comment N. 21 further states that:

> General Comment N. 21 - 36. […] Indigenous peoples' cultural values and rights associated with their ancestral lands and their relationship with nature should be regarded with respect and protected, in order to prevent the degradation of their particular way of life, including their means of subsistence, the loss of their natural resources and, ultimately, their cultural identity.[540] States parties must therefore take measures to recognize and protect the rights of indigenous peoples to own, develop, control and use their communal lands, territories and resources, and, where they have been

[534] General Comment N. 21 on the Right of everyone to participate in cultural life (Article 15) Forty-third session,2–20 November 2009.
[535] ICESCR, Art. 15.
[536] General Comment N. 21 on the Right of everyone to participate in cultural life, para. 9.
[537] *Ibid*, paras. 36 – 37.
[538] *Ibid*, para. 36. See also: Davis, Michael, *supra note* 237, p. 299.
[539] UNDRIP, Art. 26 (a).
[540] ILO Convention N. 169, Arts. 13–16. See also: UNDRIP, Arts. 20 and 33.

otherwise inhabited or used without their free and informed consent, take steps to return these lands and territories.[541]

The Comment contemplates understanding indigenous lands already provided in the ILO Convention N. 169 and the UNDRIP. It recognizes the importance of the protection of the indigenous lands for the preservation not only of their livelihood but also their cultural identity. Demands from the States the establishment of measures to protect the indigenous lands and resources and the return of their lands. Moreover, it requires that States ensure the free, prior, and informed consent of indigenous peoples in situations related to their specific rights.[542]

3.4 Convention on the Prevention and Punishment of the Crime of Genocide

The Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention)[543] also encompasses provisions that indigenous peoples can use to protect their traditional lands. According to Article 2 of the Genocide Convention and Article 6 of the Rome Statute for the International Criminal Court (ICC), deliberately inflicting conditions of life calculated to cause the physical destruction of a specific ethnic group can be defined as genocide.[544]

[541] General Comment N. 21 on the Right of everyone to participate in cultural life, paras. 36.
[542] General Comment N. 21 on the Right of everyone to participate in cultural life, paras. 37. See also: ILO Convention No. 169, Art. 6 (a) and the UNDRIP, Art. 19.
[543] Convention on the Prevention and Punishment of the Crime of Genocide, 9 December 1948, UN General Assembly, United Nations, Treaty Series, vol. 78, p. 277. Available at: https://www.refworld.org/docid/3ae6b3ac0.html
[544] Convention on the Prevention and Punishment of the Crime of Genocide (1948), Art. II(c), and Rome Statute of the International Criminal Court, u.n. Doc. A/CONF.138/9, Art. 6.

One of the central elements of genocide crime is the 'conditions of life' since the physical destruction is caused by it. Regarding the indigenous peoples, the main discussion is whether the removal of indigenous populations from their territory may be seen as a 'condition of life' with the purpose of destruction to guarantee the group's extinction.

Conforming to the Text of the Elements of Crimes, *"the term 'conditions of life' may include, but are not necessarily restricted to, deliberate deprivation of resources indispensable for survival, such as food or medical services, or systematic expulsions from homes."*[545] This broad concept of 'conditions of life' is crucial for including indigenous lands and resources under the protection of the Genocide Convention. The physical destruction of indigenous communities can be caused by the restriction in accessing their lands and natural resources because it results in the deprivation of food, a resource indispensable for survival. In addition, violations of indigenous lands, such as relocation and displacement, can harm the health of the indigenous community, resulting in massive death of the individuals in the group.[546] An example of this situation happened in the 1980s in Brazil, where the forced relocation resulted in the death caused by diseases and homesickness of 25 percent of the Xingu indigenous. [547]

[545] Assembly of States Parties to the Rome Statute of the International Criminal Court, First Sess., September 2002 ICC-ASP/1/3, at 114, n.4.
[546] In Brazil, the relocation of indigenous communities of the Xingu region was a direct cause of the death from diseases and homesickness of 25 percent of the indigenous. See also: Gilbert, Jérémie, *supra* note 3, p. 174.
[547] Icihi, SadruddinAga Khan, and Hassan Bin Talal, *Indigenous Peoples: A Global Quest for Justice: A Report for the Independent Commission on International Humanitarian Issues*, London: Zed Books, 1987, p. 85.

The question about the expulsion of a group from its lands resulting in their destruction was discussed under the International Criminal Tribunal for the Former Yugoslavia (ICTY). In the *Blagojević* case, the tribunal emphasized that:

> While killing large numbers of a group may be the most direct means of destroying a group, other acts or series of acts, can also lead to the destruction of the group. A group is comprised of its individuals, but also of its history, traditions, the relationship between its members, the relationship with other groups, the relationship with the land.[548]

Another important point about protecting indigenous peoples' lands under the Genocide Convention relates to the concept of 'specific intent'. Like the 'conditions of life', the 'specific intent' is an element of the genocide crime and requires the perpetrator's intention to destroy a group.[549] Therefore, a mere act that destroyed a group is not enough to characterize an act as genocide; it is necessary that the individual responsible for that act committed it intending to destroy the group. For the indigenous peoples, the 'specific intention' would entail demonstrating that the intention behind removing indigenous populations from their lands was to endanger the community's survival to eliminate the group.[550] The following cases will provide insight into how the analyses and proving of genocide related to indigenous peoples' lands take place.

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[548] Prosecutor *v.* Blagojević (Trial Judgment) ICTY IT-02-60-T ,17 January 2005, para 666.
[549] Assembly of States Parties to the Rome Statute of the International Criminal Court, First Sess., September 2002 ICC-ASP/1/3, at 114, n.4
[550] Gilbert, Jérémie, *supra* note 3, p. 175.

The Aché indigenous community [551] denounced the Paraguayan government before the Inter-American Human Rights Commission for genocide on the allegation that the indigenous people of that community were victims of government acts that sought to promote the farming, oil, and mining exploration by transnational companies in traditional lands,[552] which resulted on the death of 85 percent of the Aché indigenous between the 1950s and 1970s.[553] Because of the difficulty of the Aché community in proving the intention to destroy the group to support a claim of genocide, the Commission issued a preliminary decision that Paraguay had not committed genocide, despite the factual implementation of a planned and voluntary destruction approach, since the government claimed its acts were not intended for the destruction of the group, but for the sake of national development.[554] However, the Whitaker Report of the United Nations recognizes the persecution and destruction of the Aché indigenous community as an example of genocide.[555]

Another case is the Guatemalan genocide, which was the extermination of the Mayan population during the civil war between 1960 and 1996.[556] According to Human Rights Watch, the cruel actions were perpetuated by the military forces[557] and resulted in the displacement of 900,000 Mayans and the death or

[551] The Aché indigenous community is now considered as an extinct cultural group. Aché Indian in Paraguay, Case No. 1802 (Paraguay), Annual Report 1977, at 36–37, oas Doc. OEA/Ser.L/V/II.43 Doc.21 (1978)—iachr.
[552] Genocide in Paraguay (Richard Arens ed., 1976).
[553] Charny Israel W. 1999. Encyclopedia of Genocide. Santa Barbara Calif: ABC-CLIO.
[554] Gilbert, Jérémie, *supra* note 3, p. 175.
[555] UN Whitaker Report on Genocide, 1985, paragraphs 14 to 24 pages 5 to 10
[556] Foster, Lynn V., *Handbook to Life in the Ancient Maya World*, Oxford University Press, 2005, p. 84.
[557] "Human Rights Testimony Given Before the United States Congressional Human Rights Caucus" (Press release). *Human Rights Watch.* 16 October 2003.

'disappearance' of 166,000 individuals.[558] The Commission for Historical Clarification decision recognized that the Mayan population suffered genocide during the civil war[559] and emphasized that destroying property, burning crops, and implementing scorched earth tactics constituted genocide.[560] Furthermore, on the matter of 'specific intention', the Commission stated that:

> […] the reiteration of destructive acts, directed systematically against groups of the Mayan population […] demonstrates that the only common denominator for all the victims was the fact that they belonged to a specific ethnic group and makes it evident that these acts were committed 'with intent to destroy, in whole or in part' these groups.[561]

In Brazil, two cases of genocide against indigenous communities were reported. The Ticuna Massacre[562] happened in 1988 and was motivated by conflicts involving indigenous lands. In early 1988, the National Indian Foundation (FUNAI) announced that the Ticuna lands were fully demarcated and ordered the non-indigenous occupants to leave the lands. The region squatters and loggers, who were against the demarcation, refused to leave the lands and began to threaten the indigenous community to persuade them to leave their lands. The Ticuna community scheduled an assembly to discuss the situation of the demarcated lands

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558 "83 percent of the victims were part of the Mayan population." Foster, Lynn V., *supra* note 556, p. 84.

559 Report of the Commission for Historical Clarification, Guatemala: Memory of Silence (1999)

560 *Ibid.*

561 *Ibid*, para. 111.

562 "Relatorio dos problemas nao tomadas as providencias pela FUNAI: sobre o massacre dos indios Ticuna do Alto Solimoes nos dias 28 e 29 de marco de 1988." (Report of problems not taken care of by FUNAI on the massacre of the Ticuna in Alto Solimões on March 28 and 29, 1988). Available at: https://acervo.socioambiental.org/acervo/documentos/relatorio-sobre-o-massacre-dos-indios-ticuna-do-alto-solimoes-nos-dias-28-e-29-de

and the death threats they had been receiving. Intending to prevent the continuation of the assembly, the loggers and squatters invaded the meeting and shot the indigenous people who were gathered, killing and injuring more than 50 indigenous people.[563] The crime was initially treated as a homicide, but the Federal Prosecution Service argued that the violence perpetrated had been committed against an ethnic group and recognized the intention to exterminate the community. For this reason, the case was judged as genocide[564]. Only thirteen years after the Ticuna Massacre, the Federal Court of Justice convicted the accused.[565]

The Haximu Massacre, despite taking place after the case mentioned above, was the first case to be judged as genocide and represents a milestone not only for indigenous people's protection but also a critical case for understanding the crime of genocide in domestic legislation.[566] The massacre[567] happened in 1993 and was motivated by territorial conflicts between miners and the Yanomami indigenous. During the attack, the miners killed about 16 indigenous[568] and burned the Haximu village.[569] The case received international attention, which spurred investigations. The Federal Court of Justice convicted the criminals under the crime of genocide

[563] Genocídio Indígena: Massacre Dos Ticuna No Município De Benjamim Constant (Indigenous Genocide: Massacre of the Ticuna in the Municipality of Benjamim Constant), p. 103. Available at: https://www.mpf.mp.br/am/projetos-especiais/memorial/docs/ebook-memoriasehistorias-mpfam

[564] The Brazilian legislation has the crime of genocide provided by Article 1 of the Law N. 2889/56. The provision follows the text of the Genocide Convention.

[565] Genocídio Indígena: Massacre Dos Ticuna No Município De Benjamim Constant, *supra note* 563, p. 105.

[566] Denouncement of genocide against Pedro Emiliano Garcia, Eliézio Monteiro Neri, Waldinéia Silva Almeira, Juvenal Silva and Wilson Alves dos Santos. Available at: https://www.mpf.mp.br/rr/memorial/docs/atuacoes_de_destaque/massacre-de-haximu/93-000501-4-pedro-emiliano-garcia.pdf

[567] Ferguson, R. Brian, *Yanomami Warfare*, USA: School of American Research, 1995, p. 375.

[568] It is difficult to be sure of the exact number of indigenous people who died during the conflict, as many bodies were cremated due to indigenous customs.

[569] Tierney, Patrick, *Darkness in El Dorado*, New York: W.W Norton & Company, 2000, p. 195.

three years after the attack. The criminals appealed against the decision, but the Superior Court of Justice recognized the previous sentence.[570]

According to the analysis of genocide cases in Guatemala and Brazil, the existence of strategies to remove indigenous peoples from their lands through threats to the population, murder of their members, and destruction of their housing and natural resources may be considered a link between the crime of genocide and the land expropriation approach. Thus, the combined practice of killings and land destruction or dispossession can be regarded as genocide if proven that the actions were intended to exterminate the group.[571] Furthermore, it is essential to clarify that in the analyzed cases, a combination of mechanisms resulted in the genocide of the indigenous people. Still, to recognize the genocide, the expropriation and destruction of lands do not need to be practiced together with the murder of community members. Genocide can be recognized solely concerning the expropriation and destruction of land (living conditions) if it is proven that such practices were one of the primary mechanisms used to destroy the group.[572]

However, the protection of indigenous lands under the Genocide Convention still encounters resistance as the definition of genocide does not include the concepts of 'cultural genocide' and 'ethnocide',[573] which are based on the premise that a group can be exterminated by actions that harm their condition to

[570] Haximu Massacre. Federal Prosecution Service. Available at: https://www.mpf.mp.br/rr/memorial/atuacoes-de-destaque/massacre-de-haximu
[571] Gilbert, Jérémie, *supra* note 3, p. 176
[572] *Ibid*.
[573] UNESCO Declaration of San Jose: "Ethnocide means that an ethnic group is denied the right to enjoy, develop and transmit its own culture and its own language, whether individually or collectively." UNESCO Latin-American Conference, Declaration of San Jose (Dec. 11, 1981) UNESCO Doc. fs 82/WF.32 (1982)

preserve and transmit its own distinct culture, resulting on the disappearance of the cultural features of that community.

Although the concept of cultural genocide was not mentioned, the negotiations for adopting the 1948 Genocide Convention involved discussions on the subject. Still, the inclusion of the concept was rejected for two reasons: on the one hand, some States argued that such protection should be included in the protection of minority rights; on the other hand, some States were concerned that their action against indigenous populations living within their borders could be considered genocide.[574]

Later, the discussion on cultural genocide and ethnocide reemerged. A draft of the UNDRIP included the terms 'ethnocide' and 'cultural genocide', drawing a link between 'cultural genocide' and *"any action which has the aim or effect of dispossessing"* indigenous peoples of their lands.[575] Therefore, the application of the term 'aim or effect' implies that the mere fact of the individual knowing that their acts would result in the unlawful loss of life, the act performed can be considered genocide, which is a less rigorous conditional element than 'specific intent'.[576] Moreover, several indigenous representatives emphasized that the expulsion of indigenous peoples from their ancestral territory often constituted cultural genocide since dispossession and forced relocation commonly resulted in

[574] Schabas, William A, *Genocide in International Law: The crime of crimes*, Cambridge University, 2000, p. 179 – 189.
[575] Article 8 of the draft Declaration. On the question of possible genocide concerning violations of indigenous lands. See also: M. A. Greer, "Foreigners in their own Land: Cultural Land and Transnational Corporations – Emergent International Rights and Wrongs*", Virginia Journal of International Law 38*, 1998, 331–97, p. 359–64.
[576] Gilbert, Jérémie, *supra* note 3, p. 177.

their community's extermination.[577] However, in the end, the final text of the UNDRIP did not include cultural genocide or ethnocide. Despite that, Article 8, paragraph 1 of the UNDRIP provides that indigenous peoples *have "the right not to be subjected to forced assimilation or destruction of their culture"*[578] which can be interpreted as protection against 'cultural genocide'. The genocide is expressly mentioned under the UNDRIP in Article 7, paragraph 2, and states that indigenous peoples shall not be subjected to any act of genocide or any other act of violence.[579]

3.5 Summary

Chapter 2 brings the most important international instruments for the protection of indigenous peoples; however, the ILO Convention N. 169 has a low rate of ratification, and the UNDRIP is a soft law document; thus, the indigenous peoples must seek other ways to guarantee their protection, which resulted on legal adaptation movement.

The leading international human rights instruments which adapted their provisions to provide protection related to indigenous lands are the International Covenant on Civil and Political Rights,[580] the International Covenant on Economic, Social, and Cultural Rights,[581] the International Convention on the Elimination of

[577] Report of the Working Group Established in Accordance with Commission on Human Rights Resolution 1995/32 (6 March 2002) UN Doc E/CN.4/2002/98, 18.
[578] UNDRIP, Art, 8, para 1.
[579] UNDRIP, Art. 7, para 2.
[580] International Covenant on Civil and Political Rights, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171.
[581] International Covenant on Economic, Social and Cultural Rights, 16 December 1966, United Nations, Treaty Series, vol. 993, p. 3.

All Forms of Racial Discrimination,[582] and the Convention on the Prevention and Punishment of Genocide.[583] It is essential to mention that none of these instruments reference the indigenous peoples, but they were able to adequate their legal text to be interpreted to include the indigenous peoples as a subject to be protected under their legislation.

By interpreting Article 27, the ICCPR included the indigenous peoples under the umbrella of minorities. Thus, it was possible to apply the anti-discrimination provisions regarding the indigenous. As mentioned before, one of the main violations the indigenous peoples suffered was dispossession from their lands, which is the root of the discriminatory view of the dominant society. In such a way, the anti-discriminatory norms can be applied to the violation of indigenous lands. Furthermore, as explained in Chapters 1 and 2, the indigenous lands are an essential element for the indigenous culture; thus, the violation of indigenous lands can result in the violation of their cultural features, which can be a situation to be protected by Article 27. General Comment No 23, issued by the Human Rights Committee, reflects the legal standard of the ILO Convention N. 169, which recognizes the spiritual relationship of the indigenous with their lands.

The International Convention on the Elimination of All Forms of Racial Discrimination is another international legal document that can be used to protect indigenous lands. Although, at first glance, this legal instrument did not seem the most adequate to protect indigenous lands, General Recommendation XXIII on

[582] International Convention on the Elimination of All Forms of Racial Discrimination, 21 December 1965, United Nations, Treaty Series, vol. 660, p. 195.
[583] Convention on the Prevention and Punishment of the Crime of Genocide, 9 December 1948, United Nations, Treaty Series, vol. 78, p. 277.

indigenous people recognized that discrimination against indigenous people was within the scope of protection of the convention.

Once again, the connection between culture and indigenous lands was used as a basis for legal adequacy. Removing indigenous peoples from their traditional lands would be considered discriminatory, as it directly affects this group's culture and historical identity. Furthermore, the Committee on the Elimination of All Forms of Racial Discrimination has actively used the General Recommendation and the ILO Convention N. 169 as interpretative tools for adapting its legal text.

In the Concluding Observations regarding Australia and Nigeria, the Committee reaffirms the content of Article 6 of the ILO Convention N. 169 about the consultation of indigenous peoples about matters that involve them. In the Conclusion Observation on Laos, the Committee interprets Article 5 of the ICERD using Article 16 of the ILO Convention N. 169. Important to highlight that none of the states mentioned above ratified the ILO Convention N. 169, and despite being part of the ICERD, the General Recommendations issued by the Committee do not have legally binding force. Still, the interpretative standard provided by these legal documents is the perfect example of legal adaptation and how to use not only one specific instrument for protecting human rights but the entire human rights framework, which is connected.

The International Covenant on Economic, Social and Cultural Rights was another unexpected legal instrument to be applied to the indigenous lands. However, through the interpretation of Article 11 of the ICESCR, it was possible to include the indigenous lands under the scope of protection of this convention.

Paragraph 1 provides about the right to appropriate quality of life, which can include the housing situation; thus, for the indigenous peoples, this could reflect the lands where they live. Paragraph 2 addresses the right not to starve, which can be translated as land use for indigenous livelihood. Such interpretations are quite different from the abovementioned conventions, which focused on the cultural connection of the indigenous peoples with their lands.

The ESC Committee issued General Comment N. 4 on the right to adequate housing, stating that cultural aspects of housing should not be denied, which implies that the government should take into account the cultural aspects of housing for the indigenous peoples, which is related to their lands. Furthermore, the Committee also issued General Comment N. 12 on the right to adequate food associated with indigenous land use. The Committee recognized that dispossession or the lack of access to their traditional lands was directly connected to the causes of the famishment of indigenous communities. Later, the Committee issued General Comment N. 21 on the right of everyone to participate in cultural life. Following the recurrent tendency already presented in other legal documents, General Comment N. 21 connects the cultural identity of indigenous peoples to their lands. Once again, the Comment followed the view provided by the ILO Convention N. 169 and the UNDRIP.

The Genocide Convention is one of the most controversial legal instruments to be used to protect indigenous lands, using Article 2 of the Genocide Convention and Article 6 of the Rome Statute as the legal basis. According to these provisions, genocide can be defined as deliberately inflicting conditions of life to

cause the physical destruction of a specific ethnic group. There is no denying that indigenous peoples have several ethnic groups so that they can be subject to this crime. The element of crime ‘condition of life’ is the key for the interpretation to include the violation of indigenous lands as genocide. Here, the idea of deprivation of indigenous people's access to their lands and resources would cause the physical destruction of indigenous communities. Like the view used by the ESC Committee, the removal of indigenous peoples from their lands results in the deprivation of food, which will cause the physical destruction of the communities.

However, the crime also has another element, the ‘specific intent’, which is hard to prove in many cases, especially regarding the indigenous lands. It is easy to prove that someone committed violent acts against a particular group aiming for their destruction, but it is a long line to connect the link between the dispossession of indigenous lands and their intentional destruction. Many perpetrators address their acts of removal of indigenous from their lands as economic or developmental reasons, not the intention of indigenous destruction. Unlike active violent acts, which results can be seen almost immediately, the removal of indigenous lands can also result in their destruction, but this consequence is not immediate.

Important to mention that in many cases recognized as genocide, practices of killing and other acts of violence were used to dispossess indigenous lands. However, it cannot be implied that for an indigenous land violation to be considered genocide, the practice of killing and other acts of violence must be present. If it can be proven that the mere dispossession of indigenous peoples from

their lands was the main mechanism to result in their destruction, the act can be considered genocide.

Another important discussion regarding genocide is the idea of ‘cultural genocide’ and ‘ethnocide, which can be understood as acts that aim to exterminate a group through practices that lead to the disappearance of their cultural features. This topic was included in the draft of the UNDRIP, which connected the ‘cultural genocide’ with the dispossession of indigenous peoples from their lands. However, the concept was not included in the final legal text. Still, the Declaration included genocide in Article 7, and Article 8 prohibits forced assimilation or destruction of indigenous cultural features, which can be interpreted as protection against ‘cultural genocide’.

In conclusion, analyzing all the international conventions that the indigenous peoples can use to protect their lands, the main interpretative concept applied is the cultural link between indigenous peoples and their lands, which was used in all the documents. This reflects the consolidated view of ILO Convention N. 169 and the UNDRIP about the indigenous lands and their spiritual and cultural relationship. Furthermore, the negative effect on the livelihood of indigenous peoples caused by their dispossession also appears as an interpretative concept.

Important to highlight that the cultural features of their lands are connected to their existence as an ethnic group, which is related to their cultural identity as indigenous. For example, suppose an indigenous community is dispossessed, and the members are obligated to disperse and live in other areas of the dominant society. In that case, the chances of their assimilation and cultural features as a

community disappearing are really high. Thus, even if the members would still exist as individuals, they could disappear as indigenous people for the absence of their cultural aspects. Additionally, the dispossession of indigenous peoples from their lands can result in physical harm. It is not rare that the existence of reported cases of entire indigenous communities disappearing as a result of famishing and diseases caused by their removal from their land.

Chapter 4: Protection of Indigenous Peoples' Land Rights in Regional Systems

As this thesis aims to compare the legal framework of two countries that are part of different regional blocs, it is necessary to investigate how the regional legislation touches on indigenous lands before analyzing the domestic documents. This chapter will bring the regional human rights system into which Brazil is inserted, the Inter-American Court. Moreover, the regional system that includes the Philippines, which despite being an economic system, has also started to address human rights issues.

4.1 South America

Indigenous peoples are one of the most socially vulnerable groups in the world. In South America, this disadvantage of the indigenous population results from complex social and historical movements that started more than 500 years ago, which have settled discriminatory practices that were perpetuated until the present moment and have established a systematic expropriation of their territories.[584]

There are more than 45 million persons who identify as belonging to indigenous peoples living in Latin America, consisting of around 800 ethnic groups and peoples. They can be described as having a wide demographic, social,

[584] "Os Povos Indígenas na América Latina: Avanços na última década e desafios pendentes para a garantia de seus direitos" - Comissão Econômica para a América Latina e o Caribe (CEPAL); Organização das Nações Unidas (ONU); Santiago, Chile (2015), p. 5.

geographical, and political variety, with populations that can be found in large urban centers or even voluntarily inhabiting isolated areas.[585]

This Chapter will analyze the South American indigenous peoples' issues, focusing on the regional instruments in the Inter-American Human Rights System framework and examining the indigenous peoples' land rights.

4.1.1 Overview of the Organization of American States

The Organization of American States (OAS) was established in 1948 at the Ninth International Conference of American States and is acknowledged as the oldest regional organization.[586] According to article 1 of the OAS Charter[587], its main objective is to achieve peace and justice, promote solidarity and defend their sovereignty, territorial integrity, and independence. During the diplomatic conference, in addition to the creation of OAS, it adopted the Inter-American Charter of Social Guarantees and the American Declaration of the Rights and Duties of Man.[588]

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585 *Ibid*, p. 6.

586 Matos, Mariana Monteiro de, *Indigenous Land Rights in the Inter-American System: Substantive and Procedural Law*, BRILL, 2020, p. 17.

587 Organization of American States (OAS), Charter of the Organisation of American States, 30 April 1948, Article 1: The American States establish by this Charter the international organization that they have developed to achieve an order of peace and justice, to promote their solidarity, to strengthen their collaboration, and to defend their sovereignty, their territorial integrity, and their independence. Within the United Nations, the Organization of American States is a regional agency. Available at: https://www.refworld.org/docid/3ae6b3624.html

588 Circle of Rights. Economic, Socia & Cultural Rights Activism: A Training Resource. The Inter-American System for protection of Human Rights and ESC Rights, Module 30. Available at: http://hrlibrary.umn.edu/edumat/IHRIP/circle/modules/module30.htm

The Inter-American Charter of Social Guarantees'[589] main objective was to *"declare the fundamental principles that must protect workers of all kinds".*[590] Similar to the International Labour Organization, despite being an instrument focused on labor rights, it was the first regional instrument under the OAS to mention indigenous people. Article 39 stipulates:

> In countries where the problem of the aboriginal population exists, the necessary measures will be adopted to provide the Indian with protection and assistance, safeguarding their life, liberty and property, defending them from extermination, safeguarding them from oppression and exploitation, protecting him from misery and providing adequate education.
>
> The State will exercise its tutelage to preserve, maintain and develop the heritage of the Indians or their tribes, and will promote the exploitation of natural, industrial, extractive wealth or any other sources of income, coming from said heritage or related to it, in the sense of ensuring, when appropriate, the economic emancipation of indigenous groups.
>
> Institutions or services must be created for the protection of the Indians, and in particular to enforce their lands, legalize

[589] Carta Internacional Americana de Garantías Sociales (Bogotá, 1948) Aprobada en la Novena Conferencia Internacional Americana Bogotá, 1948. Available at: https://www.dipublico.org/3517/carta-internacional-americana-de-garantias-sociales-1948/

[590] *Ibid,* Artículo 1: La presente Carta de Garantías Sociales tiene por objeto declarar los principios fundamentales que deben amparar a los trabajadorcs de toda clase y constituye el mínimum de derechos de que ellos deben gozar en los Estados Americanos, sin perjuicio de que las leyes de cada uno puedan ampliar esos derechos o reconocerles otros más favorables.

their possession by them and prevent the invasion of such lands by outsiders.[591] (translated by the author)

Regardless of focusing on workers' rights, the Inter-American Charter of Social Guarantees included essential provisions for indigenous peoples, not only related to their working conditions but also dispositive for protection against their extermination and measures safeguarding indigenous lands and properties.

The American Declaration of Rights and Duties of Man was the first legal instrument related to the regional protection of human rights.[592] Its approval precedes the Universal Declaration of Human Rights, contributing to the construction of the UDHR and presenting similar characteristics, such as recognizing the inherent dignity of all human beings.[593]

The American Declaration of Rights and Duties of Man did not mention indigenous peoples in its text. Furthermore, it makes no distinction between individual and collective legal entities. Regarding property rights, it only provides

[591] *Ibid*, Artículo 39: En los países en donde exista el problema de la población aborigen se adoptarán las medidas necesarias para prestar al indio protección y asistencia, amparándole la vida, la libertad y la propiedad, defendiéndolo del exterminio, resguardándolo de la opresión y la explotación, protegiéndolo de la miseria y suministrándole adecuada educación. El Estado ejercerá su tutela para preservar, mantener y desarrollar el patrimonio de los indios o de sus tribus, y promoverá la explotación de las riquezas naturales, industriales, extractivas o cualesquiera otras fuentes de rendimiento, procedentes de dicho patrimonio o relacionadas con este, en el sentido de asegurar, cuando sea oportuna, la emancipación económica de las agrupaciones autóctonas.Deben crearse instituciones o servicios para la protección de los indios, y en particular para hacer respetar sus tierras, legalizar su posesión por los mismos y evitar la invasión de tales tierras por parte de extraños.

[592] Espiell, Hector Gros, "La declaración americana: Raíces conceptuales u políticas en la historia, la filosofía e el derecho americano", *Número especiale en conmmemoración del 40 aniversario de la DAADDH Revista del Instituto Inter-americano de Derechos Humanos*, 1989, p. 41-64.

[593] Paúl, Álvaro, "Los trabajos preparatorios de la declaración americana de los derechos y deberes del hombre y el origen remoto de la Corte Interamericana". *Universidad Nacional Autónoma de México: Serie doctrina jurídica Vol. 810*, Primeira edición, 2017, p. 2-4

for the right to private property.[594] The ADRDM was adopted with no legally binding effects but acquired some degree of legal force with the revision of the OAS Charter.[595]

Despite not including an express provision for indigenous peoples, the ADRDM was applied to their protection since the State-parties were obliged to respect and guarantee to all their inhabitants the rights included in the declaration.[596] The main provisions applied for the protection of indigenous peoples referred to the right to life, liberty, personal integrity, property, dignity, due process of law and judicial guarantees.[597]

The American Convention on Human Rights[598] was adopted in 1969 at the Inter-American Specialized Conference on Human Rights. Also known as the Pact of San José, ACHR is a legally binding instrument on the OAS state parties upon ratification or adherence.[599] Similarly to the ADRDM, the Convention did not mention indigenous peoples in its text, but this did not prevent the application of its provision to the indigenous peoples' complaints. Important to highlight that

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[594] Inter-American Commission on Human Rights (IACHR), American Declaration of the Rights and Duties of Man (ADRDM), 2 May 1948. Art. 23: Every person has a right to own such private property as meets the essential needs of decent living and helps to maintain the dignity of the individual and of the home. Available at: https://www.refworld.org/docid/3ae6b3710.html

[595] Buergenthal, Thomas, "The Revised OAS Charter and the Protection of Human Right", *The American Journal of International Law 828*, 1975. The OAS Charter was amended by the Protocol of Buenos Aires (1967), which is binding to all OAS member states.

[596] Organization of American States Report on the Human Rights Situation of the Indigenous Peoples of the Americas. Chapter 1 – Historical Background of the Rights of Indigenous Peoples under the Inter-American System. Available at: http://www.cidh.org/Indigenas/chap.1.htm

[597] ADRDM, Arts. I, XVIII, XXIII, L.

[598] American Convention on Human Rights (ACHR), "Pact of San Jose", Organization of American States (OAS), Costa Rica, 22 November 1969. It entered into force internationally only on July 18, 1978, as determined by § 2 of its art. 74, after obtaining 11 ratifications. In 2017, the Convention has 23 States Parties among the 35 independent States of the Americas, after the denunciation of Trinidad and Tobago (1998) and Venezuela (2012). Available at: https://www.refworld.org/docid/3ae6b36510.html

[599] Matos, Mariana Monteiro de, *supra* note 586, p. 20-21.

regarding the issues of the indigenous lands, it is possible to use article 21, which establishes property right.[600]

Furthermore, the ACHR assigned new attributions to the Inter-American Commission on Human Rights, created the Inter-American Court of Human Rights as the second supervisory body of the human rights machinery of the Organization of American States, and together with the ADRDM are the main normative instruments of the system.[601]

4.1.2 Overview of the Inter-American Human Rights System

Indigenous peoples in the Americas may resort to the Inter-American Human Rights System when no domestic laws recognize their rights or such laws exist, but there is no political will to implement them.

The Inter-American Human Rights System comprises an individual petition system, a mechanism for inter-state complaints, a national condition evaluation function, and two supervisory bodies: the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights. [602] The American Convention on Human Rights and the American Declaration of the Rights and Duties of Man establish the legal basis for the system.[603]

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600 Matos, Mariana Monteiro de, *supra* note 586, p. 22. See also: ACHR, Art. 21.

601 Ramos, André de Carvalho, *Curso de direitos humanos*, São Paulo : Saraiva Educação, 2018, p. 351.

602 Harmen van der Wilt & Viviana Krsticevic, "The OAS System for the Protection of Human Rights" in Raija Hanski and Markku Suksi, *An Introduction to the International Protection of Human Rights: A textbook*, Turku: Institute for Human Rights, Abo Akademi University, 1999, p. 371-386.

603 American Declaration of the Rights and Duties of Man.

i. Inter-American Commission on Human Rights

In 1959, at the Fifth Meeting of Consultation of Ministers of Foreign Affairs, held in Santiago, it was established the Inter-American Commission on Human Rights created for the protection of human rights within the OAS, intended to function provisionally until the adoption of an "Inter-American Convention on Human Rights".[604]

In 1967, Article 122 of the Protocol of Amendments to the OAS Charter appointed the Inter-American Commission on Human Rights to promote *"the observance and protection of human rights and to serve as a consultative organ"*[605] for the OAS. Furthermore, the last part of the article subjected the *"structure, competence, and procedure of this Commission"* to a future Inter-American Convention on Human Rights.[606] Thus, the Commission became part of the permanent structure of the OAS, with the State-parties having an obligation to respond to its requests for information and comply with its recommendations.[607]

The Commission gained a dual duty with the adoption of the ACHR. First, it remained a key body of the OAS, entrusted with general human rights care,

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[604] Fifth Meeting of Consultation of Ministers of Foreign Affairs, Organization of American States, Santiago, Chile, August 12-18, 1959. Available at: https://www.oas.org/council/MEETINGS%20OF%20CONSULTATION/Actas/Acta%205.pdf

[605] "Protocol of Buenos Aires" – Protocol of Amendment to the Charter of the Organization of American States (B-31), Buenos Aires, Argentina, 1967, Art. 112: There shall be an Inter-American Commission on Human Rights, whose principal function shall be to promote the observance and protection of human rights and to serve as a consultative organ of the Organization in these matters (First Part). Available at: https://www.oas.org/sap/peacefund/VirtualLibrary/ProtocolBsAs/ProtocolBuenosAires.pdf

[606] *Ibid*, Art. 112: An inter-American convention on human rights shall determine the structure, competence, and procedure of this Commission, as well as those of other organs responsible for these matters (Second Part). f

[607] Ramos, André de Carvalho, *supra* note 601, p. 351.

including examining individual petitions alleging abuses of human rights guaranteed by the OAS Charter and the American Declaration. Second, the Commission also began functioning as an organ of the ACHR, reviewing individual petitions and initiating international accountability proceedings against States before the Court. Second, the Commission became an arm of the ACHR, examining individual petitions and initiating an international responsibility action against a State before the Inter-American Court on Human Rights.[608]

Concerning the Inter-American Commission on Human Rights competence, it extends to all States parties to the ACHR; concerning human rights provided therein, it extends to all member states of the OAS about the rights contained in the ADRDM. [609] Furthermore, if the State has not adopted the ACHR or has not accepted the Court's jurisdiction, the Commission will include its individual petition findings in its Annual Report, which the OAS General Assembly will examine.[610]

Since its establishment, through *in-loco* visits and general reports on states or by issuing special reports, the IACHR has fulfilled its responsibility to monitor and promote respect for indigenous peoples. Furthermore, while processing individual petitions reporting violations of human rights protected by the OAS

[608] Ramos, André de Carvalho, *Responsabilidade internacional por violação de direitos humanos*. Rio de Janeiro: Renovar, 2004.
[609] Piovesan, Flávia, *Direitos humanos e justiça internacional : um estudo comparativo dos sistemas regionais europeu, interamericano e africano.* São Paulo : Saraiva, 5. ed. rev., ampl. e atual, 2014, p. 110. See also: Héctor Fix-Zamudio, *Protección jurídica de los derechos humanos: Estudios comparativos*, Mexico: Comision Nacional de Derechos Humanos, 1999, p. 164
[610] Ramos, André de Carvalho, *supra* note 601, p. 351.

Charter and the ADRM, the IACHR had the chance to safeguard the rights of indigenous peoples. [611]

In 1972, the IACHR adopted a resolution on the "Special protection for Indigenous Populations, Action to Combat Racism and Racial Discrimination",[612] which affirmed that:

> [F]or historical reasons and because of moral and humanitarian principles, special protection for indigenous populations constitutes a sacred commitment of the states.[613]

In 1985, the IACHR issued Resolution N. 12/85[614] related to a violation against the Yanomami Community in Brazil, and it reaffirmed the commitment to the preservation of indigenous peoples:

> [T]he Organization of American States has established as a priority action for member states, the preservation and strengthening of the cultural heritage of ethnic groups and the fight against discrimination that invalidates their potential as

[611] Organization of American States Report on the Human Rights Situation of the Indigenous Peoples of the Americas. Chapter 1 – Historical Background of the Rights of Indigenous Peoples under the Inter-American System. Available at: http://www.cidh.org/Indigenas/chap.1.htm. See also: Organization of American States Annual Report of the Inter-American Commission on Human Rights 1983-1984. Chapter 1 – Legal origin and bases of the Inter-American Commission on Human Rights. Available at: http://www.cidh.org/annualrep/83.84.eng/chap.1.htm

[612] Resolution on the Special Protection for Indigenous Populations. Action to Combat Racism and Racial Discrimination, OAS/Ser.L/V/II/.29 Doc 41 rev. 2, March 13, 1973.

[613] *Ibid*. See also MacKay, Fergus, *supra* note 16, p. 17.

[614] Organización de los Estados Americanos Informe Anual de la Comisión Interamericana de Derechos Humanos 1984-1985. Capitulo III – Resoluciones Relatinas a Casos Individuales. Caso Nº 7615 (Brasil). Resolución Nº 12/85. OEA/Ser.L/V/II.66 Available at: https://www.escr-net.org/sites/default/files/ICHR_Report_No_12_85.html

> human beings through the destruction of their cultural identity and individuality as indigenous peoples.[615]

The *Report on the Situation of Human Rights in Ecuador*[616], issued by the IACHR in 1997, once again highlighted the necessity for special protection of indigenous peoples and affirmed that:

> [W]ithin international law generally, and Inter-American law specifically, special protections for indigenous peoples may be required for them to exercise their rights fully and equally with the rest of the population. Additionally, special protections for indigenous peoples may be required to ensure their physical and cultural survival a right protected in a range of international instruments and conventions.[617]

The *1997 Report on the Situation of Human Rights in Brazil* addresses the issue of indigenous lands related to the continuous threats to the legal registration and effective possession of the lands as a result of illegal invasions for the exploration of wood, mining, agriculture, the settlement of non-indigenous, and the development of infrastructure projects. The IACHR recommended the demarcation and the legal recognition of ownership, respecting the indigenous ancestral institutions and customs.[618]

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[615] *Ibid.*
[616] Report on The Situation of Human Rights in Ecuador, OEA/Ser.L/V/II.96, Doc. 10 rev. 1, 24 April 1997
[617] *Ibid.*
[618] Report on The Situation of Human Rights in Brazil, OEA/Ser.L/V/II.97, Doc. 29 rev.1, 29 September 1997. Available at: http://www.cidh.org/countryrep/brazil-eng/chaper%206%20.htm

Similarly, in the *Report on the Situation of Human Rights in Peru,* the IACRH analyses circumstances related to indigenous lands and states that:

> Land, for the indigenous peoples, is a condition of individual security and liaison with the group. The recovery, recognition, demarcation, and registration of the lands represents essential rights for cultural survival and for maintaining the community's integrity.[619]

The 2000 Peru Report was the result of an on-site visit carried out by the Commission and regards indigenous lands; it was concluded that the domestic legal instruments do not provide the indigenous communities legal stability over their territories. Thus, the IACHR recommended adopting measures to ensure the indigenous communities the effective legal demarcation, recognition, and issuance of land titles.[620]

Following the steps of the UN System regarding indigenous peoples' issues, the General Assembly of the OAS enacted Resolution 1022[621] in 1989, urging the Commission to draft a legal document concerning the rights of indigenous peoples.[622] In 1997, the IACHR approved the *Proposed American Declaration on the Rights of Indigenous Peoples*[623], marking a significant achievement throughout

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619 Second Report on the Situation of Human Rights in Peru, OEA/Ser.L/V/II.106, Doc. 59 rev. June 2, 2000. Available at: http://www.cidh.org/countryrep/, peru2000en/chapter10.htm

620 *Ibid.*

621 Report of the Inter-American Commission on Human Rights. AG/RES.1022(XIX-0/89). Resolution adopted at the Ninth Plenary Session, held in November 18, 1989. Available at: https://www.oas.org/en/sare/documents/res-1022-89-en.pdf

622 Draft American Declaration on the Rights of Indigenous Peoples.

623 Proposed American Declaration on the Rights of Indigenous Peoples, approved by the IACHR on February 26, 1997. Available at: http://www.cidh.oas.org/Indigenas/Indigenas.en.01/Preamble.htm

its efforts to promote the observance and preservation of indigenous peoples' human rights in the Americas.[624]

The American Declaration on the Rights of Indigenous Peoples[625] was adopted after nearly 20 years of negotiations. It represents a comprehensive regional statement of the rights of the indigenous peoples of America, and while it is not a binding document stating obligations to states, it reflects current progressive views on indigenous peoples.[626]

ii. Inter-American Court on Human Rights

The creation of the Inter-American Court on Human Rights resulted from adopting the American Convention on Human Rights in 1969. The Court's organization, competence, functions, and process are determined by Chapter VIII (arts. 52 to 69).[627] The Court, also known as the Court of San José, by virtue of its settlement, began to be established by the member states only in 1978 when the Convention entered into force.[628]

The Inter-American Court of Human Rights is an autonomous judicial institution with contentious and advisory jurisdiction.[629] It is important to note that recognizing their contentious jurisdiction is not mandatory for the Convention's

[624] Organization of American States Report on the Human Rights Situation of the Indigenous Peoples of the Americas. (2000). Chapter II – Preparatory Documents for the Draf American Declaration of Indigenous Peoples. Available at: http://www.cidh.org/Indigenas/chap.2.htm

[625] American Declaration on the Rights of Indigenous Peoples : AG/RES.2888 (XLVI-O/16) : (Adopted at the thirds plenary session, held on June 15, 2016). Available at: https://www.oas.org/en/sare/documents/DecAmIND.pdf

[626] Panzironi, Francesca, *supra* note 349.

[627] American Convention on Human Rights.

[628] Matos, Mariana Monteiro de, *supra* note 586, p. 27. See also: Ramos, André de Carvalho, *supra* note 601, p. 368.

[629] Matos, Mariana Monteiro de, *supra* note 586, p. 28-29. In the advisory jurisdiction, the IACtHR is able to issue non-binding opinions or binding advisory opinions.

state parties. Thus, a State can ratify the ACHR and adopt the contentious jurisdiction of the IACtHR since such recognition is an optional clause of the Convention. [630] The State must recognize the contentious jurisdiction by a specific declaration for any and all cases [631] or even for only one specific case.[632]

Regarding the contentious and advisory competence of the IACtHR, Héctor Fix-Zamudio stated that the Inter-American Court has two essential attributions, mentioned by Articles 1 and 2. An advisory attribution is connected to the interpretation of the American Convention and other human rights treaties adopted by the American States. Moreover, jurisdictional attribution is related to the disputes that emerge from the interpretation or application of the Convention.[633]

To protect indigenous peoples' land rights, the IACtHR produced substantial jurisprudence on appropriate and effective redress procedures for indigenous peoples. Consequently, it imposed that governments take steps to give effect to the property rights of indigenous peoples, including the modification and enactment of domestic legislation.[634]

The Advisory Opinion 22/16, responsible for clarifying the legal capacity of collective entities in the Inter-American Human Rights System, also gave an

630 Ramos, André de Carvalho, *supra* note 601, p. 476.
631 ACHR, Art. 62.
632 Ramos, André de Carvalho, *supra* note 601, p. 476.
633 Héctor Fix-Zamudio, *supra* note 609, p. 164.
634 Matos, Mariana Monteiro de, *supra* note 586, p. 22. See also: Cuadernillo de Jurisprudencia de la Corte Interamericana de Derechos Humanos No. 11: Pueblos Indígenas y Tribales (2018).

opinion about the indigenous peoples, providing that indigenous people can access the Court according to the established terms.[635] The IACtHR decided:

> [A]s provided by several international legal instruments to which the States of the inter-American system are parties, and some of their national legislation, the indigenous and tribal communities, because they are in a particular situation, must be considered as holders of certain human rights. Additionally, this is explained by the fact that, in the case of indigenous peoples, their identity and certain individual rights, such as the right to property or to their territory, can be exercised only through the community to which they belong.[636]

> [T]hat the indigenous and tribal communities are entitled to some of the rights protected under the Convention and, therefore, can access the Inter-American system. Therefore, the Court finds no reason to depart from the criteria given on the matter in its case law and establishes that such aforementioned communities can directly access the Inter-American system, as they have been doing in recent years, in the search for protection of their rights and those of their

[635] Inter-American Court of Human Rights. Advisory Opinion 22/16 "Indigenous and tribal communities are holders of the rights protected in the Convention, and therefore can access the inter-American system, in the terms established in paragraphs 72 to 84 of this Advisory Opinion."
[636] *Ibid*, para. 83.

members, and it is not necessary for each member to appear individually for this purpose.[637]

However, despite Advisory Opinion 22/16[638] asserting that indigenous peoples can directly access the Court, it does not mean they can start a contentious case before the Court. According to Article 61 of the American Convention, only the Inter-American Commission and the States parties may submit a case to the Inter-American Court.[639] Therefore, individuals do not have the legitimacy to initiate a contentious case directly. Thus, individuals depend on the Commission or another State (actio popularis) for their claims to reach the Inter-American Court. This is an act of international responsibility in which passive legitimacy always belongs to the State since the Inter-American Court does not judge people.[640]

It is essential to mention that the victim can request a provisional measure directly from the Inter-American Court during the proceedings. Thus, the victim has procedural rights, provided that the Commission initiated the proceedings. If the Commission has not yet reached the Court, only the Commission itself can request a provisional measure.[641]

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637 *Ibid*, para. 84.
638 *Ibid.*
639 ACHR, Art. 61. 1. Only the States Parties and the Commission shall have the right to submit a case to the Court.
640 Ramos, André de Carvalho, *supra* note 601, p. 461. See also: Carvalho Ramos, André de Carvalho, *supra* note 608.
641 ACHR, Art. 63.2. In cases of extreme gravity and urgency, and when necessary to avoid irreparable damage to persons, the Court shall adopt such provisional measures as it deems pertinent in matters it has under consideration. With respect to a case not yet submitted to the Court, it may act at the request of the Commission.

iii. Inter-American Human Rights System and Brazil

The Brazilian State bound itself to the obligations foreseen in the American Convention on Human Rights when it was ratified in 1992. However, it was only in 1998 that recognized the mandatory litigation jurisdiction of the Inter-American Court of Human Rights for all cases relating to the interpretation and application of the Convention, according to Article 62 of the same.[642] Since then, Brazil has been internationally committed to respecting and complying with the decisions from the jurisdictional activity of the Inter-American Court on Human Rights.

The main consequences of the declaration of recognition of this mandatory litigation jurisdiction are two. The first one is that its decisions will always be able to bind and hold the Brazilian State responsible for any violation of Human Rights provided for in the American Convention on Human Rights and arising from the State's own conduct, which can be omissive or commissive. Considering this, Article 67 provides that the decisions are final and cannot be appealed,[643] and Article 68 states that the States parties must comply with the judgments to which they are parties.[644] The second major consequence is that Brazil must observe and

[642] ACHR, Art. 62 1. A State Party may, upon depositing its instrument of ratification or adherence to this Convention, or at any subsequent time, declare that it recognizes as binding, ipso facto, and not requiring special agreement, the jurisdiction of the Court on all matters relating to the interpretation or application of this Convention. 2. Such declaration may be made unconditionally, on the condition of reciprocity, for a specified period, or for specific cases. It shall be presented to the Secretary General of the Organization, who shall transmit copies thereof to the other member states of the Organization and to the Secretary of the Court. 3. The jurisdiction of the Court shall comprise all cases concerning the interpretation and application of the provisions of this Convention that are submitted to it, provided that the States Parties to the case recognize or have recognized such jurisdiction, whether by special declaration pursuant to the preceding paragraphs, or by a special agreement.

[643] ACHR, Art. 67. The judgment of the Court shall be final and not subject to appeal. In case of disagreement as to the meaning or scope of the judgment, the Court shall interpret it at the request of any of the parties, provided the request is made within ninety days from the date of notification of the judgment.

[644] ACHR, Art. 68. 1. The States Parties to the Convention undertake to comply with the judgment of the Court in any case to which they are parties. 2. That part of a judgment that stipulates

comply with the domestic legal order with the human rights provided for in the American Convention on Human Rights and interpreted by the Inter-American Court. Thus, it has to use as a parameter the international view of this Court when interpreting Human Rights in its domestic courts; otherwise, it risks being held internationally responsible.

4.1.3 Indigenous Peoples' Land Claims under Property Rights

i. American Convention on Human Rights

To better understand the indigenous peoples' collective property rights, it is first necessary to define the general meaning of property. Thus, the Inter-American Court has defined "property" as:

> [T]hose material things that can be possessed, as well as any right which may be part of a person's patrimony; that concept includes all movables and non-movables, corporeal and incorporeal elements an any tangible object of having value.[645]
>
> The concept of property includes a great variety of interests that peoples can have over tangible and intangible good according to applicable norms or understandings from various sources. With regard to land and natural resources, property is

compensatory damages may be executed in the country concerned in accordance with domestic procedure governing the execution of judgments against the state.

[645] The Mayagna (Sumo) Awas Tingni Community v. Nicaragua, Judgment of August 31, 2001, Inter-Am. Ct. H.R. (Ser. C), No 79 (2001), para. 144. Available at: https://www.corteidh.or.cr/docs/casos/articulos/seriec_79_ing.pdf

> not limited to what is possessed under a normal title of exclusive domain. Within state legal systems, property exist, for example, through prescription and limited usufruct.[646]

The American Convention on Human Rights does not expressly include collective property right in its text. Thus, the indigenous peoples' rights to collective property are an interpretative construction of Article 21 on the right to private property. Therefore, analyzing the Court's jurisprudence is the primary key to understanding the right's genesis.

Article 21 of the American Convention on Human Rights ensures the right to private property and provides that:

> 1. Everyone has the right to the use and enjoyment of his property. The law may subordinate such use and enjoyment to the interest of society.
>
> 2. No one shall be deprived of his property except upon payment of just compensation, for reasons of public utility or social interest, and in the cases and according to the forms established by law.
>
> 3. Usury and any other form of exploitation of man by man shall be prohibited by law.[647]

[646] Final Written Arguments in the Case of Awas Tingni v. Nicaragua (2001). Inter-American Commission on Human Rights, para. 61.
[647] ACHR, Art. 21.

The IACtHR used several provisions to assist in interpreting Article 21 of the ACHR, to apply the right to collective property to the indigenous peoples' complaints of violating their traditional territory. An important dispositive taken into consideration for the interpretation was Article 2 of ACHR,[648] which imposes on the state members an obligation to enact legislative or other procedures necessary to apply the rights and freedoms mentioned in Article 1. The employment of Article 2 is mainly related to the interpretation regarding the reparations ruled by the Court. [649]

Article 1 of ACHR[650] is a crucial provision on the interpretation of property rights for indigenous peoples. Paragraph 2 defines the term "person" as every human being, which restricts the *ratione personae* of the ACHR. [651] For the traditional Inter-American Court's jurisprudence, the term "person" denotes that only individuals can claim human rights under the ACRH and are the only ones to be considered victims of human rights violations.[652] However, as will be explained in detail later on, in the landmark decision of the *Awas Tingni* case, the IACtHR, considering the distinct cultural and communal aspects of the indigenous peoples, ruled for the recognition of indigenous communities as victims of human rights violation. Two understandings can be drawn from paragraph 1, which provides that:

[648] ACHR, Art. 22: Where the exercise of any of the rights or freedoms referred to in Article 1 is not already ensured by legislative or other provisions, the States Parties undertake to adopt, in accordance with their constitutional processes and the provisions of this Convention, such legislative or other measures as may be necessary to give effect to those rights or freedoms.
[649] Matos, Mariana Monteiro de, *supra* note 586, p. 22.
[650] ACHR, Art. 1.
[651] ACHR, Art. 1 (2): For the purposes of this Convention, "person" means every human being.
[652] Advisory Opnion 14/94 (1994). Inter-American Court of Human Rights, para. 27.

> The States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition.[653]

First, the provision imposes a negative obligation to the members' states of non-violation of human rights. Second, it recognizes the principle of non-discrimination, stipulating that States must comply with their obligations without discrimination. Regarding indigenous peoples, the IACtHR has been interpreting the provision following the right to cultural identity.[654]

The interpretation of indigenous peoples' right to property should comprise the property regimes originated from their own customary or traditional land occupation, regardless of the property regimes established officially by the States.[655] Thus, the recognition of indigenous people's property rights without the inclusion of the indigenous property regimes could be considered a discriminatory

[653] ACHR, Art. 1 (1).
[654] Comunidad Indígena Yakye Axa y. Paraguay (2005) Series C No. 125, Inter-American Court of Human Rights, para. 51.
[655] S. James Anaya & Jr. Robert A. Williams, "The Protection of Indigenous Peoples' Rights Over Lands and Natural Resources under the Inter-American Human Rights System", *Harvard Human Rights Journal*, Vol. 14, 2001, p. 33.

application of the property right; hence, a violation of the principle of non-discrimination enshrined in Article 1 (1) of ACHR. [656]

This interpretative *modus operandi* is endorsed by international instruments, corroborating the importance of international views on considering traditional land tenure regimes in the contemporary human rights framework.[657]

ii. American Declaration on the Rights of Indigenous Peoples

As a result of almost two decades of draft process for creating a document for the promotion and protection of the rights of indigenous peoples in the Americas, the General Assembly of the OAS approved unanimously in 2016 the American Declaration on the Rights of Indigenous Peoples.[658]

It is a soft law instrument, and despite not having legal force, it can guide the interpretation of legal instruments regarding indigenous issues, such as the American Convention on Human Rights. The ADRIP elaboration process had the participation of indigenous peoples and was grounded on the recognition of the contribution of indigenous peoples to the development, plurality, and cultural diversity of the Americas.[659] Furthermore, the Declaration aims to respect and

[656] Proposed American Declaration on the Rights of Indigenous Peoples, approved by the Inter-American Commission on Human Rights on February 26, 1997, 95th Regular Session, OEA/Ser/L/V/.II.95 Doc.6 (1997). Available at: http://www.summit-americas.org/Indigenous/Indigenous-Declaration-end.htm

[657] Maya Indigenous Community of the Toledo District v. Belize, Case 12.053, Report No. 40/04, Inter-Am. Ct. H. R., OEA/Ser.L/V/II. 122Doc. 5 rev. 1 at 727, 2004, para. 118.

[658] Nancy Yáñez Fuenzalida, "OAS: Regressive elements in the American Declaration", *Indigenous Work Group for Indigenous Affairs* (IWGIA). Available: https://iwgia.org/en/news/2422-oas-regressive-elements-in-the-american-declaratio.html. See also: Ramos, André de Carvalho, *supra* note 601, p. 415.

[659] Ramos, André de Carvalho, *supra* note 601, p. 415.

promote the rights of indigenous peoples in light of their political, economic, social, cultural, spiritual, historical, and philosophical perspectives.[660]

Article 25 of the American Declaration on the Rights of Indigenous Peoples provides for the traditional forms of property and cultural survival, which includes comprises the right to land, territory, and resources,[661] and its content is similar to the Articles 25 – 27 of the United Nations Declaration on the Rights of Indigenous Peoples.[662]

Article 25 (1) of the ADRIP, similar to Article 13 of ILO N. 169[663] and article 25 of the UNDRIP, [664] recognizes the indigenous peoples' spiritual relationship with their lands and states that:

> Indigenous peoples have the right to maintain and strengthen their distinctive spiritual, cultural, and material relationship with their lands, territories, and resources and to uphold their responsibilities to preserve them for themselves and for future generations.

It is valid to mention that ADRIP, unlike the UNDRIP, included the term "material" in its text. During the UNDRIP draft process, the term was excluded

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660 *Ibid.*
661 ADRIP, Art.25.
662 UNDRIP, Arts. 25 – 27.
663 ILO Convention N. 169, Art. 13: States shall respect the special importance for the cultures and spiritual values of the peoples concerned of their relationship with the lands or territories, or both as applicable, which they occupy or otherwise use, and in particular the collective aspects of this relationship.
664 UNDRIP, Art. 25: Indigenous peoples have the right to maintain and strengthen their distinctive spiritual relationship with their traditionally owned or otherwise occupied and used lands, territories, waters and coastal seas and other resources and to uphold their responsibilities to future generations in this regard.

because some States[665] understood that such an expression could imply a right for indigenous people to take physical possession of lands that now are owned by others.[666]

Furthermore, paragraph 1 implies that indigenous peoples are considered environmental stewards[667] through the right to "*uphold responsibilities to preserve their lands for themselves and for future generations."*[668] Regarding the role of the indigenous peoples in environmental preservation and their right to promote and establish actions to preserve their lands, territories, and resources, Article 25 (1) of ADRIP is aligned with Article 8 (j) of the Convention on Biological Diversity[669] and with Principle 22 of the Rio Declaration on Environment and Development.[670]

Paragraph 2 of Article 25 of ADRIP repeats the content of Article 26 (1) of UNDRIP[671] and recognizes the indigenous peoples' "*right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or*

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665 Australia, Canada, New Zealand, and the United States 'raised the question of third party interests' with regard to Art 25. However, Indigenous peoples and a number of States were comfortable with the inclusion of 'material' in the text of Art 25. UNCHR, Report of the Working Group Established in Accordance with Commission on Human Rights Resolution 1995/32, UN Doc E/CN.4/2003/92 (6 January 2003), paras 28, 29.

666 Fitzmaurice, Malgosia, *supra* note 362, p. 230. See also: International Law Association, *Interim Report on the Rights of Indigenous Peoples*, The Hague Conference (2010), at 52

667 Matos, Mariana Monteiro de, *supra* note 586, p. 25.

668 ADRIP Art. 25 (1).

669 Convention on Biological Diversity, Art. 8 (j): Each Contracting Party shall, as far as possible and as appropriate: Subject to its national legislation, respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity and promote their wider application with the approval and involvement of the holders of such knowledge, innovations and practices and encourage the equitable sharing of the benefits arising from the utilization of such knowledge, innovations and practices..

670 Rio Declaration on Environment and Development - Principle 22: Indigenous people and their communities and other local communities have a vital role in environmental management and development because of their knowledge and traditional practices. States should recognize and duly support their identity, culture and interests and enable their effective participation in the achievement of sustainable development.

671 UNDRIP, Art. 26 (1): Indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired.

acquired."[672] Article 25 (3) of ADRIP reproduces Article 26 (2) of UNDRIP[673] and provides the right to own, use, develop, and control their territories and resources, [674] reflecting the concept that lands and natural resources are intertwined.[675] Article 25 (4) of ADRIP duplicates Article 26 (3) of UNDRIP[676] and imposes the obligation on States to establish legal recognition and protection of the lands cited in paragraphs 2 and 3 of the provision. It provides that:

> States shall give legal recognition and protection to these lands, territories and resources. Such recognition shall be conducted with due respect to the customs, traditions and land tenure systems of the indigenous peoples concerned.[677]

Article 25 (5)[678] establishes a state obligation to institute particular systems appropriated for recognizing indigenous property and the demarcation and titling of their lands. This provision is a complement to the state obligation imposed by paragraph 4. Furthermore, the provision is an advanced version of Article 14 of ILO Convention N. 169[679] since the ILO provision only states for the recognition of the lands, not mentioning actions for the demarcation and titling of indigenous

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[672] ADRIP Art. 25 (2).
[673] UNDRIP, Art. 26 (2): Indigenous peoples have the right to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired.
[674] ADRIP, Art. 25 (3)
[675] Matos, Mariana Monteiro de, *supra* note 586, p. 25.
[676] UNDRIP, Art. 26 (1)
[677] ADRIP, Art. 25 (4)
[678] ADRIP, Art. 25 (5): Indigenous peoples have the right to legal recognition of the various and particular modalities and forms of property, possession and ownership of their lands, territories, and resources, in accordance with the legal system of each State and the relevant international instruments. States shall establish special regimes appropriate for such recognition and for their effective demarcation or titling.
[679] ILO Convention N. 169, Art 14 (2): Governments shall take steps as necessary to identify the lands which the peoples concerned traditionally occupy, and to guarantee effective protection of their rights of ownership and possession.

lands. Important to mention that paragraph 5 is considered assimilationist for establishing that the right of indigenous peoples to legal recognition of their properties should observe national legislation and important international texts.[680]

iii. Cases

Comunidad Mayagna (Sumo) Awas Tingni vs. Nicarágua (2001)[681]

The *IACHR submitted the Comunidad Mayagna Awas Tingni case* to the IACtHR based on Nicaragua's violation of the rights to private property[682] and to judicial protection[683] due to the failure to demarcate the indigenous lands and consequently violating the *Awas Tingni* community's right to their ancestral lands, as well as access to natural resources.

The *Comunidad Mayagna Awas Tingni* case established an innovative interpretation regarding the individual and collective aspects of indigenous property, expanding the scope of protection provided by Article 21 of the ACHR; thus, it became applicable not only for the protection of private property but also concerning communal property, observing the particularities of the indigenous peoples' communities.[684] In addition, the Court established restrictions on third

680 Errico, Stefania, "The American Declaration on the Rights of Indigenous Peoples", *American Society in International Law* (ASIL), Vol. 21, Issue 7 (2017). Available at: https://www.asil.org/insights/volume/21/issue/7/american-declaration-rights-indigenous-peoples

681 Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua. Judgment of August 31, 2001 (Merits, Reparations and Costs). Inter-American Court of Human Rights. Available at: https://www.corteidh.or.cr/docs/casos/articulos/seriec_79_ing.pdf

682 ACHR, Art. 21.

683 ACHR, Art. 25.

684 Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua, para. 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

parties concerning granting rights to exploit natural resources in indigenous territories.[685]

The IACtHR recognized the inextricable relationship between indigenous and their land as the basis of their culture, spiritual life, traditions, identity, integrity, and survival. In the Court's perspective, the connection between indigenous peoples and their lands is not merely a matter of possession but a conjunction of material and immaterial elements that they must fully enjoy, including preserving their culture and transmitting their legacy to future generations through their lands.[686] Thus, it is recommended that such particularities must not be overlooked when dealing with indigenous properties.

The Court recognized the violation, by Nicaragua, of the rights mentioned above. It rules for adopting appropriate procedures to identify, demarcate, and title the lands belonging to the *Awas Tingni* community.[687] Through an evolving and

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members of the indigenous communities within the framework of communal property, which is also recognized by the Constitution of Nicaragua.

[685] Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua, para. 158: Abstain from granting or considering any concessions to utilize natural resources in the lands used and occupied by Awas Tingni, until the issue of land tenure affecting Awas Tingni has been resolved, or until a specific agreement has been reached on this matter between the State and the Community

[686] Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua, para. 149. Given the characteristics of the instant case, some specifications are required on the concept of property in indigenous communities. Among indigenous peoples there is a communitarian tradition regarding a communal form of collective property of the land, in the sense that ownership of the land is not centered on an individual but rather on the group and its community. Indigenous groups, by the fact of their very existence, have the right to live freely in their own territory; the close ties of indigenous people with the land must be recognized and understood as the fundamental basis of their cultures, their spiritual life, their integrity, and their economic survival. For indigenous communities, relations to the land are not merely a matter of possession and production but a material and spiritual element which they must fully enjoy, even to preserve their cultural legacy and transmit it to future generations.

[687] Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua, para. 164 […] this Court considers that the State must adopt the legislative, administrative, and any other measures required to create an effective mechanism for delimitation, demarcation, and titling of the property of indigenous communities, in accordance with their customary law, values, customs and mores. Furthermore, as a consequence of the aforementioned violations of rights protected by the Convention in the instant case, the Court rules that the State must carry out the delimitation, demarcation, and titling of the

dynamic interpretation approach, the IACtHR recognized the rights of indigenous peoples to collective ownership of land as a communal tradition and as a fundamental and basic right to their culture, spiritual life, integrity, and economic survival.

The IACtHR stated that, among the indigenous people, there is a community relationship regarding a communal form of collective ownership of land, in the sense that their belonging is not centered on the individual but on the group and its community. Finally, the need to give due attention to indigenous peoples' right to cultural identity is emphasized.

Comunidad Sawhoyamaxa vs. Paraguay (2006)[688]

The case was submitted to the IACtHR by the Inter-American Commission because the State of Paraguay had not guaranteed the right to traditional lands, which the community had claimed since 1991. The community and its members' inability to access land resulted in food and medical vulnerability, threatening their survival and integrity. Inter-American Court ruled that Paraguay violated their right to life,[689] personal integrity, judicial guarantees, property rights, and judicial

corresponding lands of the members of the Awas Tingni Community, within a maximum term of 15 months, with full participation by the Community and taking into account its customary law, values, customs and mores.

[688] Comunidad Sawhoyamaxa vs. Paraguay (2006) Merits, Reparations and Costs. Judgment of March 29, 2006. Series C No. 146. Available at: https://www.corteidh.or.cr/docs/casos/articulos/seriec_146_ing.pdf

[689] ACHR, Art. 4.

protection[690]and determined the reparation for material and immaterial damages suffered by the *Sawhoyamaxa* indigenous community.[691]

Paraguay argued that the lands claimed by the indigenous community had been private for many years and, therefore, could no longer be the subject of discussion. However, the Court stated that the claims raised by the indigenous peoples regarding the land could not be prima facie dismissed only because a third party was privately helping such lands.[692] This view expresses the idea contained in the ILO Convention N. 169 and the UNDRIP, which allows the indigenous peoples to recover the traditional lands they are not in possession of at the moment. Thus, the Court recognized the violation of the right to property of indigenous peoples under Article 21 of the American Convention.[693]

Regarding the right to life violation, the Commission argued that Paraguay had violated its obligation to guarantee the right to life of the indigenous members of that community. The lack of recognition and protection of indigenous lands by the State forced the indigenous peoples to live in a vulnerable condition and deprived them of access to their traditional livelihood.[694] The Court recognized the violation of Article 4, paragraph 1 of the American Convention since Paraguay has

690 ACHR, Art. 25.

691 Comunidad Sawhoyamaxa vs. Paraguay, para. 1. The State violated the rights to Fair Trial and Judicial Protection enshrined in Articles 8 and 25, respectively, of the American Convention on Human Rights, relating to Articles 1(1) and 2 thereof, to the detriment of the members of the Sawhoyamaxa Indigenous Community, as set forth in paragraphs 87 to 89 and 93 to 112 herein. 2. The State violated the right to Property enshrined in Article 21 of the American Convention on Human Rights, relating to Articles 1(1) and 2 thereof, to the detriment of the members of the Sawhoyamaxa Indigenous Community, as set forth in paragraphs 117 to 144 herein. 3. The State violated the right to Life enshrined in Article 4(1) of the American Convention on Human Rights, relating to Articles 1(1) and 19 thereof, to the detriment of the members of the Sawhoyamaxa Indigenous Community, as set forth in paragraphs 150 to 178 herein. 4. It is not necessary to rule on the right to Personal Integrity, as set forth in paragraph 185 herein.

692 Comunidad Sawhoyamaxa vs. Paraguay, para. 138.

693 Comunidad Sawhoyamaxa vs. Paraguay, para. 144.

694 Comunidad Sawhoyamaxa vs. Paraguay, para. 145.a.

not adopted the necessary measures to prevent or avoid risking the right to life of the indigenous peoples.[695]

In the end, the Court imposed an obligation to the State to identify, delimit, demarcate, title, and hand over traditional lands to that community, adopting all measures for this purpose,[696] as well as adding the obligation to create a fund for the development of that community.[697]An essential argument of the sentence was that the effective guarantee of these rights demanded that the State recognize and consider the "own characteristics" that differentiated this community from the dominant society, shaping its own cultural identity.

Pueblo Saramaka vs. Suriname (2007)[698]

The conflicts between the Pueblo Saramaka and Suriname started in the 1960s. At the time, part of the territory occupied by the Samaraka tribe was flooded to construct the Afobaka Hydroelectric Power Plant, forcing them to be forcibly removed from their traditional lands. In addition, the government also granted part of the Saramaka territory to third parties for logging. The forced dispossession resulted in a negative social-environmental impact and the deprivation of subsistence resources, which drove the Saramaka community to a vulnerable

[695] Comunidad Sawhoyamaxa vs. Paraguay, para. 178.
[696] Comunidad Sawhoyamaxa vs. Paraguay, para. 239. […]the State shall individualize, demarcate, delimit, confer title to and make over for no consideration the traditional lands to the members of the Sawhoyamaxa Community or, were this impossible, alternative lands, as set forth in paragraphs 210 to 215 herein, no later than three years from the date of the instant Judgment.
[697] Comunidad Sawhoyamaxa vs. Paraguay 240. Furthermore, the State shall implement a community development fund within two years after making over the lands (supra para. 224 to 227).
[698] Saramaka People vs. Suriname. Preliminary Objections, Merits, Reparations, and Costs. Judgment of November 28, 2007 Series C No. 172. Available at: https://www.corteidh.or.cr/docs/casos/articulos/seriec_172_ing.pdf

livelihood.[699] Finally, on June 23, 2006, the Inter-American Commission submitted before the Court an application requesting the international responsibility of Suriname for the violation of Articles 21 (Right to Property) and 25 (Right to Judicial Protection of the American Convention.[700]

According to the Commission, based on Article 21 of the Convention, States must respect the indigenous's special relationship with their territory, which is connected to their social, cultural, and economic practices.[701] Thus, Suriname has a positive obligation to apply measures to guarantee that the right to traditional territories is being observed.[702] Furthermore, the Commission argued that the indigenous also have the right to use and enjoy the natural resources within their lands, which is connected to the right to property under Article 21 of the Convention. However, Suriname argued that all land rights belong to the State, giving them the full power to dispose of these resources to third parties.[703]

The Inter-American Court decided that indigenous cultural and economic survival depends on their access to and use of their lands and the natural resources within it, based on Article 21.[704] Moreover, the Court determined that States must consult indigenous peoples regarding high-impact projects to exploit natural resources in their traditional land or affect their communal life. The Court established parameters for the consultation that must be observed: free, prior, and

[699] Saramaka People vs. Suriname, para. 1 and 3.
[700] Saramaka People vs. Suriname, para. 1.
[701] Saramaka People vs. Suriname. Preliminary Objections, Merits, Reparations, and Costs. Judgment of November 28, 2007 Series C No. 172. Para. 83
[702] Saramaka People vs. Suriname. Preliminary Objections, Merits, Reparations, and Costs. Judgment of November 28, 2007 Series C No. 172. Para. 84
[703] Saramaka People vs. Suriname. Preliminary Objections, Merits, Reparations, and Costs. Judgment of November 28, 2007 Series C No. 172. Para. 120
[704] Saramaka People vs. Suriname. Preliminary Objections, Merits, Reparations, and Costs. Judgment of November 28, 2007 Series C No. 172. Para. 120

informed consent; guarantee access to information on social and environmental impacts; and respect for traditional community decision-making methods[705].

Comunidad Yakye Axa vs. Paraguay (2005)[706]

The case of the Yakye Axa Indigenous Community v. Paraguay was submitted to the Court by the Inter-American Commission because the State of Paraguay had violated the rights to life; [707] judicial guarantees; [708] right to property;[709] and judicial protection.[710] The Court verified that the offense to the right to ancestral and collective land resulted in food, medical, and health vulnerabilities of the community and its members, threatening their survival and integrity.

The IACtHR affirmed the special significance of collective ownership of ancestral lands for indigenous peoples, including the relation with the preservation

[705] Pueblo Saramaka vs. Suriname 133. the Court has stated that in ensuring the effective participation of members of the Saramaka people in development or investment plans within their territory, the State has a duty to actively consult with said community according to their customs and traditions (supra para. 129). This duty requires the State to both accept and disseminate information, and entails constant communication between the parties. These consultations must be in good faith, through culturally appropriate procedures and with the objective of reaching an agreement. Furthermore, the Saramakas must be consulted, in accordance with their own traditions, at the early stages of a development or investment plan, not only when the need arises to obtain approval from the community, if such is the case. Early notice provides time for internal discussion within communities and for proper feedback to the State. The State must also ensure that members of the Saramaka people are aware of possible risks, including environmental and health risks, in order that the proposed development or investment plan is accepted knowingly and voluntarily. Finally, consultation should take account of the Saramaka people's traditional methods of decision-making

[706] Case of the Indigenous Community Yakye Axa v. Paraguay.

[707] ACHR Art. 4.

[708] ACHR Art. 8.

[709] ACHR Art. 21.

[710] Comunidad Yakye Axa vs. Paraguay, para. 179: In accordance with the analysis in the previous chapters, the Court has found, based on the facts of the case, a violation of Article 4(1) of the American Convention, in combination with Article 1(1) of that same Convention, and of Articles 21, 8 and 25 of the American Convention, in combination with Articles 1(1) and 2 of that same Convention, to the detriment of the members of the Yakye Axa Indigenous Community.

of their cultural identity and its perpetuation to future generations.[711] It was stressed that the culture of the members of the indigenous community corresponds to a particular way of being, seeing, and acting in the world, built on their relationship with their traditional lands. Furthermore, it was pointed out that land, for indigenous peoples, is not just a means of subsistence but an integral element of their cosmovision, their religiosity, and their cultural identity since the land would be closely related to its traditions and oral expressions, customs and languages, arts and rituals, as well as its relationship with nature, culinary arts, and customary law.[712]

The central arguments of the sentence were based on a broad conception of the right to life, which is not limited to protection against arbitrary deprivation but demands positive measures for the full enjoyment of a dignified life and the right to cultural identity. Regarding the right to cultural identity, the Court alluded to the need to adopt an evolving and dynamic interpretation, as indicated by the jurisprudence of the European Court, in the sense of making the Convention a living instrument capable of accompanying temporal evolutions and the condition of current life.[713] The Court concluded that cultural identity is an added component

[711] Comunidad Yakye Axa vs. Paraguay, para. 203. Likewise, the Court notes that the special significance of the land for indigenous peoples in general, and for the Yakye Axa Community in particular (supra para. 137 and 154), entails that any denial of the enjoyment or exercise of their territorial rights is detrimental to values that are very representative for the members of said peoples, who are at risk of losing or suffering irreparable damage to their cultural identity and life and to the cultural heritage to be passed on to future generations.

[712] Comunidad Yakye Axa vs. Paraguay, para. 158 (j) […]the human, spiritual and cultural tie of the Yakye Axa Community and of its members with their ancestral land is deeply felt by them. The ancestral land of the Yakye Axa Community and the habitat that its members have humanized in this land, in which they have shifted around, molds their past, their present, and their future. It defines the identity of the Community and of its members and it represents the place where it is possible for them to imagine the realization of life aspirations that respect their cosmogony and their cultural practices.

[713] Comunidad Yakye Axa vs. Paraguay, para. 125. Previously this Court192 as well as the European Court of Human Rights193 have asserted that human rights are live instruments, whose interpretation must go hand in hand with evolution of the times and of current living conditions. Said evolutionary

to the right to life *lato sensu*. In this way, if cultural identity is violated, life is inevitably violated.[714]

Povo Indígena Xucuru e seus membros vs. Brasil (2018)[715]

Xucuru Indigenous People and their members v. Brazil case refer to the violation of the right to collective property of the Xucuru indigenous people as a result of the delay of more than sixteen years in the administrative process of recognition, titling, demarcation, and delimitation of their ancestral lands and territories; and the delay in the full regularization of these lands and territories, so that the aforementioned indigenous people can peacefully exercise this right.

The case also encompasses the violation of the rights to judicial guarantees and judicial protection because of the failure to comply with the guarantee of a reasonable period of time in the aforementioned administrative proceeding, as well as the delay in resolving civil lawsuits initiated by non-indigenous people concerning part of the ancestral lands and territories of the Xucuru indigenous people.[716]

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interpretation is consistent with the general rules of interpretation embodied in Article 29 of the American Convention, as well as those set forth in the Vienna Convention on Treaty Law.

[714] Piovesan, Flávia, *supra* note 609, p. 146-147.

[715] Case of the Xucuru Indigenous People and its members v. Brazil. Preliminary Objections, Merits, Reparations and Costs. Judgment of February 5, 2017. Series C No. 346. Available at: https://www.corteidh.or.cr/docs/casos/articulos/seriec_346_esp.pdf

[716] Case of the Xucuru Indigenous People and its members v. Brazil, para. 162. Por lo tanto, el Tribunal concluye que el proceso administrativo de titulación, demarcación y saneamiento del territorio indígena Xucuru fue parcialmente ineficaz. Por otra parte, la demora en la resolución de las acciones interpuestas por terceros no indígenas afectó la seguridad jurídica del derecho de propiedad del pueblo indígena Xucuru. En ese sentido, la Corte considera que el Estado violó el derecho a la protección judicial, así como el derecho a la propiedad colectiva, reconocidos en los artículos 25 y 21 de la Convención, en relación con el artículo 1.1 del mismo instrumento

The Inter-American Court, applying the dynamic and evolutionary interpretation approach to the protection of the rights of indigenous peoples, endorses the right to respect their specific and singular cultural identity. Revisits the right to private property[717] to ensure the right of collective and communal ownership of land as the basis of indigenous peoples' spiritual and cultural life, as well as their own integrity and economic survival.[718]

4.1.4 Summary

Regarding the indigenous peoples, the Inter-American System is one of the most developed legal frameworks. As mentioned in Chapter 1, the debates about the indigenous peoples started in the Americas; thus, since the beginning, the legal system has brought discussions about the topic. However, it is essential to point out that the main legal documents under the Inter-American System (American Declaration of the Rights and Duties of the Man and the American Convention on Human Rights) do not include indigenous peoples in their legal text. This situation pushed the system to use interpretative tools to deal with indigenous issues. Thus,

[717] ACHR, Art. 21.

[718] Case of the Xucuru Indigenous People and its members v. Brazil, para. 115. La Corte recuerda que el artículo 21 de la Convención Americana protege la estrecha vinculación que los pueblos indígenas guardan con sus tierras, así como con sus recursos naturales y los elementos incorporales que se desprendan de ellos. Entre los pueblos indígenas y tribales existe una tradición comunitaria sobre una forma comunal de la propiedad colectiva de la tierra, en el sentido de que la pertenencia de ésta no se centra en un individuo sino en el grupo y su comunidad. Tales nociones del dominio y de la posesión sobre las tierras no necesariamente corresponden a la concepción clásica de propiedad, pero la Corte ha establecido que merecen igual protección del artículo 21 de la Convención Americana. Desconocer las versiones específicas del derecho al uso y goce de los bienes, dadas por la cultura, usos, costumbres y creencias de cada pueblo, equivaldría a sostener que sólo existe una forma de usar y disponer de los bienes, lo que a su vez significaría hacer ilusoria la protección de tal disposición a estos colectivos1. Al desconocerse el derecho ancestral de los miembros de las comunidades indígenas sobre sus territorios, se podría estar afectando otros derechos básicos, como el derecho a la identidad cultural y la supervivencia misma de las comunidades indígenas y sus miembros

Advisory Opinions and jurisprudence are the most relevant and comprehensive instruments for protecting indigenous lands.

The main legal dispositive used for protecting indigenous collective lands under the Inter-American System is Article 21 of the American Convention. This provision does not mention the indigenous peoples nor include collective property right in its text, but through an interpretative construction, using general concepts about indigenous peoples, [719] legal standards available in international instruments,[720] and legal documents and jurisprudences from other international legal systems,[721] resulted in the possibility to apply the mentioned article regarding the indigenous peoples right to collective property.

Moreover, the interpretative construction of indigenous lands rights includes Article 1 of ACHR, which provides about the negative obligation of states of non-violation of human rights and recognizes the principle of non-discrimination, and together with Article 21 of the American Convention is interpreted considering the indigenous peoples' cultural identity.

The interpretation of the Inter-American System follows the concepts other international legal systems apply. Chapter 3 provided an overview of the adaptation movement used by UN human rights instruments to include the rights of indigenous peoples in their legal scope. Like the ICCPR and the ICERD, the Inter-American System used the dispositive of non-discrimination to include the

[719] Explained in Chapter 1.
[720] Explained in Chapter 2.
[721] Explained in Chapter 3.

indigenous peoples.[722] Furthermore, similarly to the ICESCR, which connects the indigenous lands to the right to appropriate quality of life,[723] right to adequate housing[724] , and right to adequate food[725], the Inter-American system uses Article 4 of the ACHR on the right to life to create a connection about the rights to access and use of indigenous peoples to their lands and natural resources, as a necessity for the subsistence of the indigenous peoples.

Important to mention that in 2016 the American Declaration on the Rights of Indigenous Peoples (ADRIP) was approved. Like the UNDRIP, the ADRIP is a soft law instrument to guide the interpretation of the legal instruments regarding the indigenous peoples. However, despite its adoption being considered a significant step forward for indigenous peoples under the jurisdiction of the Inter-American System, its application has not yet shown great relevance. The provisions contained in the Declaration reflect the text of the UNDRIP and the provisions of the ILO Convention N. 107 and 169, with only minor adaptations.

Furthermore, through the analysis of cases before the Inter-American Court, it is possible to understand the evolution of the indigenous peoples' land rights. Jurisprudence is the most widely used method for innovating interpretations and expanding the legal scope of the ACHR. The Comunidad Mayagna Awas Tingni case broke new ground by applying Article 21 concerning a collective property. In addition, it recognized the material and immaterial elements linked to the relationship of indigenous peoples with the land. The Comunidad Sawhoyamaxa

722 ICCPR, Art. 27 and ICERD Art. 5.
723 ICESCR, Art. 11. See also: General Comment N. 4.
724 *Ibid.*
725 *Ibid*. See also: General Comment N. 12

case connected the right to light and rights to the property since the deprivation of access to indigenous lands put its members in a vulnerable condition. In the Pueblo Saramaka case, more than recognizing the right to collective property, the Court established the parameters for consultation of indigenous peoples to avoid the forced dispossession and lack of access to their traditional lands and resources, which negatively impacts their cultural and physical survival. In the Comunidad Yakye case, the Court reaffirms the special significance of ancestral lands for preserving their cultural identity and its perpetuation for future generations. The Court demands not only protective measures against dispossession but also the establishment of positive measures to guarantee the enjoyment of the lands by the indigenous peoples. In the Xucuru case, the issue regarding the process of recognition, titling, demarcation, and delimitation of indigenous lands was analyzed, and the Court demanded the observation of a reasonable period of time for the competition of such administrative proceedings as a way to ensure the right of collective lands for the indigenous peoples.

In conclusion, the legal system again finds its way to protect indigenous peoples better. The Inter-American System, through the adaptation movement to improve its legal reach, uses several interpretation tools. This interpretative construction shows how human rights are connected, and even if the norm is not legally binding (soft law document or the state did not ratify the convention), the dispositive can be used for interpretation, breaking the wall between the human rights instruments.

4.2 Southeast Asia

Asia is the region with the largest population of indigenous peoples in the world, with more than 260 million people living in the area.[726] Southeast Asia has around 100 ~150 million people identifying themselves as indigenous.[727] However, this number can vary a lot since many states in the region do not recognize indigenous peoples, so they commonly are not considered in national censuses.[728]

Despite such expressive numbers, indigenous peoples in Southeast Asia do not receive as much attention and space from politicians and legal specialists compared to indigenous peoples from other regions.[729] However, the problems suffered by indigenous peoples in Asia are very similar to those of indigenous peoples all around the world since they also suffered from political domination, discrimination, and exploitation during colonial times, and this has been perpetuated until the present moment. A common issue that can be mentioned is the recognition and effective implementation of collective rights over their lands, territories, and resources.[730]

In this section, the view of Southeast Asian countries regarding the concept of indigenous peoples will be discussed. In addition, an overview of the issue of indigenous lands will be outlined. To better understand the approach used by Southeast Asian states concerning indigenous peoples, it is necessary to understand

[726] The rights of indigenous peoples in Asia. ILO. March 2017
[727] The Indigenous World 2022. 36th Edition (IWGIA), p. 646
[728] *Ibid.*
[729] Anna Meijkne, Byung Sook de, "Is There a Place for Minorities' and Indigenous Peoples' Rights within ASEAN?: Asian Values, ASEAN Values and the Protection of Southeast Asian Minorities and Indigenous peoples", *International Journal on Minority and Group Rights 17*, 2010, p. 75-110.
[730] "Status of Indigenous Peoples' lands, territories, and resources in Asia". *Asia Indigenous Peoples Pact* (AIPP), p. 6-7

"Asian values". Finally, the ASEAN system will be analyzed to discover how the indigenous issue is included.

4.2.1 Overview of Indigenous Peoples in Southeast Asia

Four perspectives can help us to draw a general description of indigenous peoples in Southeast Asia: geographical, economic, sociopolitical, and ideological.[731] Geographically, the indigenous peoples of Southeast Asia mostly live in the mountains, while the dominant society occupies the lowlands. In countries composed mainly of islands, indigenous peoples inhabit the outer islands, while the dominant group lives on the inner islands.[732] Economically, indigenous peoples' livelihoods are primarily based on agricultural activities on their inhabited lands.[733] Politically, they organize themselves in *"egalitarian or segmentary societies, or in petty chiefdoms, in which villages were politically, and to a large extent economically autonomous units.''*[734] At last, their ideology is based on indigenous peoples' religious beliefs and traditions.[735] In addition, it is essential to point out that Southeast Asia has a great cultural diversity concerning the indigenous community, containing hundreds of communities, each one of them with a distinct language, religious beliefs, livelihood systems, customary laws, and traditions.[736]

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731 Erni, Christian, "Indigenous Peoples in South and Southeast Asia: Between 20th Century Capitalism and Oriental Despotism" in Christian Erni, Indigenous Peoples in Asia, Copenhagen, IWGIA Publishers, 1996, p. 22.
732 *Ibid,* 22-23.
733 *Ibid,* 23.
734 *Ibid.*
735 *Ibid.*
736 "Status of Indigenous Peoples' lands, territories, and resources in Asia". Asia Indigenous Peoples Pact (AIPP), p. 6

i. Definition of Indigenous Peoples in Southeast Asia

The definition of indigenous peoples has been discussed for decades. During the negotiations for the adoption of ILO Convention N. 169 and UNDRIP, the search for an adequate definition and terminology was addressed as relevant, but in the end, it became evident that finding a definition to encompass such a wide range of indigenous peoples' cultures all around the world would be impossible.[737]

The term "indigenous peoples" is commonly used by the international community and mainly accepted by the western states; however, it is not a mandatory "official" terminology. Many Southeast Asian governments have applied different terminologies to refer to indigenous peoples, such as: "*ethnic minorities, hill tribes, tribal people, highland people, aboriginal people, native people*."[738] It is essential to mention that the indigenous peoples reject some terminologies because they carry the idea of "primitiveness" and "cultural inferiority", often with a pejorative tone.[739] The term "indigenous peoples" is quite controversial in Asia;[740] this is reflected by the fact that only five Asian states[741] officially adopted the term "indigenous peoples", two being Southeast Asian countries.[742] In addition to the question of which terminology to apply, many Southeast Asian states are reluctant to accept the entire concept of indigenous

737 Daes, Erica-Irene A, "Standard-Setting Activities: Evolution of Standards Concerning the Rights of Indigenous People", U.N. Doc. E/CN.4/Sub.2/AC.4/1996/2.
738 Asia Indigenous Peoples Pact, *supra* note 736, p. 7.
739 *Ibid.*
740 "Overview of State of Indigenous Peoples in Asia". Asia Indigenous Peoples Pact (AIPP), May, 201, p. 1-2.
741 The Philippines, Nepal, Cambodia, Japan and Taiwan.
742 Asia Indigenous Peoples Pact, *supra* note 736, p. 7.

peoples and often do not recognize the existence of these peoples within their borders.[743]

According to Benedict Kingsbury, three main arguments can explain the rejection of Asian states of the concept of indigenous peoples.[744] First, Asian governments claim that indigenous peoples are the outcome of European settler colonialism, mainly applied in the American continent, where colonizers removed indigenous communities from their lands. This colonialism model was not applied to the Asian region.[745] As the terminology "indigenous peoples" and the concept of indigenous are closely attached (but not exclusively) to the western colonialism patterns, Asian states consider the imposition of the concept of indigenous can be considered an act of neo-colonialism.[746] Second, Asian nations argue that during their process of decolonization, it was needed the implementation of a "national unity" policy[747] and the establishment of "*special rights and entitlements on the basis of being the earliest or original occupants might spur and legitimate chauvinist claims by groups".*[748]Third, Asian countries consider it impossible to identify initial or earlier occupation since the years of migration, integration, displacement, and other factors probably changed the configuration of the initial people.[749] Moreover, the lack of recognition of indigenous peoples creates

[743] Allen, Stephen, ''Establishing Autonomous Regimes in the Republic of China: The Salience of International Law for Taiwan's Indigenous Peoples", *Indigenous Law Journal 4*, 2005,p. 169-170

[744] Kingsbury, Benedict," The Applicability of the International Legal Concept of 'Indigenous People in Asia" in Joanne R. Bauer and Daniel A. Bell, eds., *The East Asian Challenge for Human Rights*, Cambridge, Cambridge University Press, 1999, p. 350.

[745] Allen, Stephen, *supra* note 743, p. 170.

[746] Kingsbury, Benedict, *supra* note 744, p. 351.

[747] Allen, Stephen, *supra* note 743, p. 170.

[748] Kingsbury, Benedict, *supra* note 744, p. 353.

[749] Kingsbury, Benedict, *supra* note 744, p. 352.

insecurity and concern for the indigenous peoples of the region, as this results in the denial of the application of rights specific to indigenous peoples.[750]

In 2007, one of the main international legal documents regarding indigenous peoples, the UNDRIP, was adopted. At the occasion, the entire Southeast Asia nations approved it on the ground of a common understanding among those states that the declaration did not apply to their respective states since either all or none of their population could be regarded as "indigenous".[751]

Despite most Asian states rejecting the idea of indigenous peoples, some countries[752] legally recognized and granted the status of indigenous peoples to individuals and communities within their territories. However, the level and type of procedure of this recognition differs between the states and can be applied through a constitution, domestic special law, court decisions, adoption of international instruments, or other measures.[753] However, the legal recognition does not ensure the full and effective application of individual and collective rights to the indigenous peoples.[754] Many times, Asian states apply some restrictions to the type of right to be recognized and limit the recognition regarding some particular indigenous peoples in their borders. In addition, indigenous rights are commonly

750 Asia Indigenous Peoples Pact, *supra* note 740, p. 5.
751 Micah F. Morton, "The Rising Politics of Indigeneity in Southeast Asia", *Trends in Southeast Asia*, No. 14, 2017, p. 11.
752 Malaysia, Philippines.
753 "Indigenous Peoples' Initiatives for Land Rights Recognition in Asia", Asia Indigenous Peoples Pact (AIPP), 2016, p. 4.
754 Asia Indigenous Peoples Pact, *supra* note 740, p. 3.

disregarded when clashing with state or private interests, usually related to the indigenous lands.[755]

ii. Indigenous Peoples and Lands Issues in Southeast Asia

One of the distinguishing characteristics of indigenous peoples is their deep spiritual connection to their lands.[756] The indigenous traditional lands are notably communal, and access and regulation are characterized by a high degree of democracy. For the indigenous communities, the importance of the lands goes beyond their subsistence; it is the foundation of their identity as communities and peoples.[757] The land is intergenerational because it has been handed down by ancestors and will be passed on to the future generation, and for this reason, the indigenous peoples have a strong feeling of duty over their lands.[758]

Indigenous peoples of Southeast Asia mostly reside in remote and poorly inhabited regions of their own states. Their collective lands and territories comprise an extensive area that contains natural resources, forests, biological variety, and cultural heritage,[759] including not only the lands they live and use for their subsistence but also the adjacent environments connected to the locations they occupy and otherwise use.[760]

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755 Asia Indigenous Peoples Pact, *supra* note 753, p. 7.
756 Cobo, Martínez, *supra* note 24.
757 In the report on "Indigenous peoples and their relationship to land", Mrs. Erica-Irene A. Daes, formal Chairperson of the United Nations Working Group on Indigenous Populations identified a number of elements unique to the indigenous peoples such as their profound relationship to the LTR that is collective and has various social, cultural, spiritual, economic and political dimensions and responsibilities. Daes, E. A. (2001). Indigenous peoples and their relationship to land., UN Doc E/CN.4/Sub.2/2001/2.
758 Asia Indigenous Peoples Pact, *supra* note 736, p. 12.
759 Asia Indigenous Peoples Pact, *supra* note 736, p. 11.
760 Asia Indigenous Peoples Pact, *supra* note 736, p. 11-12.

Southeast Asian countries mostly have legal systems based on colonial-era systems, which give them unrestricted authority over indigenous lands to distribute, regulate, and decide about land and resource ownership, use, control, and development. Furthermore, the states repeatedly disregard the historical and customary usage of lands and resources that indigenous peoples have cultivated and maintained for centuries, as well as their inherent rights and traditions.[761]

Moreover, the Southeast Asian states have an overall tendency to favor individual land ownership over collective rights, which makes the indigenous lands and resources a frequent target of privatization for economic purposes and State usage for development projects, causing the dispossession of indigenous communities from their traditional lands or the reduction of indigenous land rights, turning their ownership into mere concessions and revocable licenses or privileges.[762]

The creation of the ILO Convention N. 107, the revised ILO Convention N. 169, and the UNDRIP have engaged discussions worldwide regarding the recognition of indigenous rights, as well as calling the states to take action to promote and protect their rights. In Southeast Asia, many states are still reluctant to recognize and promote indigenous peoples' collective rights, especially the ones related to the traditional indigenous lands. On the other hand, some nations established provisions for the implementation of the indigenous people's right to land; however, the application of these provisions is weak, and governments have

761 Asia Indigenous Peoples Pact, *supra* note 740, p. 2.
762 Asia Indigenous Peoples Pact, *supra* note 740, p. 6.

been failing to implement appropriate protection for indigenous peoples efficiently.[763]

Daily, the individual and collective rights of Southeast Asia's indigenous peoples are infringed upon. In 2013, the Indigenous Peoples Human Rights Defenders Network [764] researched human rights violations against indigenous peoples in Asia. It registered 97 human rights violations against 102,621 indigenous persons; among these, 38 cases were related to collective rights violations, affecting 90,997 individuals. Most violations of collective rights were land grabbing and exploitation of indigenous lands, forced relocation of communities, and lack of free, prior, and informed consent of indigenous peoples. [765] These violations against indigenous peoples' lands are strongly motivated by two practices employed by the states and by private agents: environmental protection measures and national development policy.

iii. Indigenous Peoples in Southeast Asia and Environmental Protection Measures

The climate change situation has been raising much attention worldwide, and many states have been implementing policies and solutions for mitigation. The climate change impacts are being heavily felt by indigenous peoples, who are left

[763] Asia Indigenous Peoples Pact, *supra* note 753, p. 15.
[764] The Indigenous Peoples Human Rights Defenders (IPHRD) Network has *"the objective to establish a platform for solidarity, coordination and support among indigenous human rights defenders and their organizations in Asia. The Network seeks to assist indigenous human rights defenders in Asia to promote and lobby the rights of indigenous peoples at national, regional and international human rights mechanisms and procedures effectively and collectively with other indigenous human rights defenders and organizations"*. Available at: https://aippnet.org/about-iphrd/
[765] Asia Indigenous Peoples Pact, *supra* note 740, p. 2.

vulnerable. However, the vulnerability of indigenous peoples is increasing with the implementation of environmental conservation and mitigation projects.

Southeast Asian countries are developing mitigation strategies like biofuels, hydroelectric power dams, geothermal plants, carbon sinks, and forest conservation. However, the execution of these projects has caused significant damage to indigenous communities since it is taking place without the indigenous peoples' free, prior, and informed consent, [766] causing displacement of indigenous populations from their ancestral lands and forests.[767]

The conservation programs implemented by the governments negatively affect the indigenous peoples, especially the communities dependent on forest resources for their subsistence. These communities have been forcibly removed from or have restricted access to conservation areas on the ground that their sustainable resource management systems and traditional livelihoods cause environmental damage.[768] One of the main results of this policy is food insecurity among the indigenous community.

Concerning climate change, ASEAN recognizes its consequences. However, it avoids acknowledging the harmful implications of climate change policies and activities. ASEAN does not employ a people-centered approach but

[766] Initiative for Responsible Mining Assurance. Standard. Chapter 2.2 Free, Prior and Informed Consent (FPIC). Available at: https://responsiblemining.net/wp-content/uploads/2018/08/Chapter_2.2_FPIC.pdf

[767] Asia Indigenous Peoples Pact, *supra* note 740, p. 12-13.

[768] *Ibid.*

focuses on sustainable development since there is no mention of any assistance to individuals affected by climate change or the policies implemented to combat it.[769]

In addition, although indigenous peoples are one of the most affected by the impacts of climate change and by the environmental conservation measures adopted by states, they are not taken into account in any stage of implementation of these projects and are not mentioned in any ASEAN document, which ultimately results in the violation of indigenous land rights.[770] An example of a sustainable development project implemented in Southeast Asian countries that caused harm to indigenous communities is the oil palm plantations in Malaysia and Indonesia for the production of second-generation biofuels, which resulted in the displacement of indigenous peoples from their ancestral lands.[771]

The Office of the High Commissioner for Human Rights[772] issued a report on the effects of adaptation and mitigation measures on the indigenous people's human rights. The conclusion was that climate change and some adaptation and mitigation measures endanger indigenous peoples' subsistence and livelihood, as well as their cultural and social identity and their right to self-determination.[773]

Nevertheless, the ASEAN's sustainable development approach under the guise of adaptation and mitigation is likely to continue to be implemented and lead

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769 Sahrail, Mélodie, "The ASEAN actions on Climate Change: Recognizing or Por-actively addressing the issue?" *Sustainable Law on Climate Change, Working Paper Series*, December, 2011, p. 11

770 *Ibid.*

771 McLean, Kisty Galloway, *Advance Guard: Climate Change Impacts, Adaptation, Mitigation and Indigenous Peoples – A Compendium of Case Studies*, Darwin: United Nations University, 2010, p. 71.

772 Report of the United Nations High Commissioner for Human Rights on the relationship between climate change and human rights. A/HC/10/61, 15 January 2009.

773 *Ibid.*

to further exploitation of resources in indigenous territories, causing human rights violations and increasing the marginalization of indigenous peoples.[774]

iv. Indigenous Peoples in Southeast Asia and National Development Policy

The Southeast Asian region's rapid economic expansion propelled numerous nations out of the low-income category.[775] It is crucial to note that, on the one hand, the economic development is mainly centered in metropolitan regions; on the other hand, the *"poverty rates remain higher in rural areas and tend to be highest in regions with dense forests"*.[776] Moreover, the increasing domestic and foreign investments in agro-industrial crops and minerals are expanding into the rural and forest areas, where most indigenous peoples occupy.[777] Thus, although the indigenous traditional lands and resources are being used for "national development", they are not reached by this development policy, and the indigenous communities continue to be a marginalized rural group.[778] As a result, a growing number of indigenous people are moving to urban regions, searching for employment, health care, and education.[779]

For the strengthening and expansion of national development policy, Asian governments are collaborating with international financial institutions, such as the

774 Asia Indigenous Peoples Pact, *supra* note 740, p. 14-15.
775 "Community Forestry in Asia and the Pacific: Pathway to Inclusive Development", RECOFTC, 2013, p. 2. Available at: https://www.recoftc.org/publications/0000192.
776 Sunderlin, W. D., Dewi, S., Puntodewo, A., Müller, D., Angelsen, A. & Epprecht, M., "Why forests are important for global poverty alleviation: a spatial explanation. *Ecology and Society,* 13(2), 2008, p. 24. Available at: www. ecologyandsociety.org/vol13/iss2/art24/
777 Asia Indigenous Peoples Pact, *supra* note 736, p. 31.
778 Overview of State of Indigenous Peoples in Asia". Asia Indigenous Peoples Pact (AIPP), May, 2014. P. 15
779 "Status of Indigenous Peoples' lands, territories, and resources in Asia". Asia Indigenous Peoples Pact (AIPP), p. 31

World Bank[780] and the Asian Development Bank,[781] to implement projects such as large dams, land concessions, commercial agriculture, conservation programs, etc., which subject indigenous peoples in many countries to displacement and loss of traditional livelihoods.

Although the international financial institutions have policies for the protection of indigenous peoples and avoid damage, the provisions on indigenous peoples' collective rights, particularly to their lands, territories, and resources, are inadequate, and their implementation is complex when in conflict with development projects.[782]

v. Asian values and Indigenous Peoples

Southeast Asia has some regional particularities and is known for its large ethnic, cultural, and religious diversity. However, despite the cultural diversity present in this area, the indigenous peoples' lack of protection or recognition is also a fact. To better understand the reason behind the behavior of Southeast Asian states regarding indigenous peoples, it is necessary to understand the "Asian values".

[780] The World Bank is like a cooperative, made up of 189 member countries. The World Bank Group works in every major area of development, and focus on the sustainable development and eradication of the poverty. https://www.worldbank.org/en/home

[781] The Asian Development Bank (ADB) envisions a prosperous, inclusive, resilient, and sustainable Asia and the Pacific, while sustaining its efforts to eradicate extreme poverty in the region. Asia Development Bank has 68 shareholding members including 49 from the Asia and Pacific region https://www.adb.org/who-we-are/main

[782] Overview of State of Indigenous Peoples in Asia". Asia Indigenous Peoples Pact (AIPP), May, 2014. P. 14

The concept of “Asian values” is connected to Confucianism, Buddhism, and Taoism [783] and can be translated as a method of resistance against the dominance of Western ideas, whether they are linked to the economic scenario or the social context. [784] Thus, its purpose is to confront the western view of democracy and human rights to avoid a new Western colonialism.[785]

Regarding the construction and recognition of human rights in the Southeast Asian region, the political sentiment compels consideration of "Asian values" on the subject. According to the “Asian values”, communitarianism prevails over individualism, and this view needs to be applied when formulating human rights law.[786] As the “Asian values” are based on a collective perspective, it avoids the creation of rights for minorities and indigenous peoples because these are considered a threat to national unity.[787] Since the concept of “Asian values” aims to strengthen the region, in opposition to western concepts, one of its values is strengthening each country's national identity. For this reason, Asian values are, in a certain way, associated with policies of assimilation and integration of indigenous peoples.

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783 Dallmayr, F.R., “Asian values and Global Human Rights”, *Philosophy East and West* 52, 2002, p. 173.

784 Vries, A. Meijknecht, B. S., “Is there a place for minorities’ and indigenous peoples’ rights within ASEAN? Asian values, ASEAN values, and the protection of Southeast Asian minorities and indigenous peoples”, *International Journal on Minority and Group Rights* 17, 2010, 75-110, p.83

785 Inoue, T.,“Human Rights and Asian Values”, in J. M. Coicaud, M. W. Doyle and A.M. Gardner (eds), *The Globalisation of Human Rights*, Rawat Publication, p. 116

786 Vries, A. Meijknecht, B. S., *supra* note 784, p. 85.

787 *Ibid*, p.87.

4.2.2 Overview of the Association of Southeast Asian Nations

The Association of Southeast Asian Nations (ASEAN) was established on 8 August 1967 by its founding member states[788] with the adoption of the ASEAN Declaration, also known as the Bangkok Declaration.[789] Currently, ASEAN has ten member states,[790] and its Secretariat is based in Jakarta, Indonesia.[791] According to the ASEAN Statistical Yearbook 2021,[792] the total population of ASEAN Member States is 661,826,800, including the approximately 100 million indigenous people that live in these countries[793].

The ASEAN can be considered a political and economic body.[794] The Bangkok Declaration focuses on the cooperation between ASEAN members to achieve economic and social regional stability and the national development of its members.[795] Despite the Declaration mentioning cultural development[796] and the

[788] Indonesia, Malaysia, the Philippines, Singapore, and Thailand.
[789] ASEAN Declaration (Bangkok Declaration) 8 August 1967. Available at: https://agreement.asean.org/media/download/20140117154159.pdf
[790] Brunei Darussalam, Cambodia, Indonesia, Lao PDR, Malaysia, Myanmar, Philippines, Singapore, Thailand and Viet Nam. Available at: https://asean.org/member-states/
[791] Agreement on the Establishment of the ASEAN Secretariat, 24 February 1976. Available at: https://agreement.asean.org/media/download/20140117151823.pdf
[792] ASEAN Statistical Yearbook 2021, Jakarta, ASEAN Secretariat, December 2021, p. 3. Available at: https://www.aseanstats.org/wp-content/uploads/2021/12/ASYB_2021_All_Final.pdf
[793] "Indigenous Peoples Statement on the ASEAN Human Rights Declaration", Asian Indigenous Peoples Pact, (Statement, 4 December 2012)
[794] Mahendra, Muhammad Dwiki, "Indigenous Peoples in Regional Institutions: A Comparative Perspective between ASEAN and the Arctic Council", *The Indonesian Journal of Southeast Asian Studies*, Vol. 5, No. 1, July 2021, p. 40-41.
[795] ASEAN Declaration, preamble, para. 4. CONSIDERING that the countries of South-East Asia share a primary responsibility for strengthening the economic and social stability of the region and ensuring their peaceful and progressive national development, and that they are determined to ensure their stability and security from external interference in any form or manifestation in order to preserve their national identities in accordance with the ideals and aspirations of their peoples.
[796] ASEAN Declaration, Art. 2 (1).

regional collaboration on cultural matters[797] as part of the aims and purposes of ASEAN, it does not mention indigenous peoples or its cultural aspects.

In November 2007, the ASEAN Charter[798] was adopted and came into force in December 2008. The ASEAN Charter[799] is a legally binding agreement between ASEAN Member States and has established a new legal and institutional framework to boost and strengthen the regional community.[800] Article 7 of the Charter establishes the creation of the ASEAN Community, which includes the ASEAN Political-Security Community Council, the ASEAN Economic Community Council, and the ASEAN Socio-Cultural Community Council.[801] Moreover, Article 14 calls for establishing a human rights body to promote and protect human rights and fundamental freedoms.[802]

For this study, it will be analyzed the connection between the indigenous peoples in Southeast Asia and ASEAN's essential instruments, such as the ASEAN Charter and the ASEAN Human Rights Declaration (AHRD), and also some of ASEAN's institutional bodies, including the ASEAN Community and the ASEAN Intergovernmental Commission on Human Rights (AICHR).

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797 ASEAN Declaration, Art. 2 (3).

798 Charter of Association of Southeast Asian Nations (Charter of ASEAN), Singapore, 20 November 2007. Available at: https://agreement.asean.org/media/download/20160509062115.pdf

799 It was registered with the Secretariat of the United Nations, according to Article 102, Paragraph 1 of the Charter of the United Nations.

800 Charter of ASEAN, para. 12.

801 Charter of ASEAN, Art. 9 (1).

802 Charter of ASEAN, Art. 14 (1): In conformity with the purpose and principles of the ASEAN Charter relating to the promotion and protection of human rights and fundamental freedoms, ASEAN shall establish an ASEAN Human rights body.

i. ASEAN Charter and Indigenous Peoples

The ASEAN Charter declared to be a people-orientated instrument[803], and for this reason, applied the term 'peoples';[804] thus, its reach also includes the indigenous peoples, as they are part of the peoples of member states. Article 1 of the ASEAN Charter provides its purposes, and regarding the indigenous peoples, a provision within that could be understood as including them or even affecting their lands directly is Article 1 (9):

> Article 1 – The Purposes of ASEAN are: (9) To promote sustainable development so as to ensure the protection of the region's environment of its cultural heritage and the quality of life of its peoples[805]

Analyzing this provision in the light that indigenous peoples are part of the 'peoples' mentioned in the Charter, their cultural heritage linked to their land should also be reached by the protection given by the article. In addition, Article 1 (7)[806] includes promoting and protecting human rights and fundamental freedoms, which can be understood as incorporating the indigenous peoples' human rights. Furthermore, Article 1 (14)[807] mentions the promotion and awareness of the diverse

[803] Charter of ASEAN, Art. 1 (13): To promote a people-orientated ASEAN in which all sectors of society are encouraged to participate in, and benefit from, the process of ASEAN integration and community building.
[804] Charter of ASEAN, preamble, para 1: "We, the peoples of the Member States […]".
[805] Charter of ASEAN, Art. 1 (9).
[806] Charter of ASEAN, Art. 1 (7): To strengthen democracy, enhance good governance and the rule of law, and to promote and protect human rights and fundamental freedoms, with due to the rights and responsibilities of the Member States of ASEAN.
[807] Charter of ASEAN, Art. 1 (14): To promote an ASEAN identity through the fostering of greater awareness of the diverse culture and heritage of he region.

culture and heritage of the region, which can be implied as encompassing indigenous cultural diversity.

Article 2 brings the principles to be followed by ASEAN and its Member States. Once again, it mentions the promotion and protection of human rights[808] and includes respect for the UN Charter, international law, and international humanitarian law.[809] Regarding this provision, necessary to mention that all the Southeast Asian nations voted in favor of the UNDRIP, and despite not being a legally binding instrument, its content states a customary law related to the indigenous peoples; thus, like the UN Charter, the UNDRIP should be respected by ASEAN and its member states. Furthermore, there are other legally binding international instruments that Southeast Asian countries are part of it, and they encompass provisions that can be applied to indigenous peoples' issues.[810] Moreover, it is added as a principle the *"respect for the different cultures, languages and religions of the peoples of ASEAN"*,[811] which can be considered an indirect reference to indigenous peoples and their cultural diversity.

However, the ASEAN Charter does not expressly mention indigenous peoples nor makes any attempt to interpret its provision to include them, despite

[808] Charter of ASEAN, Art. 2 (2 i): respect for fundamental freedoms, the promotion and protection of human rights, and the promotion of social justice.
[809] Charter of ASEAN, Art. 2 (2 j): upholding the United Nations Chater and international law, including international humanitarian law, subscribed to by ASEAN Member Sates.
[810] Refer to the Chapter 3.
[811] Charter of ASEAN, Art. 2 (2 l): respect for different cultures, languages and religions of the peoples of ASEAN, while enohasising their common values in the spirit of unity in diversity. f

having some provisions that could encompass the indigenous peoples. Thus, there is no explicit connection between ASEAN Charter and the indigenous peoples.[812]

ii. ASEAN Economic Community (AEC)

In 2007, the ASEAN member states adopted the Declaration on the ASEAN Economic Community Blueprint[813], which has as its main purpose regional economic integration[814] through the establishment of a single market and production base[815] through the free flow of goods, services, investments, capital, and skilled labor.[816]

Although the ASEAN Blueprint does not explicitly mention indigenous peoples, its content directly affects them, especially their traditional lands. The AEC investment regime includes the "*manufacturing, agriculture, fishery, forestry, and mining and quarrying"* industries[817], which have a negative impact on the indigenous peoples' livelihood since their lands, territories, and resources are being

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812 Mahendra, Muhammad Dwiki, *supra* note 794.

813 Declaration on the ASEAN Economic Community Blueprint, Singapore, 20 November 2007. Available at: https://www.asean.org/wp-content/uploads/images/archive/5187-10.pdf

814 ASEAN Economic Community Blueprint, Art. 2. f

815 ASEAN Economic Community Blueprint, Art. 6: The AEC will establish ASEAN as a single market and production base making ASEAN more dynamic and competitive with new mechanisms and measures to strengthen the implementation of its existing economic initiatives; accelerating regional integration in the priority sectors; facilitating movement of business persons, skilled labour and talents; and strengthening the institutional mechanisms of ASEAN […]. f

816 ASEAN Economic Community Blueprint, Art. 9: An ASEAN single market and production base shall comprise five core elements: (i) free flow of goods; (ii) free flow of services; (iii) free flow of investment; (iv) freer flow of capital; and (v) free flow of skilled labour. In addition, the single market and production base also include two important components, namely, the priority integration sectors, and food, agriculture and forestry.

817 ASEAN Economic Community Blueprint, Art. 25: Under the AIA, all industries (in the manufacturing, agriculture, fishery, forestry and mining and quarrying sectors and services incidental to these five sectors) shall be open and national treatment granted to investors both at the pre-establishment and the post-establishment stages, with some exceptions as listed in member countries' Temporary Exclusion Lists (TEL) and Sensitive Lists (SL). The TEL is to be phased-out based on agreed timelines. Although the SL does not have a timeline for phasing-out, they will be reviewed periodically. f

exploited for the sake of national and regional development that does not even include them as beneficiaries, instead push them to further marginalization.[818]

Indigenous peoples in Asia may experience even greater dispossession and degradation of their lands, territories, and resource because of the forthcoming economic integration of ASEAN. The ASEAN economic integration objectives include implementing an extensive infrastructure development in energy, transport, and communications, which will cut across indigenous traditional lands and exploit their natural resources.[819] The infrastructure projects to be implemented include the ASEAN power grid, [820] Trans-ASEAN Gas Pipeline, [821] ASEAN Highway Network, [822] Singapore-Kunming Rail Link, and regional telecommunications networks.[823]

The problems regarding indigenous lands and the development projects have two main causes: the first one is related to the State's concession over indigenous lands without their free, prior, informed consent (FPIC); the second is regarding the lack of involvement of the States in the negotiations between the indigenous and the investors over the indigenous lands.[824] The solution for the first

[818] "Asean's Indigenous Peoples. Asean Briefing Paper," Asia Indigenous Peoples Pact (AIPP), p. 17. Available at: http://www.aippnet.org/docs/hr/ASEAN%20BRIEFING%20PAPER_print_Foma;.pdf
[819] Asia Indigenous Peoples Pact, *supra* note 740, p. 8.
[820] ASEAN Power Grid. Available at: https://asean.org/wp-content/uploads/images/2015/October/outreach-document/Edited%20APG-3.pdf
[821] Trans-ASEAN Gas Pipeline. Available at: https://asean.org/wp-content/uploads/images/2015/October/outreach-document/Edited%20TAGP-3.pdf
[822] ASEAN Highway Network. Available at: https://www.jica.go.jp/jica-ri/IFIC_and_JBICI-Studies/english/publications/reports/study/capacity/infra/pdf/200403_14e.pdf
[823] Singapore-Kunming Rail Link and regional telecommunications networks. Available at: https://www.unescap.org/sites/default/d8files/Malaysia%20-%20Present%20Singapore%20-%20Kunming%20rail%20link.pdf
[824] Nur Putri Hidayah, Fifik Wiryani, Hera Pratita Madyasti, "The Strengthening Legal Protection of Indigenous Peoples in Facing Investment Climate in Era of Asean Economic Community in Indonesia", *IOP Conference Series: Earth and Environmental Science* 175 (2018), p. 3.

problem is contained in Article 10 of the UNDRIP[825], which is considered an international standard,[826] and each state member should implement its application by establishing appropriate measures. The principle of FPIC is to guarantee the active participation of indigenous peoples in matters involving them. The imposition of FPIC would require from the private party or the state that the indigenous community be included in the negotiation before granting or using permits for the use and exploitation of the land and resources. The second problem is related to the inequality of power between a private party and the indigenous community. In this case, the State should intervene and act to avoid any violation of indigenous rights.

However, as mentioned previously, recognizing the indigenous peoples by the ASEAN Member States is necessary. Furthermore, the states that already recognize indigenous peoples in their domestic legal framework need to comply with their provisions and not simply disregard the indigenous peoples' protection when confronted with private or state matters. Thus, substantial State involvement is required to protect indigenous people from AEC's harmful excesses.

iii. ASEAN Political Security Community (APSC)

The purpose of the ASEAN Political Security Community (APSC) is to enhance political and security development cooperation and interstate collaboration to guarantee that the region's nations coexist peacefully with one another and the

[825] UNDRIP, Art. 10: Indigenous peoples shall not be forcibly removed from their lands or territories. No relocation shall take place without the free, prior and informed consent of the indigenous peoples concerned and after agreement on just and fair compensation and, where possible, with the option of return.

[826] Asia Indigenous Peoples Pact, *supra* note 818, p. 17.

rest of the world in an atmosphere that is just, democratic, and harmonious.[827] According to the APSC Blueprint,[828] *"respect for and promotion and protection of human rights and fundamental freedoms as inscribed in the ASEAN Charter"*[829] is also an objective of the ASPC. Therefore, all points addressed to the ASEAN Charter regarding human rights must also be considered. Furthermore, the Political Security Community reaffirms the observance of non-interference, consensual decision-making, national and regional resilience, and respect for sovereignty.[830] Moreover, APSC Blueprint reiterates the promotion of nondiscrimination based on gender, ethnicity, religion, language, or social and cultural background in the process of integration and community development of ASEAN.[831]

One of the main goals of the Political Security Community is related to the promotion and preservation of ASEAN peoples' human rights and basic freedoms,[832] which should be achieved through the establishment of the ASEAN human rights body, the interaction, and cooperation between the ASEAN bodies and international organizations, civil society organizations, and existing human rights mechanisms, the active communication among ASEAN states regarding human rights matters.[833]

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827 ASEAN Political-Security Community Blueprint, Jakarta: ASEAN Secretariat, June 2009. I. Introduction (1) and II. Characteristics and elements of the APSC (6). Available at: https://asean.org/wp-content/uploads/2021/03/APSC_BluePrint.pdf

828 ASEAN Political-Security Community Blueprint.

829 ASEAN Political-Security Community Blueprint, II. Characteristics and elements of the APSC (7).

830 ASEAN Political-Security Community Blueprint, A.2.3 (iii).

831 ASEAN Political-Security Community Blueprint, II. Characteristics and elements of the APSC (7).

832 ASEAN Political-Security Community Blueprint, A. 1. (12).

833 ASEAN Political-Security Community Blueprint, A.1.5.

In addition, the Political Security Community works to enhance awareness and respect of political systems, culture, and history.[834] The promotion, respect, and appreciation for the region's diversity emphasized by the ASEAN and its bodies aim to construct a regional cultural identity. It is important to note that the observance of cultural diversity mentions is mainly focused on State-to-State diversity, not within State diversity. Furthermore, the state-to-state cultures subject to protection are dominant and mainstream political systems, cultures, and histories.[835] Unfortunately, ASEAN does not recognize the existence of indigenous peoples in the region nor recognize their customary law, political system, and history as part of the cultural elements to be protected.

Despite connecting the promotion of peace and stability with a resolution of the religious and ethnic conflicts in the region, it does not address the causes for the eruption of such disputes nor provides strategies to remedy problems based on the premise of protecting human rights and promoting justice, equality, and nondiscrimination.[836]

The issue of ethnic conflicts directly affects indigenous peoples and could serve as a safeguard against the assimilation of these communities and arbitrary dispossession of their lands. However, there is a lack of effective measures that will result in conflict resolution, and recognizing the need to promote and respect human rights and cultural diversity is not enough to result in effective preservation. In conclusion, the Political Security Community Blueprint does not mention

[834] ASEAN Political-Security Community Blueprint, A. (13) and A.1.1.
[835] Asia Indigenous Peoples Pact, *supra* note 818, p. 17.
[836] *Ibid.*

Indigenous Peoples, who are also members of the ASEAN Community, nor address Indigenous Peoples' human rights concerns in the area.

iv. ASEAN Socio-Cultural Community (ASCC)

The ASEAN Socio-Cultural Community is dedicated to establishing a community based on a shared regional identity, with cooperation centered on social development to improve the standard of living of disadvantaged groups and the rural population. Additionally, the ASEAN Socio-Cultural Community shall seek the active participation of all sectors of society, including women, youth, and local communities.[837]

The ASCC Blueprint does emphasize respect for rights and fundamental freedoms, as well as the promotion and preservation of human rights and social justice, with special emphasis on disadvantaged, vulnerable, and marginalized populations. Although there is no express mention of indigenous peoples, the State's non-recognition, human rights breaches, and discrimination faced on a daily basis by the indigenous peoples place them under this category. Important to remind that regarding the right to adequate food, the Manual on Human Rights Reporting about the International Covenant on Economic, Social and Cultural Rights includes the indigenous peoples as part of *"especially vulnerable or disadvantaged groups"*, including indigenous peoples.[838] However, the activities planned under Social Justice and Rights are intended to treat symptoms rather than underlying systemic causes such as access to justice, clashing interests between

[837] ASEAN Socio-Cultural Community. Overview. Available at: https://asean.org/our-communities/asean-socio-cultural-community/
[838] Manual on Human Rights Reporting, p. 122

Indigenous Peoples and companies, or involvement in decision-making. Furthermore, the Blueprint includes promoting corporate social responsibility and environmental conservation but does not mention actual actions to guarantee corporate compliance with the indigenous lands' social and environmental protection requirements.

v. ASEAN Intergovernmental Commission on Human Rights (AICHR)

The creation of the ASEAN Inter-Governmental Commission on Human Rights (AICHR) is based on Article 14 of the ASEAN Charter, and it is an essential step toward expanding human rights in Southeast Asian countries.[839] However, its current implementation is insufficient regarding human rights protection since its activities are restricted. The AICHR may record and communicate about human rights breaches but cannot compel member nations to comply with human rights norms.[840]

The Term of Reference of the ASEAN Inter-governmental Commission on Human Rights [841] contains the purposes, principles, mandate, functions, composition, and further information regarding the AICHR. It is important to note that following the trend of other ASEAN documents, the AICHR's term of reference does not mention indigenous peoples.

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[839] ASEAN Political-Security Community Blueprint, A. 1. (15) and A.1.5 f

[840] The AICHR will be analyzed in a following section. See also: Asia Indigenous Peoples Pact, *supra* note 818, p. 17.

[841] Term of Reference of the ASEAN Inter-governmental Commission on Human Rights. Jakarta: ASEAN Secretariat, October 2009. Available at: https://aichr.org/wp-content/uploads/2020/02/TOR-of-AICHR.pdf

The purpose of the AICHR is *"to promote and protect human rights and fundamental freedoms of the peoples of ASEAN".*[842] As mentioned in the analysis of the ASEAN Charter, the indigenous peoples should be subject to rights under this document, as they are "peoples" within the jurisdiction of ASEAN. Furthermore, it aims to contribute to the *"well-being, livelihood, welfare […] of ASEAN peoples".* [843] When analyzing this provision taking into account the indigenous peoples, it is possible to connect with the protection of the right to land since, for indigenous peoples, access to their traditional lands directly influences their livelihood.

The AICHR also mentions upholding international human rights standards and international human rights instruments to which ASEAN states are parties.[844] Thus, the ASEAN states that adopted the UNDRIP should observe its legal standards. The same can be said regards international instruments such as ICCPR, ICERD, ICESCR, and Genocide Convention, which contain provisions that can be applied to the protection of indigenous peoples, as was explained in Chapter 3.

The Term of Reference mentions the *"respect for different cultures, languages and religions of the peoples of ASEAN, while emphasising their common values in the spirit of unity in diversity"*[845] as a principle followed by the AICHR. The first part of the provision can lead to the inclusion of the indigenous peoples as a subject to be respected regarding their cultural difference, but the second part of the text talks about the unity of diversity. This concept relates to "Asian values",

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842 *Ibid*, Art. 1.1.
843 *Ibid*, Art. 1.3.
844 *Ibid*, Art. 1.6.
845 *Ibid*, Art. 2.1 g.

and as explained previously, it is connected to assimilationist policies. However, the principle of non-discrimination is mentioned,[846] which again opens a door for the inclusion of indigenous peoples. It is important to remember that several international instruments use the principle of non-discrimination as an interpretation tool to insert indigenous peoples under the legal scope of these instruments.[847]

The Term of Reference provides the mandate and functions[848] of the AICHR, which includes the promotion and protection of human rights through education, research, and propagation of information, the development of the ASEAN Human Rights Declaration, which happened in 2012, the implementation of international human rights treaty obligation, the encouragement of ASEAN States to adopt international human rights instruments, assistance on human rights matters, the engagement of dialogue and consultation with civil society organizations, collect information about the promotion and protection of human rights, and prepare studies on issues of human rights in ASEAN. However, the main activities practiced by the AICHR focus on promoting rather than effectively protecting human rights.

Thus, despite being considered a significant step forward in the development of human rights in ASEAN, the AICHR is still in its early stage, with most of its capacity devoted to the mere promotion of human rights. Furthermore, it is a severe mistake for a human rights system to ignore such a relevant topic as

[846] *Ibid*, Art. 2.2 g.
[847] Refer to Chapter 3.
[848] Term of Reference of the ASEAN Inter-governmental Commission on Human Rights. Art. 4.

indigenous rights, even more so in a region with many indigenous people. It is evident that AICHR avoids conflicting with the internal norms of the ASEAN states and does not engage in any pressure for ASEAN member states to include indigenous peoples under this new regional human rights system.

vi. ASEAN Human Rights Declaration

The ASEAN member states signed the ASEAN Human Rights Declaration (AHRD) on 18 November 2012.[849] Considered a landmark for the construction of a regional human rights framework, the Declaration includes provisions regarding general principles (Articles 1 to 9),[850] civil and political rights (Articles 10 to 25),[851] economic, social, and political rights (Articles 26 to 34),[852] right to development (Articles 35 to 37),[853] right to peace (Article 38),[854] and general provisions for cooperation in the promotion and protection of human rights (Articles 39 to 40).[855]

Indigenous peoples are not included under the ADHR, but the instrument contains provisions that can be interpreted to encompass the indigenous peoples. Article 4 mentions that the *"rights of vulnerable and marginalised groups are an inalienable, integral and indivisible part of human rights and fundamental*

[849] ASEAN Secretariat, ASEAN Human Rights Declaration, 19 November 2012. Available at: https://asean.org/asean-human-rights-declaration/
[850] ASEAN Human Rights Declaration, Arts. 1 – 9.
[851] ASEAN Human Rights Declaration, Arts. 10 – 25.
[852] ASEAN Human Rights Declaration, Arts. 26 – 34.
[853] ASEAN Human Rights Declaration, Arts. 35 – 37.
[854] ASEAN Human Rights Declaration, Art. 38.
[855] ASEAN Human Rights Declaration, Arts. 39 – 40.

freedoms".[856] The ESC Committee recognizes the indigenous peoples as part of vulnerable groups; the definition of "indigenous" constructed by the World Bank and the factors created by the UN include the marginalization as a feature of indigenous peoples. Thus, it can be implied that indigenous peoples can be represented as vulnerable and marginalized groups. Article 9 provides the principle of non-discrimination, which in other international instruments was interpreted to guarantee the right to cultural life and even protection regarding indigenous lands.[857]

The right to life is stated in Article 11, which is dispositive and can be interpreted to include protection for indigenous people. This adequation happened when the Inter-American Court connected Article 4 (right to life) and Article 21 (right to property) of the American Convention, interpreting both provisions taking into account the unique and vital importance of the traditional lands for the indigenous peoples and how the lack of the access to the lands could result in the risk to their life.

Article 28[858] provides the right to an adequate standard of living, which includes the right to adequate food and adequate and affordable housing. This norm is very similar to Article 11 of the ICERS, interpreted by General Comment

[856] ASEAN Human Rights Declaration, Art. 4: The rights of women, children, the elderly, persons with disabilities, migrant workers, and vulnerable and marginalised groups are an inalienable, integral and indivisible part of human rights and fundamental freedoms.
[857] Refer to Chapter 2 and 3.
[858] ASEAN Human Rights Declaration, Art. 28: Every person has the right to an adequate standard of living for himself or herself and his or her family including: a. The right to adequate and affordable food, freedom from hunger and access to safe and nutritious food; b. The right to clothing; c. The right to adequate and affordable housing; d. The right to medical care and necessary social services; e. The right to safe drinking water and sanitation; f. The right to a safe, clean and sustainable environment.

N. 4 and 12 to link the right to an adequate standard of living to the right to indigenous lands.

However, despite the apparent possibility of adapting ADHR provisions to include protection for indigenous peoples, the very omission of the term "indigenous" in the text clearly states that ASEAN has no interest in promoting the protection of indigenous rights.

4.2.3 Summary

Southeast Asia is one of the regions in the world with the largest population of indigenous peoples. However, many states still avoid the recognition of indigenous peoples in their territories, which results in many violations of indigenous peoples' rights, especially the ones related to their traditional lands.

One of the main problems related to the violation of indigenous rights is that many Southeast Asian states reject the concept of indigenous peoples because they believe it is a concept referring only to the inhabitants of the Americas. The "Asian values" also influence the lack of recognition of indigenous rights since such values encompass the ideas of national unity and communitarianism, which are associated with the assimilation of distinct cultural groups and minorities, including indigenous peoples.

Recently Southeast Asia entered a wave of economic growth, and the reflection was the increasing violation of indigenous territories in favor of the region's development. Furthermore, implementing environmental protection measures also removed indigenous peoples from their lands, and these two

practices have forced more and more indigenous peoples into a condition of vulnerability.

One of the main protagonists of the development and sustainability projects is ASEAN, a political and economic body created to strengthen regional collaboration in Southeast Asia. This body established a regional legal framework, which includes the ASEAN Charter and the ASEAN Human Rights Declaration. Furthermore, it created the ASEAN Community, containing the ASEAN Political-Security Community Council, the ASEAN Economic Community Council, and the ASEAN Socio-Cultural Community Council.[859] Moreover, it established a human rights body, the ASEAN Intergovernmental Commission on Human Rights.

Although the creation of ASEAN represents an achievement from an economic point of view, from a legal and human rights perspective, the body has many gaps. Regarding indigenous peoples, all legal instruments connected to ASEAN are silent about the matter. Upon studying the ASEAN legal instruments, it is possible to identify that the documents contain many provisions that can be interpreted to include indigenous rights, like the practices under other international instruments. However, if ASEAN included indigenous peoples in its legislation, the body could conflict with member states that do not recognize indigenous peoples in their domestic legislation. As the body was created for regional empowerment, it is evident that any controversial issue between member states is avoided.

[859] Charter of ASEAN, Art. 9 (1).

Chapter 5: Protection of Indigenous Peoples' Land Rights in Domestic Jurisdiction

5.1 Indigenous Peoples' Land Rights in Brazil

5.1.1 Indigenous Peoples' Land Rights in the Brazilian Constitution

The 1934 Brazilian Constitution was the first to deal with the property rights of the indigenous community, at the time called 'foresters', applied the 'indigenato' theory as the basis for the constitutional protection of the traditional lands in Article 129 which provided that "*the ownership of land belonging to foresters who are permanently located therein will be respected, being prohibited, however, from alienating them."*[860] According to João Mendes da Silva Jr, indigenous peoples' rights to the lands occupied by them, which is a title acquired congenitally by its very existence, is different from the right of occupation of non-indigenous people, which depends on being legitimized through acquired titles.[861] Thus, beyond the jus possessionis (right of possession, power over the thing), the indigenous person also has the jus possidendi (right to possession), the result of their original right to land.[862] For José Afonso da Silva,[863] the Constitution

[860] Brasil. Constituição (1934) Constituição da República dos Estados Unidos do Brasil. Rio de Janeiro, 1934. Available at: http://www.planalto.gov.br/ccivil_03/constituicao/constituicao34.htm. Original text: Artigo 129 - Será respeitada a posse de terras de silvícolas que nelas se achem. permanentemente localizados, sendo-lhes, no entanto, vedado aliená-las.

[861] Ramos, André de Carvalho, *supra* note 601, p. 937.

[862] Villares, Luiz Fernando, *Direito e povos indígenas*, Curitiba: Juruá, 2009, p. 76, 103 e 104.

conferred to the indigenous land a legal status of natural law, as this right antecede the constitutional recognition itself, emphasizing the community and original features of the land. However, despite the constitutional recognition of the indigenous land as the Union's property, the regulation about the matter was lacking.[864]

The following constitutions of 1937 and 1946 did not present any innovation, merely repeating the previous provision. As a result of the absence of legislation to regularize the indigenous land as belonging to the Union, the States continued to declare the indigenous land as 'vacant land',[865] which made it hard for the Union to recognize them. Only in 1973 was the problem solved with the creation of Article 22, a single paragraph of the 'Lei n. 6.001/73 – Indian Statute,[866] which stated that the lands occupied by the indigenous were inalienable assets of the Union.[867] Furthermore, Article 186 of the 1967 Constitution added the right of

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[863] Silva, José Afonso da. Parecer sobre a situação do direito indígena à terra. Available: http://www.mpf.mp.br/atuacao-tematica/ccr6/documentos-e-publicacoes/artigos/docs_artigos/joseafonso-da-silva-parecer-maio-2016-1.pdf

[864] "The Dominant Titles granted before the 1934 Constitution were affected by supervening nullity of the norm of its art. 129. The lands occupied by forestry people who, under the regime of Constitution of 1891, integrated the indigenous collective heritage, became, with the Constitution of 1934, to be under the domain of the Union" (ApC 1999.01.000.22.8900, Rep. Selene Maria de Almeida, Federal Regional Court of the 1st Region, DJ of 16-2-2001).

[865] Vacant Land: They are public lands without allocation by the government and which at no time have been part of the property of a private individual, even if they are illegally under their possession. (my translation) Original text: Terras devolutas são terras públicas sem destinação pelo Poder Público e que em nenhum momento integraram o patrimônio de um particular, ainda que estejam irregularmente sob sua posse. Available in: https://www2.camara.leg.br/a-camara/estruturaadm/gestao-na-camara-dosdeputados/responsabilidade-social-e-ambiental/acessibilidade/glossarios/dicionario-de-libras/t/terrasdevolutas

[866] Lei n. 6.001/1973 – Translated text: Article 22, single paragraph: The lands occupied by the indigenous, under the terms of this article, will be inalienable assets of the Union. Available: http://www.planalto.gov.br/ccivil_03/leis/l6001.htm

[867] The dispute of States over indigenous land is portrayed in the Supreme Federal Court of original civil actions N. 362 and 366, in which the State of Mato Grosso demand compensation for land that would have been illegally incorporated to the Parque Xingu and to the reserves Nambikwára and Parecis. On the occasion, the Minister Marco Aurélio declared that lands occupied by indigenous are not considered as vacant lands since the advent of 1934 Charter. Furthermore, the Minister mentioned the Supreme Court Extraordinary Appeal N. 44. 585, which in the occasion declared the unconstitutionality of the 'Lei N. 1.077/1950' from State of Mato Grosso, that had reduced the area of

exclusive usufruct by the indigenous of the resources existing in the lands they occupied.[868]

The 1988 Brazilian Constitution is considered revolutionary regards the indigenous peoples' rights since it is the first constitution to contain provisions that protect the indigenous communities without the idea of integrating them into the dominant society in Brazil, but instead, providing for respect and recognition to their *"social organization, customs, languages, beliefs, and traditions"*.[869] Furthermore, it guarantees incorporation into the constitutional scope of the human rights provisions contained in the international law treaties to which Brazil is a party.

The 1988 Charter put aside the Eurocentric perspective regards the indigenous peoples, which had as its objective the integration and unification of indigenous communities into the scope of the Brazilian society utilizing the European view as standard to what was considered an ideal society representation. It replaced the old view of hierarchy between the indigenous community as the base and the dominant community above them for a horizontal interaction between

land that was in possession by foresters. Available in: https://cimi.org.br/wp-content/uploads/2017/11/STF-acordao_ACO-366_ACO-362.pdf.

[868] Brasil. Constituição (1967), Constituição da República Federativa do Brasil. Brasília, 1967. Original Text: Artigo 186 – É assegurada aos silvícolas a posse permanente das terras que habitam e reconhecido o seu direito ao usufruto exclusivo dos recursos naturais e de todas as utilidades nela existentes.

[869] Brasil. Constituição (1988). Constituição da República Federativa do Brasil: promulgada em 5 de outubro de 1988. Original text: Artigo 231- São reconhecidos aos índios sua organização social, costumes, línguas, crenças e tradições, e os direitos originários sobre as terras que tradicionalmente ocupam, competindo à União demarcá-las, proteger e fazer respeitar todos os seus bens. Available: http://www.planalto.gov.br/ccivil_03/constituicao/constituicao.htm

the indigenous communities and the Brazilian State, emphasizing the *"respect for diversity, through the recognition of the plurality of cultures"*.[870]

Article 231 of the Constitution considers as 'original' rights those utilized by the indigenous people regarding the land they traditionally occupy, and the Union must demarcate,[871] protect and guarantee the respect for their assets. Paragraph 1º defines lands traditionally occupied by the indigenous, considering them as:

> Brazilian Constitution - Article 231, §1º
>
> [L]ands inhabited by them on a permanent basis, those used for their productive activities, those essential to the preservation of environmental resources necessary for their well-being and those necessary for their reproduction physical and cultural, according to their uses, customs and traditions[872]

Unlike private property, which only considers the land's social function, indigenous property considers the cultural and traditional link of the land with the maintenance of their communities. Débora Pereira[873] states that regarding the indigenous property, the land goes beyond the patrimonial scope, having the status

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[870] Belfort, L. F. I.2006. "A proteção dos conhecimentos tradicionais dos povos indígenas, em face da convenção sobre diversidade biológica", *Universidade de Brasília*, Brasília: Faculdade de Direito, p. 25.

[871] As the STF decided, "the five-year period for completing the demarcation of indigenous lands is not decadent, and the norm constant in art. 67 of the ADCT merely programmatic, to be indicated to the administrative body that proceeds with the demarcations within a reasonable period" (STF – Plenum – RMS 26212/DF – Judge Ricardo Lewandowski, decision: 5-3-2011).

[872] Brasil, Constituição 1988. Original text: Art. 231, para 1: São terras tradicionalmente ocupadas pelos índios as por eles habitadas em caráter permanente, as utilizadas para suas atividades produtivas, as imprescindíveis à preservação dos recursos ambientais necessários a seu bem-estar e as necessárias a sua reprodução física e cultural, segundo seus usos, costumes e tradições.

[873] Pereira, Deborah Macedo Duprat de Brito, *A defesa dos direitos socioambientais no judiciário*, São Paulo : Instituto Sócioambiental, 2003, p. 12.

of life condition for these peoples. Thus, *"to take away their lands is to take away their right to live, the founding value of every legal order, […] for this reason, it is not subject to a merely patrimonial right or interest"* [874] otherwise, an improper inversion of values could happen.

The constitutional text determines that the indigenous people have permanent possession of the land they traditionally occupy, with the exclusive use of the soil, rivers, and lakes existing on them.[875] Regards permanent possession, José Afonso da Silva[876] explains that the land traditionally occupied by indigenous are not under a mere possession regulated by civil law but should be considered as *"a 'possessio ab origine' which for the Romans was in the consciousness of the ancient people, and was not the material relationship of man with the thing, but a power, as landlord."*[877]

Furthermore, the indigenous lands are attributed the characteristics of inalienability, unavailability, and imprescriptibly of the rights over them.[878] Thus, the indigenous lands cannot be subject to adverse possession or derivative land acquisition. As determined in the constitution, the lands traditionally occupied by the indigenous are assets of the Union,[879] which also has the competence to delimit

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874 Santos, Luciano Gersom dos, *O Índio Brasileiro: o que você precisa saber sobre os povos indígenas no Brasil de hoje*. Brasília: LACED/Museu Nacional, 2006, p. 101. "Territory is a condition for the life of indigenous peoples, not only in the sense of a material good or factor of production, bus as the environment in which develop all forms of life. Territory, therefore, is a set of beings, spirits, goods, values, knowledge, traditions that guarantee the possibility and the meaning of individual and collective life. Land is also a key factor in resistance of indigenous peoples, It is the theme that unifies, articulates and mobilizes everyone, the villages, peoples and indigenous organizations, around the common fight that is the defense of their territories" (my translation).

875 Brasil, Constituição 1988, Art. 231, para. 2.

876 Silva, José Afonso da. *Curso de direito constitucional positivo*. 9. ed. São Paulo: Malheiros, 1992.

877 *Ibid*, p. 729

878 Brasil, Constituição 1988, Art. 231, para. 4.

879 Brasil, Constituição 1988, Art. 20, XI.

these lands through an extensive administrative demarcation process,[880] which determines whether the land is, or not, indigenous land.

Article 67 of the Transitory Constitutional Provisions Act 16 established that the Union should complete the indigenous land's delimitation within five years from the promulgation of the constitution, which took place in 1989.[881] It is evident that the process of delimitation of indigenous lands is still incomplete; however, the Supreme Federal Court,[882] in several judgments, stated that the deadline mentioned above is not peremptory but only programmatic for the completion of the demarcation of indigenous lands within a reasonable period. Thus, despite the termination of the deadline, this did not harm the rights of the indigenous peoples, which continue to be assured, regardless of the demarcation. However, the Supreme Federal Court, from 2014 onwards, began to use a restrictive interpretation of Article 231, which threatened the normative constitutional protection of indigenous lands' rights.[883]

5.1.2 Indigenous Peoples' Land Rights in the Brazilian Infra-constitutional Legislation

Under the infra-constitutional scope, the protection of indigenous rights and interests is regulated. The Indian Statute was created in December 1973. Article 1 states that its objective is to regulate *"the legal status of indigenous or*

[880] The administrative process for the demarcation of indigenous lands it is regulates by its own legislation – Lei 6.001/ 1973 and Decreto 1.775/1996

[881] Art. 67 ADCT. Available in: http://www.planalto.gov.br/ccivil_03/constituicao/constituicao.htm#adct.

[882] Supreme Federal Court – Mandado de Segurança Nº 24.566 DF. Available in: https://redir.stf.jus.br/paginadorpub/paginador.jsp?docTP=AC&docID=86161.

[883] This situation will be further commented on in the analysis of domestic jurisprudence

foresters and indigenous communities, with the purpose of preserving their culture and integrating them, progressively and harmoniously, to the national communion."[884] This provision was in harmony with the determination of the 1967 Constitution, which established the competence of the Union to legislate on integrating the foresters into the national community.[885]

According to Souza and Barbosa,[886] it was evident that the Statute was based on the integrationist policies of the indigenous communities since the organization methods, beliefs, and customs of the traditional communities were not considered an integral part of the national identity. Therefore, it was expected of the foresters and the indigenous communities to adapt and harmonize with a model of society imposed by the nonindigenous people, denying their identities in favor of their inclusion into the Brazilian nation. Article 4 of the Indigenous Statute establishes a three-phase integration of the indigenous into the society:

> Article 4º - The indigenous are considered:
>
> I – Isolated – When they live in unknown groups or of which there are few and vague reports through occasional contacts with elements of the national communion;
>
> II – In the process of integration – When, in intermittent or permanent contact with outside groups, they maintain less or most of the conditions of their native life, but accept some practices and ways of existence common to other sector of the

[884] Estatuto do Índio – Lei 6.001/1973. Available in: http://www.planalto.gov.br/ccivil_03/leis/l6001.htm.
[885] Brasil. Constituição (1967) Constituição da República Federativa do Brasil. Brasília, 1967. Art. 8, XVII, "o".
[886] Souza, M. N & Barbosa, E. M. 2011. *Direitos indígenas fundamentais e sua tutela na ordem jurídica brasileira.* Âmbito Jurídico. Rio Grande: XIV. N. 85.

national communion, which they need increasingly for their own sustenance;

III – Integrated – When incorporated into the national community and recognized in the full exercise of civil rights, even though they retain uses, customs and traditions characteristic of their culture.[887]

It is noticeable the paradox around the Statute and its prejudiced characteristic. Despite having as objective the protection of indigenous and its communities, the civil rights were granted to them only after the integration; thus, for an indigenous to be able to protect the rights of his community, it is necessary first to become part of the non-indigenous society, which means that they need to set aside their culture and traditions to be allowed to observe the indigenous community and the people who are part of it.

During the period of the integrationist policies, another essential legislation appeared, creating the FUNAI (National Indigenous Foundation),[888] which is responsible for establishing guidelines, ensuring compliance with the indigenous policy, and managing indigenous heritage. However, despite being a body to help protect the indigenous communities, it lacks instruments and provisions for the indigenous lands. The only provision about the matter is Article 1º, I, 'b', which gives the FUNAI competence to guarantee the permanent possession of the lands

[887] Estatuto do Índio – Lei 6.001/1973.
[888] Created in 5 December 1967 by the Lei 5.371 – Fundação Nacional do Índio. Available in: http://www.planalto.gov.br/ccivil_03/leis/1950-1969/l5371.htm.

they inhabit and the exclusive use of natural resources and all the utilities therein for the indigenous people.[889]

The Decree n. 542 of 1993,[890] from the Ministry of Justice, internally regulated the FUNAI to adapt the institution to the new view regards the indigenous rights given by the 1988 Constitution, which brought provisions addressing the cultural and ethnic diversity of Brazil. However, due to the adaptation, the FUNAI's competence was reduced, maintaining only the function of overseeing the land issue for indigenous peoples.

Nowadays, the FUNAI is regulated by the Portaria n. 1.733.[891] Article 4º provides that the FUNAI has the function of promoting *"studies on identification and delimitation, demarcation, land title regularization and registration of land traditionally occupied by indigenous peoples."*[892] However, the single paragraph of this provision opens the possibility for public or private institutions, through agreements or contracts, to measure and demarcate the land if it proved that the FUNAI could not perform the activity directly.[893]

Regards the administrative procedure of the demarcation of the indigenous lands, Article 19 of the Statute of Indigenous states that the indigenous lands will be administratively demarcated by a procedure initiated and under the guidance of

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889 Lei 5.371/67, Art. 1, I, b

890 Portaria MJ nº 542 (21 December 1993). Available in: https://cimi.org.br/2004/06/21770

891 Portaria nº 1.733 (27 December 2012). Available in: http://www.funai.gov.br/arquivos/conteudo/coplam/2013/ESTATUTO/Regimento_Interno.pdf .

892 *Ibid,* Art. 4.

893 *Ibid,* Art 4, single paragraph.

the FUNAI,[894] following the process established in the decree of the Executive Power, which was issued in January 1996.[895] According to this legislation, the demarcation will be based on work carried out by an anthropologist of recognized qualification, corresponding to the anthropological identification study.[896] The demarcation must be approved by the Minister of Justice,[897] ratified by the President of the Republic, and, subsequently, registered in the Union Patrimony Service's proper book and the real estate registry of the district of the land situation.[898]

FUNAI, despite having been created as a body to protect and assist in the protection of indigenous lands, has followed a political line that conflicts with the objectives of its creation. For example, the foundation has started to delay land demarcation processes of indigenous lands already in progress.[899] In recent years, the Foundation has asked for the review of around 27 demarcation processes in

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894 Lei n. 6.001/1973 – Original text: Art. 19. As terras indígenas, por iniciativa e sob orientação do órgão federal de assistência ao índio, serão administrativamente demarcadas, de acordo com o processo estabelecido em decreto do Poder Executivo.

895 Decreto nº 1.775 (8 January 1996). Provides for administrative procedure for the demarcation of indigenous lands. Available in: http://www.planalto.gov.br/ccivil_03/decreto/d1775.htm. See also: http://www.funai.gov.br/index.php/2014-02-07-13-24-53.

896 *Ibid.* Original text: Art. 2 - A demarcação das terras tradicionalmente ocupadas pelos índios será fundamentada em trabalhos desenvolvidos por antropólogo de qualificação reconhecida, que elaborará, em prazo fixado na portaria de nomeação baixada pelo titular do órgão federal de assistência ao índio, estudo antropológico de identificação.

897 *Ibid.* Original text: Artigo 2º, § 10. Em até trinta dias após o recebimento do procedimento, o Ministro de Estado da Justiça decidirá: I - declarando, mediante portaria, os limites da terra indígena e determinando a sua demarcação.

898 *Ibid.* Original text: Art. 6° Em até trinta dias após a publicação do decreto de homologação, o órgão federal de assistência ao índio promoverá o respectivo registro em cartório imobiliário da comarca correspondente e na Secretaria do Patrimônio da União do Ministério da Fazenda

899 Federal Public Prosecutor's Office (MPF) in Minas Gerais (MG) obtained, together with the Federal Justice, the condemnation of the National Indian Foundation (Funai) to conclude all the acts of its competence referring to the revision of the limits of the indigenous land of the Xacriabá people, especially in relation to the approval and publication of the Detailed Report on the Identification and Review of the Xacriabá Indigenous Land. ACP nº 1854-98.2014.4.01.3807. Available in: https://www.mpf.mp.br/mg/sala-de-imprensa/docs/recurso-danos-morais-xacriabas The Federal Public Prosecutor's Office (MPF) of several States searched the Federal Justice to obtain decisions that ensured the conclusion of the demarcation of indigenous lands.

their final stages.[900] These revisions undermine the legal security of these indigenous lands and open doors for the non-indigenous occupation of indigenous lands.

In April 2020, FUNAI issued Normative Instruction (IN) nº 09/2020, allowing the certification of private properties in areas of traditional occupation, facilitating invasions in indigenous territories, and legitimizing land grabbing.[901] As a result, another 72 farms were certified in non-homologated indigenous lands in May of the same year.[902]

5.1.3 Brazilian Cases

The Raposa Serra do Sol Indigenous Land[903] was a leading case regarding the demarcation of indigenous land, and it is considered the first case of great relevance on the matter to reach the Brazilian Supreme Court.

The Petition nº 3.388 was filed by Senator Augusto Affonso Botelho Neto against the Union, contesting the standard of continuous demarcation of TI RSS,[904] and at the time, claimed three factual reasons. The first reason was the imminent damage to the economy of the State of Roraima since the non-indigenous people who inhabited the area would stop producing and cultivating the land. The second

[900] APIB: Apib repudia aprovação de novo Estatuto e mudanças na estrutura da Funai. Available in: http://obind.eco.br/2022/10/11/apib-apib-repudia-aprovacao-de-novo-estatuto-e-mudancas-na-estrutura-da-funai/

[901] Normative Instruction (IN) nº 09/2020https://www.gov.br/funai/pt-br/arquivos/conteudo/dpt/pdf/instrucao-normativa-09.pdf

[902] APIB: Apib repudia aprovação de novo Estatuto e mudanças na estrutura da Funai. Available in: http://obind.eco.br/2022/10/11/apib-apib-repudia-aprovacao-de-novo-estatuto-e-mudancas-na-estrutura-da-funai/

[903] Terra Indígena Raposa Serra do Sol (Supremo Tribunal Federal. Petição Nº 3.388/ RO, 2009) Available in: http://www.stf.jus.br/arquivo/cms/noticianoticiastf/anexo/pet3388ma.pdf.

[904] Terra Indígena Raposa Serra do Sol

reason was national security and sovereignty, which could be compromised as it is a border region. The last one was that the State of Roraima would lose a large area of land, which would become part of the domain of the Union.

In addition, the author claimed that the demarcation process suffered from uncorrectable defects and violations, such as the partiality of the anthropological report on which the demarcation was based, the absence of hearings from all the interested parties and the difference between the area described in the Ordinance nº 820/98 and Ordinance nº 534/2005. At last, demanded, as injunction, the suspension of the effects of Ordinance nº 534/2005, as well as the respective ratification decree and, regards the merits, asked for the declaration of nullity of the same Ordinance.

The case developed in a context in which, after 2005, an outbreak of actions appeared with the purpose of challenging the demarcation act, coming mainly from rice farmers who maintained agricultural activities in the area and the Government of the State of Roraima. The case had significant repercussions on public opinion, was widely publicized by the media, and raised the debate on the matter. The preliminary injunction was rejected by the reporting judge, whose decision was confirmed by the collegiate body when considering the appeal filed by the plaintiff in a session on April 6, 2006.

The Supreme Federal Court decided, based on the rapporteur's vote of Minister Carlos Ayres Britto, for the recognition of the legality of the administrative process of demarcation. In addition, the rapporteur did not find any violation of national sovereignty or territorial security given the proximity of

political frontier lands to the north of the Brazilian State, with Guyana and Venezuela, which were the principal concern of the Armed Forces.[905] Moreover, the decision rejected the application of the island method regarding the demarcation of the lands, ensuring the contiguity demarcation. Furthermore, it rejected any violation of the federative principle,[906] repealing the idea that the demarcation of indigenous land represents possible harm to the national development, an argument in disagreement with the arguments claimed by the Government of the State of Roraima and the farmers who developed agricultural activities in the region.[907]

One of the most important provisions of the decision was the establishment of the *"positive content of the indigenous lands demarcation act"*, which brought innovation to the legal order by creating parameters for land demarcation in that specific case.[908] Minister Carlos Britto defined four criteria for recognizing a certain land as indigenous land, and two of them deserve to be highlighted: a) the traditional occupation framework; and b) the temporal occupation framework.[909]

According to the traditional occupation framework, which follows the 'indigenato theory', for an indigenous land to be considered traditional, the indigenous communities must demonstrate a long-lasting relationship between

[905] According to the Rapporteur "no indigenous land rises to the level of political territory". Supremo Tribunal Federal. Pet. 3.388. Ementa. Rel. Min. Carlos Ayres Brito. Julgado em 24.09.2009. § 5º.
[906] The Rapporteur stated that "no ethnicity or community constitutes a federal unit" (my translation). Supremo Tribunal Federal. Pet. 3.388. Ementa. Rel. Min. Carlos Ayres Brito. Julgado em 24.09.2009. § 5º.
[907] *Ibid.*
[908] *Ibid*, §78.
[909] The third and the fourth criteria were: c) the framework of the concrete land coverage and the practical purpose of the traditional occupation, which describes the practical utility that traditionally occupied land should serve, emphasizing the criteria of ancestry; d) the framework of the extensive land ownership concept of the "principle of proportionality" in the indigenous matter.

them and the land, in a sentimental and psychic sense of ethnographic continuity, with the use of the land for the exercise of traditions, customs, and subsistence. The criteria regarding the traditional occupation framework establish that the indigenous have to fulfill two elements: an immaterial element (spiritual, ancestral, psychological) and a material element, which is derivative of the direct relationship with the land, such as fishing, hunting, planting, etc.[910] The mentioned criteria above are in line with the grammatical interpretation of Article 231 of the 1988 Constitution, which provides in paragraph 1º that:

> Article 231 – The indigenous are recognized […] the original rights over the lands they traditionally occupy, […]: §1 – The lands traditionally occupied by the indigenous are those which they inhabit on a permanent basis, those used for their productive activities, those essential to the preservation of environmental resources necessary for their well-being and those necessary for their physical and cultural reproduction, according to their uses, customs and traditions.[911]

The temporal occupation framework criteria establish that indigenous lands will be those in which there was a practical occupation, by indigenous populations, on the promulgation of the current Brazilian Constitution, which happened on October 5, 1988. This parameter narrows the right to land provided by the constitutional text, taking into account a grammatical interpretation.

[910] Supremo Tribunal Federal. Pet. 3.388. voto Min. Rel. Carlos Ayres Brito. Julgado em 24.09.2009.
[911] Brasil, Constituição 1988, Art. 231, para. 1.

The Constitution states that indigenous lands are those inhabited by the indigenous permanently; however, it does not determine that they needed to be occupying the land on the date of the promulgation of the Constitution precisely because the traditional framework criteria was used to prevent the stubborn dispossession, that are the situations in which the indigenous people were expelled from their lands by non-indigenous people and were prevented from returning to them, even though the land kept the necessary conditions – immaterial and material – for the establishment of traditional occupation.

The temporal occupation framework is the most controversial innovation brought by the decision since its requirement is not expressed in the Constitution or in any other legislation, resulting from the interpretative activity of the Supreme Federal Court. As mentioned, the suggestion of a temporal occupation framework as a base for the demarcation of indigenous lands emerged in the administrative process of the present case, when the State of Roraima and the Municipality of Normandia claimed that the indigenous occupation should last until the date of the 1988 Constitution. However, this argument was not accepted at the time by the Minister (Judge)[912] of Justice Nelson Jobim, considering that since the 1934 Constitution, the lands of indigenous people have been targeted for special protection.[913]

On the other hand, in the judiciary sphere, the thesis of the temporal framework gained strength, with the rapporteur stating that the term 'occupy' in the

[912] The Supreme Court Judges are called "Minister".

[913] Nobrega, Luciana Nogueira. "Anna Pata, Anna Yan – Nossa terra, Nossa Mãe: a demarcação da Terra Indígena Raposa Serra do Sol e os direitos territoriais indígenas no Brasil em julgamento." Dissertação (Mestrado em Direito) - Faculdade de Direito, Universidade Federal do Ceará, Fortaleza, 2011.p. 95 – 97.

caput of Article 231 of the 1988 Constitution means an objective milestone: the word occupy is on the present verbal tense, which means that exclude the future occupation and the past occupation. Considering the entire historical line of the indigenous and the indigenous communities, the arbitrary establishment of that date shows a disregard for the indigenous historicity, ignoring the Brazilian indigenist past and the original nature of their rights, as well as violating the human rights of these people in favor of individuals and the state.

Currently, the Supreme Federal Court is judging the Xokleng Case,[914] which brings back the discussion about the applicability of the temporal occupation framework, and the decision on this case will replace the previous one given in the Raposa Terra do Sol case; and will establish new parameters for the interpretation of indigenous rights guaranteed in the Constitution that should be applied to all indigenous lands.

The Extraordinary Appeal with general repercussions (RE-RG) 1017365[915]is a request for repossession filed by the Instituto do Meio Ambiente de Santa Catarina against FUNAI and the Xokleng indigenous people involving a claimed area of the indigenous territory of Ibirama-Laklanõ.[916] The disputed territory was reduced throughout the 20th century, and the indigenous people never stopped claiming it.[917] The area has already been identified by FUNAI's

[914] "Quem são os Xokleng, os indígenas que podem mudar a trajetória jurídica das demarcações", *Câmara dos Deputados.* Available in: https://www2.camara.leg.br/atividade-legislativa/comissoes/comissoes-permanentes/cdhm/noticias/quem-sao-os-xokleng-os-indigenas-que-podem-mudar-a-trajetoria-juridica-das-demarcacoes

[915] Recurso Extraordinário (RE) 1.017.365 STF. Available at: https://portal.stf.jus.br/processos/downloadPeca.asp?id=15339909193&ext=.pdf

[916] Ibid, p. 2.

[917] "Quem são os Xokleng, os indígenas que podem mudar a trajetória jurídica das demarcações", *Câmara dos Deputados.*

anthropological studies and declared by the Ministry of Justice as part of their traditional land.[918]

The STF trial of RE (Extraordinary Appeal) 1017365 will decide which theory the demarcation of indigenous lands should follow. Thus, what is at stake is the recognition or denial of the most fundamental right of indigenous peoples: the right to land. Like what happened in the Raposa Serra do Sol case, the Xokleng case focuses on two theories: the traditional occupation framework and the temporal occupation framework. Supported by the indigenous representatives, the traditional occupation framework (indigenous theory) is considered a legislative tradition from the colonial period, which recognizes the right of indigenous peoples over their lands as a right 'originary' prior to the State itself. The 1988 Federal Constitution follows this tradition by guaranteeing indigenous people *"the original rights over the lands they traditionally occupy"*.[919] On the other hand, defended by ruralists, the temporal occupation framework is a restrictive proposal that intends to limit the rights of indigenous peoples to their lands by reinterpreting the Constitution based on the thesis of the so-called 'time frame',[920] ignoring the historic violations that these peoples have suffered over the years. At the begging of 2019, the plenary of the STF unanimously recognized the 'general repercussion' of the judgment of RE 1017365, meaning that the final decision will establish a

[918] Portaria 1.128/2003 do Ministro da Justiça. See also: Recurso Extraordinário (RE) 1.017.365 STF, p. 7.
[919] Brasil, Constituição 1988, Art. 231.
[920] Recurso Extraordinário (RE) 1.017.365 STF, p. 17.

thesis of reference for all cases involving indigenous lands in all instances of the Judiciary.[921]

If the STF recognizes the original nature of indigenous land rights and rejects the thesis of the temporal framework, the way will be cleared for the resolution of hundreds of disputes throughout the nation, as well as dozens of litigations that may be solved quickly. Alternatively, if the STF adopts a temporal framework, it will validate historical usurpations and transgressions against indigenous peoples. In such circumstances, one might anticipate a deluge of additional rulings annulling demarcations, leading to hostilities in pacified zones and escalating conflicts in locations where they have already erupted.

5.2 Indigenous Peoples' Land Rights in the Philippines

5.2.1 Indigenous Peoples' Land Rights in the Philippines Constitution

The Philippines' legal system regarding indigenous peoples is influenced by both the Spanish and American legal systems as a reflection of the years that both States controlled the Philippines. While the Philippines was under Spanish authority, the indigenous legislation which controlled indigenous peoples in Spanish territory in Latin America was also applicable to indigenous peoples in the Philippines, and other laws expressly addressing the Philippines' situation were

[921] *Ibid*, p. 33.

also enacted by Spain.[922] As time passed, the legislation developed to include clauses acknowledging the native peoples' previous rights and an obligation to acquire their approval in certain circumstances. However, customary property rights were often disregarded,[923] and indigenous peoples were compelled to submit to Spanish control to prevent conflict.[924]

By signing the Treaty of Paris in 1898, Spain passed over the authority of the Philippines to the United States. The treaty granted the United States ownership of the Islands' public lands.[925] In seizing control of the Philippines, the US administration allegedly followed a benevolent assimilation strategy.[926] Nonetheless, its annexation of the Philippines was primarily motivated by imperialistic aspirations.

The United States quickly identified the abundance of mineral resources in the Philippines, and the exploitation of mineral resources was considered an urgent economic concern. For this reason, most of the 1902 Philippines Organic Act provisions were devoted to mining and protecting the interests of American

[922] Molintas, J. M, "The Philippine Indigenous Peoples' Struggle", *Arizona Journal of International and Comparative Law*, 2004.
[923] Cushner, Nicholas P., "Spain in the Philippines: From Conquest to Revolution", *Institute of Philippine Culture*, Ateneo de Manila University, 1971, p. 12. See also: Lynch, Owen J., "Land Rights, Land Laws and Land Usurpation: The Spanish Era (1565-1898)", *Philippine Law Journal* 63, no. 1 1988, p. 85.
[924] Aragon, Jesús Gayo, "The Controversy over Justification of Spanish Rule in the Philippines', in *Studies in Philippine Church History*, ed. G. Anderson, Ithaca NY: Cornell University Press, 1969, p. 6.
[925] United States Congress, A Treaty of Peace Between the United States and Spain, U.S. Congress, 55th Cong., 3d sess., Senate Doc. No. 62, Part 1, Washington: Government Printing Office, 1899.
[926] Miller, Stuart C., *Benevolent Assimilation: The American Conquest of the Philippines, 1899–1903*, New Haven and London: Yale University Press, 1982.

miners.[927] The US government vigorously implemented land regulations, massively confiscating property for military, logging, and mining reasons.[928]

In 1909, the subject of continuous non-consensual seizure of native lands was judged by the Supreme Court of the United States, which ruled in favor of indigenous rights in the landmark case Cariño vs. Insular Government Decision.[929] Cariño inherited his family's lands in the Cordillera following the Igorot tradition. However, the property was confiscated by the US for the construction of a military facility. Cariño launched a lawsuit against the Philippine government, which at the time was under control. Despite his attempts to register the property, the Philippine Supreme Court rejected his request because it conflicted with the public land regulations since his lands exceeded their limit.[930]

The decision of the US Supreme Court acknowledged that since immemorial times, indigenous peoples of the Philippines had inhabited ancestral areas over which they have rights. It was expressed that indigenous peoples' private property rights are *"vested through a traditional legal system different from what the colonizers prescribed".* [931] Furthermore, the Court emphasized that indigenous lands have traditionally been considered private property based on *"native custom and by long association".*[932] Therefore, it considered that the basis

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927 Thompson, Winfred L., *The Introduction of American Law in the Philippines and Puerto Rico 1898-1905*, Fayetteville, AR: University of Arkansas Press, 1989, p. 128.

928 Doyle, Cathal, "The Philippines Indigenous Peoples Rights Act and ILO Convention 169 on Tribal and Indigenous Peoples: Exploring synergies for rights realization", *The International Jornal of Human Rights*, 2020, Vol. 24, NOS. 2-3, 170-190, p. 175.

929 Cariño vs. Insular Government of the Philippine Islands, 212 U.S. 449 (1909).

930 *Ibid.*

931 Legal Rights and Natural Resources Center (LRC-KSK), A Divided Court, A Conquered People? Case Materials from the Constitutional Challenge to the Indigenous Peoples' Rights Act of 1997. Quezon City: Legal Rights and Natural Resources Centre Inc, (Manila: Kasama sa Kalikasan LRC-KSK, Friends of the Earth-Philippines, 2001), p. 15.

932 Cariño vs. Insular Government of the Philippine Islands, 212 U.S. 449 (1909).

of indigenous peoples' land and resource rights was a composition of custom (indigenous law) and long-term occupation. This created the foundation for the argument that the State could not unilaterally expropriate indigenous lands and resources by categorizing them as public lands without permission acquired in line with the indigenous peoples' law.[933]

The Philippines obtained independence in 1935 and became the self-governing Commonwealth of the Philippines. The drafters of the Constitution of the Commonwealth, as well as the government of the United States, recognized the abundant potential of natural resources in the country and emphasized that through the utilization of these natural resources, *"the country may, in the future, become one of the richest in the world"*.[934] Thus, the settlers' vision of land was preserved mainly in the 1935 Constitution. Furthermore, contrary to the principles established in the Cariño judgment, the Constitution did not mention indigenous peoples or their rights. Instead, it confirmed that lands and resources were considered the State's public domain.[935] This understanding is provided by Article XIII, paragraph 1 of the 1935 Constitution, which states:

> 1935 Commonwealth Constitution - Article XIII - §1º. All agricultural, timber, and mineral lands of the public domain, waters, minerals, coal, petroleum, and other mineral oils, all forces of potential energy, and other natural resources of the Philippines belong to the State, and their disposition,

933 Doyle, Cathal, *supra* note 928, p. 176.
934 Noblejas, Antonio H., *Philippine Law on Natural Resources*, Manila: Central Book Supply, 1961, p. 1.
935 Doyle, Cathal, *supra* note 928, p. 176.

> exploitation, development, or utilization shall be limited to the citizens of the Philippines, or to corporations or associations at least sixty per centum of the capital of which is owned by such citizens, subject to existing right, grant, lease or concession at the time of the inauguration of the Government established under the Constitution.[936]

Establishing a state policy for exploiting natural resources was strengthened by adopting legislation that regularized the activities mentioned in the Constitution. An important regulation was the Mining Act of 1935, which prohibited indigenous people from engaging in mining operations. In addition, Commonwealth Act 137 granted timber and water rights for the mining activities' development and operation.[937] These laws, in addition, forbid the involvement of indigenous peoples in activities to exploit natural resources on their lands, openly deny the existence of indigenous peoples, and, therefore, any right that is specific to these peoples, such as the right to their traditional lands.

Following the provisions of the Philippine Independence Act, the Commonwealth of the Philippines became the Republic of the Philippines and attained political independence from the United States in 1946. Nevertheless, the postwar system, for the most part, mirrored the objectives of the American colonial authority, which were primarily centered on the exploitation of natural resources by

[936] Isagania A. Cruz, Philippine Political Law 493-94 (1995).
[937] Cariño, Joanna, "National Minorities and Development: A Cordillera". *Cordillera Consultative Committee* eds., 1984.

the government and the integration agenda of the indigenous peoples.[938] During the discussions on the adoption of ILO Convention N. 107, the Philippines' comments reflected its integration approach. Regarding Article 2, the Philippines government pressured the adoption of the following text:

> Draft of ILO Convention N. 107 - Article 2: (1) the progressive integration of indigenous and other tribal populations into the life of their respective countries should be mainly at their own initiative; and (2) in the process of the said integration no attempt, direct or indirect, should be made to interfere with the religious beliefs and practices of such populations.[939]

In contrast to the previous constitution, which ignored the indigenous peoples in its text, the Philippine Constitution of 1973 incorporated the subject of indigenous peoples when recognizing the *"customs, traditions, beliefs, and interests"* of *"national cultural communities"*.[940] However, it simply compelled policymakers to consider these interests and did not establish rights regarding lands or self-government.[941] Only in the following decade, with the adoption of the 1987 Philippines Constitution, the assimilation and integration approach for constructing a unified and homogeneous nation was put aside. Instead, the Constitution

[938] Molintas, J. M, *supra* note 922, p. 285.
[939] International Labour Organisation, International Labour Conference, 40th Session. Report VI (2) (Geneva: ILO, 1957), p.13.
[940] Philippines Constitution, 1973, Art. XV § 11.
[941] Philippines Constitution, 1973, Art. XV § 11.

provided for the recognition, defense, and applicability of permanent inherent collective rights of the indigenous communities.[942]

Four parts of the 1987 Constitution provide explicitly for indigenous peoples' rights, and a general clause deals with the duty to recognize and promote the rights of indigenous cultural groups.[943] The indigenous peoples' rights to ancestral land and domain and their connection to customary indigenous law must be secured, taking into consideration that land reform policy is implemented as a method of achieving *"a more equitable distribution of opportunities, income and wealth"* and *"raising the quality of life for all, especially the less privileged"*.[944]

Paragraph 5 of the Article XII of the 1987 Constitution provided authority to Congress to determine the application of customary rules controlling property rights as well as the terms for assessing the ownership and size of ancestral territory.[945] Furthermore, it states that indigenous peoples' land rights are subject to *"national development policies and programs".*[946]Article XIV, paragraph 17, calls for the acknowledgment, respect, and protection of indigenous peoples' rights aiming at the preservation and development of their culture, traditions, and systems. In addition, the article stipulates that these rights must be considered in creating national programs and strategies.[947] The implementation of the Indigenous Peoples Rights Act resulted from this provision.

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942 Philippines Constitution, 1987, Art. XIV § 17.
943 Philippines Constitution, 1987, Art. II § 22.
944 Philippines Constitution, 1987, Art. XII § 1, 5.
945 Philippines Constitution, 1987, Art. XII § 5.
946 *Ibid.*
947 Philippines Constitution, 1987, Art. XIV § 17.

Thus, the Constitution provides that indigenous peoples' land rights must be recognized in the framework of national development strategies and programs[948] but also mandates that such policies and programs be designed with indigenous peoples' rights in mind[949]. One clause attempts to counterbalance the other, and national growth cannot trump indigenous peoples' rights and vice versa.

The Philippine Constitution of 1987 brought significant changes regarding the State's acknowledgment of indigenous people's rights, especially on the issue of land rights. The vision development of indigenous peoples could be noticed during the discussions on the revision of ILO Convention N. 107, which resulted in the adoption of ILO Convention N. 169.[950] On that occasion, the Philippines expressed its intent to establish legislation regarding the autonomy and territorial rights of indigenous peoples. Such plans were implemented in 1997 with the enactment of the Indigenous Peoples' Rights Act.[951]

5.2.2 Indigenous Peoples' Land Rights in the Philippines Infra-constitutional Legislation

The Indigenous Peoples Rights Act (IPRA)[952] of the Philippines is widely regarded as one of the most progressive legislative measures on indigenous peoples' rights in the world, reiterating the constitutional acknowledgment of inherent self-determination and cultural and land rights. Furthermore, it recognizes

948 *Ibid.*
949 Philippines Constitution, 1987, Art. XII § 5.
950 ILO Convention N. 169.
951 Philippines Indigenous Peoples Rights Act (IPRA) of 1997, Republic Act No. 8371 An Act to Recognize, Protect and Promote the Rights of Indigenous Cultural Communities/Indigenous Peoples, Creating a National Commission on Indigenous Peoples, Establishing Implementing Mechanisms, Appropriating Funds Therefor, and for Other Purposes (enacted 29 October 1997).
952 *Ibid.*

and gives effect to the customary law regarding indigenous land and resource, following the 1987 Constitution.

The IPRA's text was based on ILO Convention N. 169;[953] however, essential to note that despite the Philippines it is not a state party to the convention, meaning its activities and obligations regarding the indigenous communities are not examined by the Committee of Experts of Conventions and Recommendations, which examines the application of international standards regarding indigenous peoples.[954]

The IPRA, in many points, is more detailed than the ILO Convention N. 169 and even UNDRIP since it does not simply state rights but also establishes institutions, like the National Commission on Indigenous Peoples (NCIP), which is composed of indigenous peoples from various areas and is in charge of executing the IPRA and preparing a Medium Term Philippine Development Plan for Indigenous Peoples.[955] The provisions regarding indigenous lands under the IPRA are extensive and encompass the concept of ancestral lands,[956] the indigenous

[953] Justice Santiago M. Kapunan, Separate Opinion, Cruz v Secretary of Environment and Natural Resources et al GR No. 135385 December 6, 2000, p. 3. See also: Candelaria, Sedfrey M., "Comparative Analysis on the ILO Indigenous and Tribal Peoples Convention No. 169, UN Declaration on the Rights of Indigenous Peoples (UNDRIP), and Indigenous Peoples' Rights Act (IPRA) of the Philippines", International Labour Organization, Manila, 2012.

[954] "Monitoring Compliance with international labour standards: The key role of the ILO Committee of Experts on the Application of Conventions and Recommendations." International Labour Organization, 26 November 2019.

[955] Erni, Christian, "Country Profile: The Philippines" in Christian Erni, *The Concept of Indigenous Peoples in Asia*, Copenhagen, IWGIA Publishers, 1996, p. 22.

[956] IPRA. Chapter III, Section 4.

concept of ownership,[957] the composition of ancestral lands,[958] and the rights to ancestral domains.[959]

The IPRA acknowledges the communal and individual aspects of indigenous peoples' rights to ownership and control of the lands they have historically occupied or had access. Because these lands are an inherent part of their lives and culture and hence vital to their existence, the government must take action to maintain their ownership and possession rights over these areas. The IPRA establishes a method for delineating or identifying indigenous peoples' ancestral land and ancestral domains to issue indigenous peoples titles of ownership over these territories.[960]

According to IPRA, indigenous land/domains include the whole environment that the entire community or individuals inhabit and utilize. Thus, their houses, air, water, animals, plants, minerals, and other resources are all included in the indigenous peoples' territories. Furthermore, indigenous peoples inhabited the abovementioned lands long before the State was established. Regarding the concept of ancestral lands, the IPRA states:

> Chapter III, Section 4. Concept of Ancestral Lands/Domains:
> Ancestral lands/domains shall include such concepts of territories which cover not only the physical environment but the total environment including the spiritual and cultural

957 IPRA. Chapter III, Section 5.
958 IPRA. Chapter III, Section 6.
959 IPRA. Chapter III, Section 47
960 Candelaria, Sedfrey M., *supra* note 953, p. 4.

> bonds to the area which the ICCs/IPs possess, occupy and use and to which they have claims of ownership.[961]

Moreover, under this provision, the Philippines recognizes the spiritual and cultural bond the indigenous peoples had with their traditional lands and includes this aspect in the concept of ancestral lands.

Regarding the concept of ownership, the IPRA acknowledge the right of indigenous peoples to maintain, develop, and strengthen their special spiritual and material relationship with the lands, territories, and resources they have traditionally owned, occupied, or used and to uphold their responsibilities to future generations in this regard. The text follows the standards set by the UNDRIP.

> IPRA – Chapter III, Section 5. Indigenous Concept of Ownership
>
> Indigenous concept of ownership sustains the view that ancestral domains and all resources found therein shall serve as the material bases of their cultural integrity. The indigenous concept of ownership generally holds that ancestral domains are the ICCs/IPs' private but community property which belongs to all generations and therefore cannot be sold, disposed or destroyed. It likewise covers sustainable traditional resource rights.[962]

[961] IPRA. Chapter III, Section 4.
[962] IPRA. Chapter III, Section 5.

Following this provision, the Philippines acknowledges that land is of utmost significance to indigenous peoples, as it is regarded as an essential and fundamental component of their life and provides them with cultural identity and spiritual and social well-being. [963] In addition, this provision brings the differentiation between ancestral lands and ancestral domains, which is related to the possibility of selling or disposing of the lands. On the one hand, the rights to ownership of ancestral domains prevent selling, disposing, or destroying the domains; hence, they cannot be transferred. In contrast, the right to ownership of ancestral lands may be transmitted to members of the same indigenous community according to the community's customary law and traditions.[964]

Regarding the Ancestral Domains, Section 3 (a) states that it encompasses the lands, the natural resources, and the surrounding environment, inhabited or owned by indigenous peoples, communally or individually, by themselves or via their ancestors, from pre-colonial times, continuously until the present. The provision includes an exception regarding the continuity of indigenous occupation of the ancestral domain, which mentions *"war, force majeure or displacement by force, deceit, stealth or as a consequence of government projects or any other voluntary dealings entered into by government and private individuals/corporations, and which are necessary to ensure their economic, social and cultural welfare".* [965] Furthermore, the provision also includes the natural resources and lands that nowadays are not occupied only by indigenous peoples but

963 Candelaria, Sedfrey M., *supra* note 953, p. 34.
964 IPRA. Chapter III, Section 8 (a): Right to transfer land/property. - Such right shall include the right to transfer land or property rights to/among members of the same ICCs/IPs, subject to customary laws and traditions of the community concerned.
965 IPRA. Chapter II, Section 3 (a).

from which they traditionally used for their livelihood and traditional activities, particularly related to nomadic and/or shifting cultivators.[966]In addition, Section 3 (b) stresses ancestral lands,[967] which is quite similar to the definition of ancestral domains; however, the domains include the surrounding environment and the natural resources. Thus, it is essential to note that the ancestral lands are within the ancestral domain.

Another essential subject closely related to the indigenous lands' protection is natural resources. The IPRA acknowledges indigenous peoples' rights to their territories' natural resources and their use, management, and conservation.[968] However, it is crucial to note that the IPRA allows indigenous peoples to enjoy priority rights in using natural resources, which does not mean total ownership. Priority rights do not imply exclusive rights but rather the right to preferential treatment or first consideration in awarding privileges allowed by current laws and

[966] IPRA. Chapter II, Section 3. Definition of Terms. - For purposes of this Act, the following terms shall mean: a) Ancestral Domains - Subject to Section 56 hereof, refer to all areas generally belonging to ICCs/IPs comprising lands, inland waters, coastal areas, and natural resources therein, held under a claim of ownership, occupied or possessed by ICCs/IPs, by themselves or through their ancestors, communally or individually since time immemorial, continuously to the present except when interrupted by war, force majeure or displacement by force, deceit, stealth or as a consequence of government projects or any other voluntary dealings entered into by government and private individuals/corporations, and which are necessary to ensure their economic, social and cultural welfare. It shall include ancestral lands, forests, pasture, residential, agricultural, and other lands individually owned whether alienable and disposable or otherwise, hunting grounds, burial grounds, worship areas, bodies of water, mineral and other natural resources, and lands which may no longer be exclusively occupied by ICCs/IPs but from which they traditionally had access to for their subsistence and traditional activities, particularly the home ranges of ICCs/IPs who are still nomadic and/or shifting cultivators;

[967] IPRA. Chapter II, Section 3. Definition of Terms. - For purposes of this Act, the following terms shall mean: b) Ancestral Lands - Subject to Section 56 hereof, refers to land occupied, possessed and utilized by individuals, families and clans who are members of the ICCs/IPs since time immemorial, by themselves or through their predecessors-in-interest, under claims of individual or traditional group ownership, continuously, to the present except when interrupted by war, force majeure or displacement by force, deceit, stealth, or as a consequence of government projects and other voluntary dealings entered into by government and private individuals/corporations including, but not limited to, residential lots, rice terraces or paddies, private forests, swidden farms and tree lots;

[968] IPRA. Chapter III, Section 7. Rights to Ancestral Domains (b) Right to Develop Lands and Natural Resources.

regulations, with proper respect for the interests and welfare o indigenous peoples residing in the region. Priority rights are reserved for harvesting, developing, or exploiting any natural resources within their areas.[969]

One of the biggest obstacles confronting indigenous peoples in the context of natural resources exploitation in their lands and impeding the achievement of their rights is the presence and selective execution of contradictory laws and regulations. One example is the Philippine Mining Act of 1995 (Republic Act No. 7942), which strives to promote national growth via 'rational' exploitation, development, usage, and protection of the country's mining resources.[970] The Philippine Mining Act takes the indigenous peoples into account; however, the provisions safeguarding the indigenous lands contained in the Act are insufficient and weaken the protection given by the IPRA. Like the IPRA Chapter III, Section 3 (a) and (b), the Mining Act Chapter I, Section 3 (w)[971] also attribute the aspects of immemorial time and continuity regarding the indigenous lands; however, different from the indigenous instrument does not include any exception, which can be understood that under the mining legislation, for the land to receive proception as indigenous lands, the occupation has to be happening at the present moment, not accepting past occupation.

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969 Candelaria, Sedfrey M., *supra* note 953, p. 38.

970 Philippine Mining Act of 1995 (Republic Act No. 7942). Chapter I, Section 2. All mineral resources in public and private lands within the territory and exclusive economic zone of the Republic of the Philippines are owned by the State. It shall be the responsibility of the State to promote their rational exploration, development, utilization and conservation through the combined efforts of government and the private sector in order to enhance national growth in a way that effectively safeguards the environment and protect the rights of affected communities.

971 *Ibid*, Chapter I, Section 3. (w) Indigenous peoples as having continuously lived as communities defined land since time immemorial and have succeeded in preserving, maintaining, and sharing common bonds of languages, customs, traditions, and other distinctive cultural traits, and as may be defined and delineated by law.

Chapter III, Section 4, regarding the ownership of mining resources, states that*: "The State shall recognize and protect the rights of the indigenous cultural communities to their ancestral lands as provided for by the Constitution."*[972] It is essential to mention that the Mining Act was enacted before the IPRA; thus, most of its provision considers the indigenous peoples' protection under the Philippines Constitution. Furthermore, the mining legislation provides that *"no ancestral land shall be opened for mining-operations without prior consent of the indigenous cultural community concerned".* [973] Following what is determined by the Constitution, the Mining Act includes the prior consent obligation; however, the companies and the State often disregard this practice. One example is the Mines and Geosciences Bureau in the Philippines disregarded the consent obligation in the case of the Subanon of Mt. Canatuan.[974] Another situation regarding the lack of free, prior, and informed consent happened with the indigenous peoples in the Cordillera related to the Gened Dam matter. In this case, the police forces blocked the indigenous members who opposed the dam from participating in the procedure.[975]

In additionally to the problem related to the free, prior informed consent procedure, the indigenous peoples in the Philippines also face the delay in the delimitation of their lands, which causes a lot of criticism to the NCIP since its main work is to proceed with the Certificate of Ancestral Domain/ Land Title (CADT/CALT) to the indigenous communities; moreover, the *"titling procedures*

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[972] *Ibid*, Chapter III, Section 4.
[973] *Ibid*, Chapter III, Section 16.
[974] "State of the World's Indigenous Peoples: Right to Land, Territories and Resources", Department of Economic and Social Affairs. United nations, New York, 2021, p. 50.
[975] Carino, Joji, *Global Report on the Sitution of Lands, territories and Resources of Indigenous Peoples*, Indigenous Peoples Major Group for Sustainable Development, p. 25.

have been criticized for being unnecessarily costly and lengthy and lacking in cultural sensitivity."[976]

Thus, indigenous peoples' primary challenges are the culturally insensitive and expensive titling procedures and the problematic application of the Act's provisions protecting vested property rights to pre-law enactment mining leases.[977] Even though the IPRA and mining law address free, prior, and informed consent when it comes to licensing extractive sector operations and transferring management responsibility for protected areas inside ancestral domains,[978] the provision is ineffective because the current Philippines government policy has labeled many indigenous leaders as terrorists, creating a context in which their lives and liberty are jeopardized. Community consent to measures affecting their land, territorial, and resource rights cannot apply freely.[979]

5.2.3 The Philippines Cases

The most known and relevant case about indigenous peoples was Cariño (1909), in which the US Court confirmed that since immemorial times the indigenous peoples have rights over their ancestral lands. However, as this case happened before the adoption of important domestic legal instruments regarding indigenous peoples' rights, the 1987 Philippines Constitution, and the IPRA, it is

976 *Ibid*, p. 25.
977 *Ibid*, p. 23.
978 "Philippines indigenous peoples ICERD shadow report", Alternative Law Groups Inc. and others, 2009, p. 36-38; See also: Magno, Cielo, "Free prior and informed consent in the Philippines: regulations and realities", *Oxfam America Briefing Paper*, Washington, D.C., Oxfam, September 2013, p. 13-18.
979 Dekdeken, Sarah Bestang K. & Cariño, Jill K., "Philippines", in *The Indigenous World 2019*, David Nathaniel Berger, ed., Copenhagen, International Work Group for Indigenous Affairs, 2019.

necessary to analyze recent cases to understand the influence and applicability of these instruments in favor of protecting indigenous lands.

i. Isagani Cruz and Cesar Europa vs. Secretary of Environment and Natural Resources, National Commission on Indigenous Peoples (2000)[980]

In 1998, Isagani and Cesar filed a petition contesting the constitutionality of certain provisions of the IPRA and its Implementing Rules. According to the petitioners, the IPRA provisions related to ancestral domains and lands, such as Sections 3, 5, 6, 7, 8, 57, and 58,[981] resulted in *"an illegitimate deprivation of the State's ownership of land in the public domain as well as [...]* natural resources therein" which violates the Article XII, Section 2 of the 1987 Philippines Constitution. [982]

Furthermore, they pointed out as invalid and unconstitutional Sections 51, 52, 53, 59, 63, 65, and 66 of IPRA, which determine the NCIP powers and jurisdiction and recognize the application of customary law to dispute settlements

[980] G.R. No. 135385. Dec 6, 2000.
[981] *Ibid*, p. 3.
[982] Philippines Constitution 1987, Art. XII. Section 2. Section 2. All lands of the public domain, waters, minerals, coal, petroleum, and other mineral oils, all forces of potential energy, fisheries, forests or timber, wildlife, flora and fauna, and other natural resources are owned by the State. With the exception of agricultural lands, all other natural resources shall not be alienated. The exploration, development, and utilization of natural resources shall be under the full control and supervision of the State. The State may directly undertake such activities, or it may enter into co-production, joint venture, or production-sharing agreements with Filipino citizens, or corporations or associations at least sixty per centum of whose capital is owned by such citizens. Such agreements may be for a period not exceeding twenty-five years, renewable for not more than twenty-five years, and under such terms and conditions as may be provided by law. In cases of water rights for irrigation, water supply fisheries, or industrial uses other than the development of water power, beneficial use may be the measure and limit of the grant.

related to ancestral domains and lands because this practice violates the due process clause of the Constitution.[983]

The members of the Court deliberated about the petition, and the votes were equally divided. Seven members voted to dismiss the petition, while seven voted to accept it. Following Rule 56, Section 7 of the Rules of Civil Procedure, the petition was dismissed because a majority was not reached.[984] Representing the Justices (Judge)[985] that voted for the dismissal of the petition, Justice Juno presented a Separate Opinion, where he explained why the IPRA does not conflict with the 1987 Philippine Constitution.[986]

The initial petition presented by Isagani and Cesar provides a concept of state ownership which declare that *"all lands of the public domain and natural resources, whether on public or private land, belong to the State"*;[987] thus, the IPRA would be violating this concept and in conflict with the 1987 Constitution and previous legislation regarding state ownership of land and natural resources.[988] Justice Juno estates that IPRA inserted 'radical concepts' into the Philippine legal framework created to protect indigenous communities and their ancestral lands, which the Constitution previously provided.[989] Therefore, the construction of the IPRA was grounded on the Constitution, so it would be difficult to have conflicting norms with its own base.

983 G.R. No. 135385. Dec 6, 2000, p. 4.
984 *Ibid*, p. 5-6.
985 The Judges are called Justices.
986 G.R. No. 135385. Dec 6, 2000, p. 6 – 55.
987 *Ibid*, p. 14.
988 *Ibid.*
989 *Ibid*, p. 7.

According to Justice Juno, the IPRA acknowledges the indigenous peoples as a distinct part of the dominant society in the Philippines, granting them the ownership and possession of their ancestral domains and ancestral lands, grounded on the Native title,[990] which are rights to lands and domains held under a claim of private ownership since immemorial times. Therefore, ancestral domains and lands constitute indigenous peoples' private property and are not part of the land of the public domain.[991] This understanding overturns the allegations brought by the petitioners that the indigenous lands were part of the public domain.

As explained in the subsection above, the IPRA provides that the rights to own and possess ancestral domains and ancestral lands are distinct; however, both are based on the indigenous concept of ownership, which considers the ancestral domains and ancestral lands are private but community property. The ancestral domain is owned by all the indigenous members of the community and not by one individual. Important to clarify that indigenous communal rights are distinct from the co-ownership rights acknowledged by the Civil sphere. Furthermore, the indigenous communal rights to the domain and lands extend to all generations of the indigenous peoples, past, present, and future.[992]

Regarding the petitioners' allegation that IPRA conflicts with the state ownership over natural resources, Justice June pointed out that under IPRA, no provision grants indigenous people ownership over natural resources. The indigenous peoples' right of ownership to their domains is provided in Section 7

990 This concept was acknowledged in the Cariño vs. Insular Government case.
991 G.R. No. 135385. Dec 6, 2000, p. 40.
992 *Ibid*, p. 43.

(a)[993] and does not cover *"waters, minerals, coal, petroleum and other mineral oils, all forces of potential energy, fisheries, forests or timber, wildlife, flora and fauna and all other natural resources"* included in Section 2, Article XII of the 1987 Constitution as belonging to the State. Thus, the IPRA complies with the Constitutional provision. [994]

Therefore, the State has ownership over the natural resources in the ancestral domains, which can be granted to the indigenous people the right to *"manage and conserve"* for future generations, *"benefit and share"* the profits, and *"negotiate the terms and conditions for their exploration"* for *"ensuring ecological and environmental protection and conservation measures."*[995] Moreover, essential to explain that the grant for indigenous peoples to manage and conserve natural resources is not automatic nor mandatory. Section 57 of the IPRA only provides for "priority rights", which cannot be understood as ownership rights. So, the entity that owns these resources, the State, has the power to grant preferential rights over the resources to whosoever chooses, which can be the indigenous or not.[996] Thus, different from what was claimed by the petitioners, the IPRA does not violate state ownership over natural resources.

In conclusion, Justice Juno mentions IPRA as an essential instrument to remedy the historical injustice perpetrated against the indigenous communities, and

[993] IPRA, Section 7 (a) Right of Ownership. — The right to claim ownership over lands, bodies of water traditionally and actually occupied by ICCs/IPs, sacred places, traditional hunting and fishing grounds, and all improvements made by them at any time within the domains.
[994] G.R. No. 135385. Dec 6, 2000, p. 48.
[995] *Ibid*, p. 50.
[996] G.R. No. 161881. PH Supreme Court Third Division. Jul 31, 2008, p. 51-52.

the Court must recognize the indigenous inclusion under the legal system and their customary law, which is the best way to protect their rights.

ii. Nicasio I. Alcantara vs. Department of Environment and Natural Resources (2008)[997]

In 2003, the Department of Environment and Natural Resources canceled the Forest Land Grazing Lease Agreement with Nicasio Alcantara, ordering him to vacate the land. The lands previously subject to the lease agreement would now be directed to the installation of members of the group B'laan and Maguindanaoans.[998]

The lands were claimed as ancestral lands of the B'laan and Maguindanaoans indigenous peoples, as they and their predecessors maintained a connection with that land through cultivating, possessing, and occupying it since immemorial times. Moreover, any eventual loss of control over the lands directly resulted from settlers' actions.[999]

Nicasio was the son of a settler and received a permit over the land in 1983. In 1990, representatives of the B'laan and Maguindanaoans indigenous groups filed a petition before the Commission on the Settlement of Land Problems (COSLAP)[1000] seeking the cancelation of the permit and the reinstallation of indigenous peoples in the land. In 1993, despite de running case for canceling the permit, the lease agreement with Nicasio was renewed for 25 years. In 1998, the COSLAP issued its decision, ruling to cancel the lease agreement and recognizing

997 *Ibid.*
998 *Ibid*, p. 1.
999 *Ibid.*
1000 Executive Order N. 561/1957. Commission on the Settlement of Land Problems. Available at: http://www.lis.dar.gov.ph/documents/3537.

the lands as ancestral lands.[1001] Furthermore, it ruled that the lease agreement contradicted Presidential Decree N. 410[1002] and the 1987 Constitution.

Nicasio filed a sequence of petitions before the COSLAP, the Court of Appeals, and the Supreme Court, seeking the annulment of the decision to cancel the lease agreement. However, the COSLAP decision about the lease cancelation was confirmed. Later, Nicasion filed a new petition before the Court of Appeals, this time questioning residual rights, on the ground that the rights to ancestral lands arose only with the adoption of the IPRA in 1997, and until that moment, indigenous had no right to recover their ancestral lands, applying the Section 56 of the IPRA, which provides about existing property rights regimes, and states that *"property rights within ancestral domains already existing and/or vested upon effectivity of this Act, shall be recognized and respected"*.However, the legal dispute was previous to 1997, so the Act could not cover the case; thus, Section 56 was not applicable.[1003]

Furthermore, the legal defect related to the lease agreement resulted from the conflict with Presidential Decree N. 410, adopted in 1974, before the case and the lease. Moreover, the idea that the right to recover ancestral lands appeared just with IPRA is wrong; the Presidential Decree already provided for it.

Important to highlight the fact that when the first permit and the renewal were granted, Presidential Decree N. 410 was applicable, meaning that from the

[1001] G.R. No. 161881. PH Supreme Court Third Division. Jul 31, 2008. p. 2-3.
[1002] Presidential Decree N. 410/1974. Declaring ancestral lands occupied and cultivated by national cultural communities as alienable and disposable and for other purposes. Available at: https://lawphil.net/statutes/presdecs/pd1974/pd_410_1974.html
[1003] G.R. No. 161881. PH Supreme Court Third Division. Jul 31, 2008. p 3-9.

start, there was an illegality regarding the lease of that land. Therefore, the violation of indigenous lands was not related to the lack of legal provision but by the inertia of the State regarding the implementation of the proper legal instruments for the protection of indigenous rights. In the end, the Court of Appels once again ruled for the illegality of the lease agreement and the recognition of the lands belonging to the B'laan and Maguindanaoans indigenous groups.[1004]

Despite the case having no direct connection with the IPRA, it is possible to identify how the adoption of the instrument affected the legal system mindset. The IPRA is the strongest legal instrument for the protection of indigenous rights, but before it, other devices were created for protecting ancestral lands; however, they had little or no implementation by the government. After adopting the 1987 Constitution and the IPRA, it is possible to identify the proactivity of the legal and governmental system to protect indigenous rights.

[1004] *Ibid*, p. 10-11.

6. Conclusion

In the last century, indigenous peoples were reintroduced as a subject under international law. By analyzing the construction of international legal instruments, it is possible to have an overview of the development of indigenous rights. The analysis of the creation of indigenous rights is relevant not only for historical purposes but also to capture the best methods applied throughout the years to develop the law.

Indigenous land rights were first dealt with in the international sphere by the ILO Convention N. 107 in 1957, and the draft did not include the participation of indigenous peoples. The heavy view of the States is evident, especially with the inclusion of "integration" as the overall concept of the Convention, implying that the purpose was not the protection of indigenous peoples but their assimilation into the dominant society. Soon international organizations, States, nongovernmental organizations, and indigenous communities realized the impossibility of creating adequate indigenous rights without considering their views. Learning from its past mistakes, the revised ILO Convention N. 169 had a broad participation of indigenous representatives; the result was a substantial improvement in the legal provisions of the revised Convention, especially concerning indigenous lands, since this was one of the most controversial issues to be discussed between indigenous peoples and the States. Seeing the positive results, the United Nations decided to increase the active participation of indigenous representatives during the draft of the UNDRIP, giving rise to the most robust set of norms on indigenous

rights. It is concluded that indigenous participation in the creation of legal instruments directly affects the improvement of indigenous rights.

Furthermore, when analyzing the construction of domestic law, it is evident that domestic legislation often mirrors international legislation and vice versa. For example, like the ILO Convention No. 169, Brazil abandoned the integrationist concept in its national legislation by the end of the 1980s. Around the same time, the Philippines also recognized indigenous rights in its Constitution and later created the IPRA, which reflects the provisions contained in ILO Convention No. 169.

As this thesis focuses on studying indigenous lands, it is imperative to consider concepts essential for understanding the meaning of land for indigenous peoples. The importance of traditional lands for the indigenous people goes beyond the community's subsistence. The lands are part of the very nature of the indigenous peoples because they practice and perpetuate their cultural aspects through this land. Therefore, the violation of traditional lands affects the existence of these people as indigenous people. The ILO Convention N. 169 and the UNDRIP recognize the indigenous people's spiritual relationship with their lands, and this concept is fundamental for correctly interpreting norms on indigenous lands.

Furthermore, this concept can be applied as an interpretation tool to extend the scope of a provision to include the protection of indigenous lands. Chapter 3, which includes an analysis of the legal adaptation movement of various UN human rights conventions, shows that many provisions use the cultural aspect of

indigenous lands as a basis to fill the legislative gap and apply these norms to protect indigenous lands. Article 27 of ICCPR, Articles 2 and 4 of ICERD, General Comment N. 21 of ESC Committee, and Article 2 of Genocide Convention are examples of norms that use the cultural aspect of indigenous lands in their interpretation.

The Inter-American System states that the connection between indigenous peoples and their lands is a conjunction of material and immaterial elements. The first element is connected to the importance of the lands for the survival o the indigenous, while the second is related to cultural aspects. Under the IACtHR, the special connection between indigenous peoples and their lands is applied as an interpretation tool to create a bridge between the right to life provided in article 21 of the American Convention and the protection of indigenous lands, which does not have an explicit provision. In conclusion, the concept of indigenous lands is an efficient interpretation tool that expands the legal scope of norms and fills legal gaps in instruments that do not include the protection of indigenous lands.

Indigenous land rights are one of the special rights of indigenous peoples because they are connected with the characteristics and the very nature of indigenous peoples. There are more than 5,000 distinct indigenous ethnic groups that can be found in all regions of the world, but even though their cultures are very different from one another, indigenous peoples worldwide have similar issues regarding the preservation of their land rights. Therefore, recognizing an individual or a group as indigenous is fundamental for them to receive adequate protection. Thus, it is necessary to know how to identify who indigenous peoples are, which is

why discussions about their definitions have always been included in the creation of national and international legal instruments.

The first definition of indigenous peoples applied to international instruments was related to the idea of “native inhabitants” and “colonialism,” reflecting the experience of the indigenous peoples in the Americas, where the discussions about them started. However, applying a definition that focuses on the background of indigenous peoples from a specific region would result in excluding indigenous peoples with different experiences. Moreover, the cultural difference does not only occur between indigenous peoples from different regions but also between indigenous peoples located in the same country. Therefore, a specific definition of indigenous peoples would not be able to include the cultural diversity of all existing ethnic groups.

Despite the evident difficulty in creating a definition of indigenous peoples, the United Nations, the International Labour Organization, and the World Bank tried to formulate a definition that could be applied as an international standard or only for the interpretative purpose of their legal instruments. However, none could provide a definition that encompasses the cultural diversity of the indigenous peoples.

Although there is no universal legal definition, a research conducted by the UN Working Group on Indigenous Population resulted in the acceptance of elements that can help identify indigenous peoples. These elements focus on self-identification, the historical and ancient connection with lands, the perpetuation of a distinct culture, and the marginalization condition. The elements can be present at

different levels within the indigenous communities. For example, the indigenous community ‘A’ have a longer historical connection with their lands than indigenous community ‘B’; however, the cultural perpetuation of indigenous community B is more intense than community ‘A’, while community ‘C’ are entirely isolated from the dominant society. Despite the three communities having different levels of the elements, their members can be identified as indigenous. Thus, the elements are not compulsory for identifying indigenous peoples but only a tool to assist in the process.

Understanding the definition and concept of indigenous peoples influence the recognition of indigenous peoples at the international, regional, and national levels. Therefore, it affects the applicability of indigenous rights. Imagine that ‘State A’ does not accept the concept of indigenous peoples; consequently, it does not recognize the existence of indigenous peoples in its territory; thus, no indigenous people's specific rights will be applied in this State jurisdiction.

Chapter 4 analyzes the regional systems from South America and Southeast Asia, and the recognition of the indigenous peoples is the main difference between the two systems. On the one hand, regarding South America, since the beginning of its colonization, the colonizing powers recognized the presence of native inhabitants in the territory; thus, there was never any doubt about the existence of indigenous peoples in this region. In addition, the construction of indigenous peoples' rights began in the Americas, which strengthened the concept of indigenous peoples and their recognition. Because of this experience, when the Inter-American system appeared, issues involving

indigenous peoples soon began to be discussed, despite the lack of legal provisions. Currently, the Inter-American Court is one of the most active and developed judicial systems to deal with indigenous rights.

On the other hand, Southeast Asia demonstrates a strong resistance to accepting the concept of indigenous peoples. Many States in this region justify the rejection by claiming that 'indigenous peoples' emerged from the colonial experience in the Americas; however, as mentioned above, the concept of indigenous is not restricted by a specific region. Another reason would be related to the terminology 'indigenous', which is a western creation, and Southeast Asian States consider that applying this concept would be a form of neo-colonialism. Although western States created the terminology, the concept of indigenous peoples was not created by any State because indigenous have existed since immemorial times, all around the world, even before the creation of states; thus, the idea of indigenous peoples always existed. Some countries also declare to be impossible to identify the initial inhabitants; however, as explained above, through the self-identification and the cultural link with the traditional lands is possible to proceed with the recognition of indigenous peoples. It is important to emphasize that the lack of recognition of indigenous peoples causes legal insecurity for the indigenous peoples in the region.

As a result of the analysis of Southeast Asia, it can be concluded that although some countries have domestic legislation on indigenous peoples, these provisions do not offer adequate protection. Furthermore, many states refuse to adopt international instruments dealing with indigenous peoples' rights. This

overall reluctance regarding the indigenous people is also present in ASEAN. Although it was created as a political and economic body, it contains provisions and internal structures that could be applied to protect indigenous peoples. However, the study about the association points out that the absence of indigenous peoples from the scope is deliberate, and there is no indication of adequacy or interpretation of the internal norm in order to include indigenous peoples, as this could create conflict with the internal legislation of States that do not recognize indigenous peoples or have a limited list of indigenous rights.

This thesis focuses on the comparative analysis of two countries which are part of South America and Southeast Asia. Despite being in different geographical regions and included in regional systems with different cultural, social, and economic characteristics, Brazil and the Philippines have a common point related to their indigenous peoples. The European colonization of both countries started in the early 1500s, and even though Brazil was colonized by Portugal and the Philippines was colonized by Spain, the two colonizers had a similar approach regarding indigenous peoples. Since the beginning, the existence of native inhabitants in the territories was recognized, and they were even in the legislation of the time, especially the ones related to territories. Despite the Philippines being far from the American continent, Spain applied the same legislation to the indigenous peoples in America and other regions, including the Philippines.

Unlike other countries in Southeast Asia, the Philippines recognized indigenous peoples' existence for centuries, which strongly influenced the development of legal provisions to protect indigenous peoples. For this reason, the

Philippines' domestic legal framework vis-à-vis indigenous peoples is more advanced than other countries in the region.

When comparing the domestic legal system of both countries, it is possible to identify that in Brazil, the legal instrument that gives legal protection to indigenous lands is the Constitution, while in the Philippines, the Constitution only recognizes the right to ancestral lands, with the IPRA being the legal instrument that will be the basis for the protection of indigenous lands in the country.

In addition to establishing rights for indigenous peoples, the IPRA also establishes the creation of the National Commission on Indigenous Peoples (NCIP), which is responsible for the certification of ancestral domain and land title. Likewise, Brazil has the National Indian Foundation (FUNAI), whose primary function is overseeing the issue of indigenous lands.

Another comparison point between the two countries legal provisions is the amount of domestic legal provisions about indigenous lands. Brazil's legal basis for indigenous lands consists only of Article 231 of the Constitution, and the IPRA has several articles dealing with the subject, including extensive and detailed rules.

Due to its reduced legal provision, jurisprudence is essential in protecting Brazil's indigenous lands. In addition, Brazil adopts many international instruments that deal with indigenous rights. The Inter-American system also significantly influences the consolidation and protection of the rights of indigenous peoples. Therefore, despite not having an extensive list of indigenous peoples' land rights provisions, Brazil has several tools to assist in applying the law.

The IPRA was based on ILO Convention No. 169 and is considered one of the most advanced domestic legislation on indigenous peoples' rights. However, this does not mean that indigenous peoples' rights in the Philippines are more efficient than in other countries. Through the analysis of international instruments discussed in Chapters 2 and 3 and regional systems discussed in Chapter 4, the conclusion is that a single instrument, however robust it may be, cannot promote the complete protection of indigenous rights.

Unfortunately, following the regional tendency of Southeast Asia, as verified in Chapter 4, the Philippines lacks the adoption of international instruments, including the ILO Convention N. 169, which was used as a base to establish its legislation. Furthermore, the regional system of which the Philippines is part, ASEAN, omits indigenous peoples' matter under its framework. Despite having strong legislation, the Philippines lacks tools to protect indigenous rights in case of legal failure of the IPRA.

On the one hand, Brazil has a reduced provision for protecting indigenous land rights but can use the instruments included in Chapters 2, 3, and 4; thus, the issue of indigenous rights is overseen in the international, regional, and domestic spheres. On the other hand, the Philippines has comprehensive legislation, but only the conventions of Chapter 3 are available to use. Therefore, indigenous rights are primarily overseen in the domestic sphere, as there is no legal protection under the regional system, and the international instruments available to the Philippines are not commonly invoked.

A significant difference between the two countries is related to the nature of indigenous lands. Brazil establishes that traditional lands are the property of the State and not private property of indigenous peoples; however, the lands are not public domain; they are only for permanent and exclusive communal use by the indigenous community. The indigenous lands under the Philippines legislation are also not considered public domain; however, the lands are a private property of the indigenous community with communal rights.

Analyzing international instruments and domestic norms made it possible to identify common points among all. First was the spiritual relationship with the lands, included in the ILO Convention N. 169 Article 13 (2), UNDRIP Article 25, Brazilian Constitution Article 231, paragraph 1, and IPRA Chapter III, Sector 4. Furthermore, Brazil also uses the Inter-American Court jurisprudence, which considers the spiritual relationship as an 'immaterial element' of traditional lands.

Regarding the ownership, as provided by Article 14 of the ILO Convention N. 169 and Article 26 (2) of UNDRIP, IPRA Chapter III Section 5 provides about the ownership of ancestral domains. Going against the legal tendency, as mentioned before, Brazil's legislation does not give indigenous peoples the right to own traditional lands; they only have the right to use and control the lands.

Natural resources are a complex and controversial topic. ILO Convention N. 169, Article 15 provides the right to indigenous peoples to participate in the use, management, and conservation of natural resources, and the cases where the natural resources are State property, the indigenous must be consulted before the exploitation, with the possibility of participating in the benefits. UNDRIP includes

natural resources in all the provisions related to lands and territories; thus, natural resources are included in the right to the spiritual relationship (Article 25) and the right to own, use, develop, and control (Article 26). The IPRA provides that natural resources are property of the State, and the indigenous receive priority rights to use, develop and manage. Brazil follows the ILO provision regarding the natural resources that are property of the State.

In general terms, both domestic legislations are in accordance with international human rights instruments. It is essential to clarify that IPRA was based on ILO Convention No. 169 and therefore includes advanced provisions compared to other domestic legislations. Despite the legal sophistication, the applicability of its provisions, especially the right to ancestral lands and domains, is constantly violated. Furthermore, important to mention that international human rights instruments are legal standards; national legislation must address specific questions related to the observance of legal standards provided by international instruments. However, concise legislations like the Brazilian are common and often require legal complement in other sources.

From the comparison between Brazil and the Philippines, the conclusion is that the adequate method for the preservation of indigenous rights through a joint legal framework, which takes into account all the levels in which that community is inserted, be it international, regional, or domestic because one system can offer assistance when another is insufficient. In addition, each system can review the application of indigenous rights, which would help to avoid violation of rights.

Furthermore, many examples of violations of indigenous land rights were presented throughout the thesis, most cases related to 'national development'. Under the terms of international instruments and domestic legislation, the State is appointed as the entity responsible for supervising and implementing indigenous rights and safeguarding these rights from being violated. However, in many cases, the States and private agents are violators of the rights they were supposed to protect, which is a recurrent situation concerning indigenous lands. Property is usually connected with financial gain, especially when exploiting natural resources. Many natural resources that have a high market value or are essential for developing a country can be found in indigenous lands.

For this reason, the ‘ dispossession’ or intensive exploitation of natural resources in indigenous lands is justifiable for society's benefit. This situation describes the main problem indigenous communities face, even when they have a legal instrument to protect themselves. In Brazil and the Philippines, we can see cases where private agents and the State itself plead before domestic courts for the invalidation of the recognition of indigenous lands and even the invalidation of provisions that deal with the protection of indigenous lands. Therefore, it is not wrong to think that the inclusion of provisions regarding the right to indigenous lands is not enough to avoid and combat the violation of these lands; the State must fulfill its obligations and show itself as an entity in favor of the protection of indigenous lands, not as the enemy.

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Korean Abstract

원주민들의 생계와 문화적 측면은 본질적으로 그들이 전통적으로 살아온 토지와 밀접하게 연계되어 있으며, 이는 그들의 원주민으로서의 생존과 존재에 영향을 미칠 수 있다. 영토, 토지, 자원에 대한 권리침해는 전 세계 원주민 공동체가 공통적으로 경험하는 중대한 문제이다. 본 논문은 브라질과 필리핀의 자국 원주민 토지권에 대해 비교하고자 한다. 또한 본 연구의 목적은 원주민 토지 조항에 관한 국제적, 지역적 입법에 대한 통찰을 제공하고 원주민 토지 보호를 위해 반드시 적용되어야 할 기준을 명확히 하는 것이다. 본 연구는 비교분석 방법을 적용하였으며, 문헌연구를 통해 자료를 수집하였으며, 이는 주로 서적과 디지털 자료, 특히 온라인 저널, 기사, 기타 UN 내 원주민 토지와 관련된 2 차 자료로 구성되어 법적 의견을 도출하였다. 본 연구에서 논의된 국제 기구는 원주민의 권리를 구성하기 위한 보편적인 법적 표준으로서 ILO 협약 제 169 호와 UNDRIP 를 포함한다. 본 논문에서 논의된 UN 국제인권협약은 다른 국제기구의 토착 개념과 법적 기준을 고려함으로써 법적 공백을 메우고 토착 토지의 보호 범위를 확대할 수 있는 가능성을 제시한다. 본 연구에서 고찰한 지역제도인 미주제도와 ASEAN 제도는 각 지역의 토착공동체에 적용되는 지역사회적, 법적 특수성을 포함한다. 본 논문에서 논의된 브라질과 필리핀의 헌법 및 법령은 국제법적 틀에 포함된 법적 기준을 반영하여, 원주민 토지의 침해가 국제법 문서와의 불합치 문제가 아님을 입증한다. 본 연구는 원주민 토지권에 관한 법적 틀의 개선 보다는 국내

영역에서 기존 조항의 적용 가능성을 개선할 필요가 있음을 시사한다. 나아가 원주민의 토지권이 제대로 적용되기 위해서는 원주민의 고유하고 없어서는 안 되는 개념이 제도적으로 고려되어야 한다. 마지막으로, 원주민의 주요 우방이자 적이 될 수 있는 국가의 지원은 원주민의 토지를 효과적으로 보호하는 조치의 시행을 위해 필요하게 되는데, 이는 국가의 지원 없이는 법적 수단이 아무리 발달해도 보호에 충분하지 않다.

키워드: 원주민, 토지권, 국제법, 인권, 원주민 집단권, 전통영토

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