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# Towards a Jurisprudential Articulation of Indigenous Land Rights

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## Abstract

*As expert analysis concentrates on indigenous rights instruments, particularly the long fought for 2007 UN Declaration on the Rights of Indigenous Peoples, a body of jurisprudence over indigenous land and resources parallels specialized standard-setting under general human rights treaties. The aim of the present article is to provide a practical and comparative perspective on indigenous land rights based on the process of jurisprudential articulation under such treaties, principally in the Inter-American and African contexts. While specialized standards inevitably generate a view of such rights (and, indeed, indigenous rights more generally) as a set of entitlements separate from general human rights, judicial and quasi-judicial practice as it exists or is being developed within regional and global human rights systems is effectively shaping up their content and meaning. I argue that indigenous land rights jurisprudence reflects a distinctive type of human rights discourse, which is an indispensable point of reference to vest indigenous land issues with greater legal significance. From a practical standpoint, focussing on human rights judicial and quasi-judicial action to expand existing treaty-based regimes and promote constructive partnerships with national courts, though not a panacea to all the intricacies of indigenous rights, does appear to offer a more realistic alternative to advocacy strategies primarily based on universally binding principles (at least at this stage) or the disengagement of domestic systems from international (human rights) law.*

## 1 Introduction

The connection between indigenous peoples and their traditional lands largely defines these peoples' identity, both historically and in relation to present-day threats to their

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physical and cultural integrity. A complex set of indigenous rights has gradually emerged to afford specific forms of protection under international law. It primarily consists of general texts of varying degrees of legal significance, including the 1989 International Labour Organization Convention No. 169 concerning Indigenous and Tribal Peoples in Independent Countries (ILO Convention 169),<sup>1</sup> the 2007 United Nations Declaration on the Rights of Indigenous Peoples (DRIP),<sup>2</sup> and the 2008 Draft American Declaration on the Rights of Indigenous Peoples.<sup>3</sup> In addition, international financial institutions' policies and environmental conventions have addressed – to a greater or lesser extent – indigenous concerns.

While expert analysis concentrates on specialized standards, particularly the long fought for DRIP, a body of jurisprudence over indigenous land and resources parallels these developments, especially within regional (general) human rights treaties. There is also evidence suggesting that non-human rights adjudicatory bodies, including the Inspection Panel of the World Bank, the WTO Appellate Body, the NAFTA Tribunal, and even the International Court of Justice, are likely to engage with indigenous land issues as they fall within the scope of their own jurisdiction.<sup>4</sup>

The discourse of judicial and quasi-judicial bodies in the context of human rights law questions the impact of specialized standard-setting on indigenous land rights and exposes international jurisprudence as the main vehicle for articulating the content and meaning of such rights. Also, I argue that an excessive focus on specialized instruments and their related institutional mechanisms overlooks the role of national courts in articulating and implementing indigenous land rights in synergy with international courts and court-like bodies.

The aim of the present article is thus to provide a practical and comparative perspective on indigenous land rights based on the process of jurisprudential articulation under general human rights treaties.<sup>5</sup> I will first sketch out a number of uncertainties surrounding specialized standards on indigenous land rights (Section 2), and give an account of responses to those uncertainties as reflected in the land rights jurisprudence being developed within the Inter-American human rights system (Sections 3–4). Building on this assessment, I will then look at the impact of the Inter-American

<sup>1</sup> Adopted on 27 June 1989, C169, available at: [www.ilo.org](http://www.ilo.org); as of 6 March 2010 it had been ratified by 20 countries.

<sup>2</sup> UN Doc. A/Res/61/295. Adopted on 13 Sept. 2007 by a vote of 143 in favour, 4 against (Australia, Canada, New Zealand, and US), and 11 abstentions.

<sup>3</sup> New Basic Text for Final Revisions, Working Group to Prepare the Draft American Declaration on the Rights of Indigenous Peoples, Eleventh Meeting of Negotiations, GT/DADIN/doc.334/08, 18 Apr. 2008.

<sup>4</sup> E.g., in *Aerial Herbicide Spraying (Ecuador v. Colombia)*, filed with the International Court of Justice in Mar. 2008, Ecuador claims that Colombia's spraying of chemical herbicides has caused damage to Ecuadorian territory and the (mainly indigenous) local population living in the affected areas, thereby violating obligations relating to environmental protection and human rights.

<sup>5</sup> The following does not address specific questions of cultural property and traditional knowledge: for commentary see some of the contributions to the present symposium.

jurisprudence on recent case law of the UN Human Rights Committee (HRC) and, more importantly, the African Commission on Human and Peoples' Rights (ACHPR) under their respective human rights treaties (Sections 5–6). Finally, I will locate indigenous land rights in the wider practice of direct and indirect interaction between international and domestic courts (and court-like bodies) (Section 7). I will conclude with some thoughts on the distinctive role of treaty-based human rights jurisprudence in the indigenous rights discourse, compared to advocacy strategies based on international customary law or the disengagement of domestic systems from the international legal process.

## 2 Specialized Land Rights Standards: A Snapshot of Uncertainties

The scope of contemporary international indigenous rights varies depending on the legal and institutional setting concerned. I will make no attempt here to describe and survey the multiple specialized instruments and monitoring mechanisms that have been established over the years at the international level. Instead, I will briefly comment on indigenous land rights provisions, as set out mainly in ILO Convention 169 and the DRIP, particularly in relation to those areas of protection the international legal significance of which has been the subject of contention.

At one end of the spectrum is the rather uncontroversial notion that indigenous land rights serve the purpose of protecting indigenous identity as defined by the cultural and spiritual attachment of the community to its traditional lands. Article 13 ILO Convention 169 and Article 25 DRIP represent indispensable starting points for any credible articulation of indigenous land rights under international human rights law. The implications of this principle are mainly captured in the form of entitlements to lands indigenous peoples currently possess or of which they have been recently deprived. Article 14(1) ILO Convention 169 provides a protective 'model' built around current patterns of land use, in connection with traditional forms of occupation.<sup>6</sup> Article 26(2) DRIP reflects a similar logic, focussing as it does on the 'right to own, use, develop and control the lands, territories and resources that [indigenous peoples] possess by reason of traditional ownership or other traditional occupation or use'.

However, when it comes to establishing the legal dimension of indigenous land rights, the extent to which such instruments prioritize indigenous customs and laws

<sup>6</sup> 'The rights of ownership and possession of the peoples concerned over the lands which they traditionally occupy shall be recognised.' The Committee on the Elimination of Racial Discrimination (CERD) has interpreted Art. 5(d)(v) of the International Convention on the Elimination of All Forms of Racial Discrimination, available at: [www.ilo.org](http://www.ilo.org), to include indigenous land rights (e.g., Concluding Observations on Guatemala, UN Doc. CERD/C/GTM/CO/11, 15 May 2006, at para. 19); see also General Comment No. 21 on the right of everyone to take part in cultural life (Art. 15(1)(a) of the International Covenant on Economic, Social and Cultural Rights): Committee on Economic, Social and Cultural Rights, UN Doc. E/C.12/GC/21, 21 Dec. 2009, at para. 36.

over domestic law, or international law over domestic practice, is arguably unclear. ILO Convention 169 assumes that the national legal system is the fundamental framework within which those rights will be realized.<sup>7</sup> It does not dissociate international standards (or indeed indigenous customs and laws) from national practice. It is meant to work within that practice by leaving issues of detail and substance to the state concerned. While Article 26(3) DRIP recognizes that ‘customs, traditions and land tenure systems’ shall inform legal protection of indigenous lands, the actual extent of protection loosely formulated in Article 26(2) appears to depend on the specific workings of domestic law rather than international law proper.<sup>8</sup>

Specialized instruments generate further misgivings along the scale of uncertainties that arise in the context of distinctive (substantive and procedural) aspects of land rights protection. For the purposes of this analysis, I will sketch out four. First, the ramifications of rights over lands that are currently in the possession of indigenous peoples are far from clearly stated. While land demarcation has been a recurring theme in treaty monitoring practice,<sup>9</sup> the DRIP remains surprisingly silent on the point, despite the fact that a proposal for including provision on land demarcation and titling in Article 26 was put forward in the course of the negotiations.<sup>10</sup> ILO Convention 169, for its part, does set out an obligation in Article 14(2) ‘to take steps as necessary to identify’ the lands at issue, without spelling out the contours of such obligation. More generally, there is little indication of how to appreciate the relationship between indigenous land rights and potentially competing non-indigenous (third-party) rights over land. Although there exists a strong presumption that involuntary dispossession will entail restitution, the circumstances that cannot preclude restitution, and/or the function of alternative methods of redress, are often lacking or only vaguely set out.<sup>11</sup>

Secondly, as I mentioned earlier, ILO Convention 169 embodies entitlements to the land which indigenous peoples traditionally occupy. As a result, it does not directly deal with lands they ever occupied and were deprived of. Rather, Article 14(3) defers to adequate national legal procedures in order to settle any disputes over past dispossession which may arise within a particular state. The DRIP largely draws on this model. Concerns about the retrospective nature of land rights were voiced by several states at different stages of the negotiations, and were confirmed by some of them before and after the passage of the DRIP within the General Assembly.<sup>12</sup> The outcome

<sup>7</sup> Swepton, ‘A New Step in the International Law on Indigenous and Tribal Peoples: ILO Convention No. 169 of 1989’, 15 *Oklahoma City U L Rev* (1990) 677, at 696.

<sup>8</sup> It should be noted that current draft Art. XXIV of the Draft American Declaration on the Rights of Indigenous Peoples refers to the principles of the legal system of each state in relation to land rights recognition, demarcation, and remedies (paras 1, 2, 8), *supra* note 3.

<sup>9</sup> See, e.g., ILO Governing Body, Representation under Article 24 of the ILO Constitution: Guatemala, GB. 299/6/1, 299th Session, June 2007.

<sup>10</sup> Working Group on the draft declaration on the rights of indigenous peoples, E/CN.4/2004/81, at paras 110–112, 114–115.

<sup>11</sup> Art. 28 DRIP, for instance, understands compensation as coming in the form of alternative lands ‘or’ monetary compensation, ‘or other appropriate redress’.

<sup>12</sup> UN GA, GA/10612, Sixty-first General Assembly Plenary 107th & 108th Meetings, 13 Sept. 2007, interventions by Australia, Canada, New Zealand, the US, the UK, Norway, and Sweden.

of this exercise was effectively a compromise solution based on a division of labour between (more) substantive standards relating to the protection of current lands and procedural, process-oriented requirements to deal with past grievances. While Articles 27 and 28 DRIP establish, respectively, the right to an open internal process to address indigenous claims and the right to redress – including restitution – and no time limit is attached to either of them, there is no real guidance as to the factual and legal basis for restitution claims and their implications for non-indigenous parties, not least in view of issues of inter-temporal law which historic claims typically raise.<sup>13</sup>

Thirdly, the crucial question of natural (sub-surface) resources has been left essentially unresolved. Unsurprisingly, it was one of the most significant stumbling blocks during the lengthy negotiations of the DRIP. Specialized instruments seem in effect to assume directly or indirectly the centrality of state ownership of sub-soil resources.<sup>14</sup> Article 26(2) DRIP does encompass ‘resources’ currently in use. Yet, it is unclear whether this may generate anything other than what is set out in Article 32(2) concerning development activities – that is, consultation and good faith cooperation by the state with indigenous peoples prior to development project approval. Indigenous participation in economic benefits deriving from such activities is also conspicuously missing in the DRIP, and only tentatively formulated in Article 15(2) ILO Convention 169.<sup>15</sup> More generally, the factual and procedural criteria which should inform indigenous communities’ effective participation in the decision-making process are not fully accounted for.

And so I come to the fourth set of uncertainties. While specialized instruments generally recognize the right of indigenous peoples to be consulted in relation to matters affecting them, ambiguities persist over whether indigenous land rights encompass a right to veto decisions regarding development projects which are likely to affect indigenous traditional lands and resources. While ILO Convention 169 does not endorse ‘free, prior and informed consent’, the DRIP does call on states to consult with the communities in order to obtain their prior consent to the investment activities in question.<sup>16</sup> With the exception of extreme cases, such as forcible removal from land (Article 10), the final version of the DRIP reproduces that formula beyond land rights provisions.<sup>17</sup> From the preparatory works, it becomes apparent that this line was a

<sup>13</sup> Francioni, ‘Is International Law Ready to Ensure Redress for Historical Injustices?’, in F. Lenzerini (ed.), *Reparations for Indigenous Peoples: International & Comparative Perspectives* (2008), at 27, 43.

<sup>14</sup> Errico, ‘The Draft UN Declaration on the Rights of Indigenous Peoples: An Overview’, 7 *Human Rts L Rev* (2007) 741, at 754; see also current draft Art. XXIV(7) of the Draft American Declaration on the Rights of Indigenous Peoples, *supra* note 3.

<sup>15</sup> The peoples concerned are entitled to benefit-sharing ‘wherever possible’; but see CERD, Concluding Observations on Ecuador, UN Doc. CERD/C/62/CO/2, 2 June 2003, at para. 16; and Art. XXIV(7) of the Draft American Declaration on the Rights of Indigenous Peoples, *supra* note 3.

<sup>16</sup> Art. 32(2). Aside from cases where prior consent is required by national legislation, CERD seems to have favoured a similar line in recent practice notwithstanding the arguably stronger language of Recommendation XXIII: Indigenous Peoples, UN Doc. CERD/C/51/misc13/Rev. (1997), at para. 4(d).

<sup>17</sup> *Supra* note 2, Art. 19.

final attempt at reconciling indigenous views of consent and states' insistence that rights and interests in land and resources are vested in the state.<sup>18</sup> One might argue that the real limit to this approach is not that it fails to recognize a free-standing right to consent, but rather that it fails to explain the ramifications of consultation and consent as part of effective participation.<sup>19</sup>

### 3 The Response from the Inter-American Human Rights System

#### *A Property*

I have dealt at some length with the origins and developments of the Inter-American jurisprudence on indigenous rights elsewhere.<sup>20</sup> What is important for this discussion is the extent to which its contribution intersects the controversial areas arising from the body of specialized international standards on indigenous land rights.

Both the Inter-American Court of Human Rights (IACtHR) and the Inter-American Commission of Human Rights (IACHR) have elaborated on the meaning and practical implications of recognizing and enjoying rights over traditional lands which the community currently possesses or of which it was recently deprived. They have done so in at least three different ways.

First, they have linked the loose concept of indigenous rights over traditional lands to the established notion of property. As is widely known, the case of *Mayagna (Sumo) Awas Tingni Community v. Nicaragua*<sup>21</sup> accomplished a turn towards openly locating indigenous land issues within the scope of Article 21 of the American Convention on Human Rights (hereinafter, 'ACHR'). The IACHR asked the IACtHR to deliver judgment on *inter alia* Nicaragua's failure to demarcate the communal lands of the Awas Tingni Community, to adopt effective measures to ensure their property rights, and to consider the impact on such rights deriving from logging activities on their lands. The interpretation of Article 21 ACHR rested on the notion that the terms of an international human rights treaty should be regarded as having an autonomous meaning compared to national law concepts, and their interpretation should be adapted to present-day conditions and be such that the scope of rights is not restrictive.<sup>22</sup> As Judge Ramírez noted, 'use and enjoyment of his property' in Article 21, instead of 'private property' from an earlier draft of this Article, can be taken to imply rejection of a single model of property and to allow for accommodation of all subjects protected by

<sup>18</sup> See further the statements made by states before and after the adoption of the DRIP, *passim*, *supra* note 12.

<sup>19</sup> No specific guidance is offered by CERD, *supra* note 16, at para. 4(d).

<sup>20</sup> G. Pentassuglia, *Minority Groups and Judicial Discourse in International Law: A Comparative Perspective* (2009).

<sup>21</sup> Judgment of 31 Aug. 2001, Series C No. 79.

<sup>22</sup> *Ibid.*, at paras 146, 148.



the ACHR ‘according to [their] culture, interests, aspirations, customs, characteristics and beliefs’.<sup>23</sup> On this reading, ‘property’ was presented as reflective of the interplay of collective material and cultural attachments.<sup>24</sup> Central to this approach is the principle that possession of the land *per se* qualifies for international legal recognition and protection as indigenous property notwithstanding the community’s lack of real title to it under domestic law.<sup>25</sup> At the same time, indigenous possession itself has been internally re-defined to include not only a strict physical relationship with the land, but also a variety of spiritual and cultural bonds which have been maintained despite lack of access to that land for reasons outside the group’s will.<sup>26</sup> The idea of indigenous property thus lies at the intersection of a critical understanding of possession and title, on the one hand, and material and spiritual basis of identity, on the other.

Secondly, the IACtHR has converted indigenous property rights into a state’s obligation to delimit, demarcate, and title the lands in question, thereby requiring an effective domestic procedure to realize those rights. Delimiting, demarcating, and titling the land are designed to protect against state and non-state incursions which encroach on the group’s effective ability to sustain the relationship with its subsistence and cultural base. The point has been clearly made by the IACtHR in relation to titling:

[R]ather than a privilege to use the land, which can be taken away by the State or trumped by real property rights of third parties, members of indigenous and tribal peoples must obtain title to their territory in order to guarantee its permanent use and enjoyment . . . This title must be recognized and respected, not only in practice, but also in law, in order to ensure its legal certainty.<sup>27</sup>

In short, the obligation to recognize indigenous property rights is not exhausted by generic domestic enactments. It does involve an elaborate process of physical identification and legal protection of the land to the immediate benefit of the community concerned. The property rights resulting from such a process must crucially include that kind of communal property which arises out of indigenous customary laws and land tenure patterns, i.e. ‘indigenous custom and tradition’.<sup>28</sup>

Thirdly, as explained in the next section, the IACtHR has established benchmarks for the state to be able to examine equally valid indigenous and private claims to the land, and therefore to determine on a case-by-case basis the ‘legality, necessity and

<sup>23</sup> *Ibid.*, Concurring Opinion of Judge Sergio García Ramírez, at para. 11.

<sup>24</sup> *Ibid.*, at para. 149.

<sup>25</sup> *Ibid.*, at para. 146; *Maya Indigenous Communities of the Toledo District v. Belize*, Report No. 96/03, Case 12.053, 24 Oct. 2003, at para. 116.

<sup>26</sup> See, e.g., *Moiwana Village v. Suriname*, Judgment of 15 June 2005, Series C No. 124; *Sawhoyamaya Indigenous Community v. Paraguay*, Judgment of 29 Mar. 2006, Series C No. 146; on historic claims see *infra*, sect. 3B.

<sup>27</sup> *The Saramaka People v. Suriname*, Judgment of 28 Nov. 2007, Series C No. 172, at para. 115. The same rationale applies, *a fortiori*, in the event that the community becomes displaced as a result of violent attacks on its members: see *Moiwana Village v. Suriname, Interpretation of the Judgment on the Preliminary Objections, Merits and Reparations*, Judgment of 8 Feb. 2006, Series C No. 145, at para. 19.

<sup>28</sup> *Maya Indigenous Communities*, *supra* note 25, at para. 116.

proportionality’ of expropriation of privately owned land as a way of attaining a legitimate objective in a democratic society.<sup>29</sup> In other words, the entrenchment of indigenous property rights in law and in fact has been related to obstacles which may derive from competing private property claims to the land (or parts thereof) while seeking to secure effective protection of those rights.

## B Historic Claims

The Inter-American case law sheds light over the extent to which historic claims can be upheld through the judicial or quasi-judicial process, in the face of controversies over the extent to which they actually creep into specialized texts, such as ILO Convention 169 and the DRIP.

Here again, at least three elements are central to this jurisprudential line. First, it confirms in principle the right to regain the lands of which the group was dispossessed in the past against its will, i.e., through acts of violence or other forms of involuntary land deprivation.<sup>30</sup> Financial compensation unquestionably represents the *ultima ratio* where neither the original land nor appropriate alternative lands are available.<sup>31</sup> State discretion in handling restitution claims is limited in ways which arguably exceed the scope of Article 28 DRIP.<sup>32</sup>

But when exactly can a historic claim be made? This is the second element of the line under review – the way that the Inter-American jurisprudence understands the role of past indigenous grievances in present-day human rights proceedings. In *Moiwana*, the factual circumstances in which the community became displaced in 1986 are taken as they are and directly related to their ‘continuing effects’ post-ratification of the ACHR by Suriname.<sup>33</sup> Such circumstances are legally constitutive of the temporal basis for the restitution claim and its attendant jurisdictional implications *ratione temporis*. By contrast, much earlier (colonial) dispossessions are not *per se* the subject of assessment from a strictly *ratione temporis* perspective. Rather, they provide the historical background to *current* facts as they are reflected in the relevant proceedings. *Yakye Axa* and *Sawhoyamaxa* – both of them involving forms of historical dispossession – define the role of the past not in isolation, but in terms of a marked connection with present (unsuccessful) attempts to regain the land through domestic procedures. They focus on facts which occurred at a time when Paraguay had already ratified the ACHR notwithstanding the obvious relation of those facts to the progressive colonization of the Paraguayan Chaco to the detriment of the Yakye Axa and Sawhoyamaxa

<sup>29</sup> *Yakye Axa Indigenous Community v. Paraguay*, Judgment of 17 June 2005, Series C No. 125, at paras 146, 217.

<sup>30</sup> *Sawhoyamaxa Indigenous Community*, *supra* note 26, at para. 128.

<sup>31</sup> *Yakye Axa Indigenous Community*, *supra* note 29, at paras 149–151; *Sawhoyamaxa Indigenous Community*, *supra* note 26, at para. 135.

<sup>32</sup> See *supra* note 11.

<sup>33</sup> *Supra* note 26, at para. 108.



peoples who had historically lived in that region. Past wrongs and their ‘continuing’ effects are not measured on the basis of a ‘critical date’ set by colonial or post-colonial history. Instead, the interpretation of present-day events or measures underlying the dispute at issue is informed by distinctive historical factors and, most crucially, contemporary developments in international human rights law.<sup>34</sup>

In other words, the principled acknowledgment of the right to recover ancestral lands is made in practice a function of an attachment to those lands which has been maintained by the community over time.<sup>35</sup> The key feature of this approach is that proof of an existing relationship to ancestral lands must not work restrictively if past dispossessions for reasons outside the group’s will are to be brought to bear on current human rights entitlements. Indeed, such a relationship:

[M]ay be expressed in different ways, depending on the particular indigenous people involved and the specific circumstances surrounding it, and it may include the traditional use or presence, be it through spiritual or ceremonial ties; settlements or sporadic cultivation; seasonal or nomadic gathering, hunting and fishing; the use of natural resources associated with their customs and any other element characterizing their culture.<sup>36</sup>

Given the premise of indigenous dispossession as integral to the colonial experience, this rather loose and contextual understanding of ties with the land as the legally relevant factual element triggering restitution claims values spiritual and cultural connections in the same way that it embraces multiple material dimensions. By emphasizing the diverse ties of indigenous communities to their traditional lands instead of uninterrupted physical possession, the IACtHR facilitates rather than constrains proof of indigenous property rights.

If that is the case, then accepting historic land claims becomes intimately linked to the process that is required to consider them against predictable competing claims from those ‘innocent third parties’ to which the lands have been ‘legitimately transferred’.<sup>37</sup> And so we come to the third element of the Inter-American jurisprudence. *Yakye Axa* and *Sahoyamaxa* effectively generate a general procedural framework for addressing competing land claims, regardless of the specific temporal dimension that may be relevant to them. As noted, *Yakye Axa* provides criteria for a case-by-case assessment, in accordance with Article 21(2) ACHR, the outcome of which may or may not favour the community.<sup>38</sup> Still, the IACtHR has offered justifications for limiting individual private property under Article 21, based on the need to preserve indigenous peoples’ physical integrity and identity, and thus to subordinate that property to the higher interest of cultural pluralism in a genuinely democratic society.<sup>39</sup>

<sup>34</sup> See the IACHR’s decision in *Mary and Carrie Damm v. United States*, Report No. 75/02, Case 11.1140, 27 Dec. 2002, at para. 167.

<sup>35</sup> *Sahoyamaxa Indigenous Community*, *supra* note 26, at paras 131–132.

<sup>36</sup> *Ibid.*, at para. 131.

<sup>37</sup> *Ibid.*

<sup>38</sup> *Yakye Axa Indigenous Community*, *supra* note 29, at para. 146.

<sup>39</sup> *Ibid.*, at para. 148.

Further, it has importantly identified a range of circumstances surrounding private property over the lands – including the fact that the reclaimed lands have long been in private hands under domestic law and are being productively used – which do not constitute ‘objective and fundamental’ reasons for dismissing *prima facie* an indigenous claim.<sup>40</sup> Alternative lands of equal size and quality or, absent those, financial compensation operate as residual forms of redress where traditional lands cannot be returned in any particular case, or other lands are not available or are not consented to by the group. Indeed, the appropriateness of alternative lands or monetary compensation must duly reflect the interests and needs of the people as well as the (non-monetary) significance they attach to the land.<sup>41</sup>

### C Natural (Sub-soil) Resources

On the controversial issue of natural (sub-soil) resources, two elements are embedded in the Inter-American jurisprudence. One is the understanding of such resources in the context of indigenous property. The other is the special protection of indigenous rights over natural resources which is mandated to secure their effective enjoyment against abuse by state and non-state actors alike.

While the general theme of natural resources had been considered in earlier jurisprudence,<sup>42</sup> those elements come to the fore in *The Saramaka People v. Suriname*.<sup>43</sup> The case essentially turned on whether the state had failed both to recognize the right to property of the members of the Saramaka people over the territory which they had traditionally used and occupied, and to allow effective judicial protection of such right under the ACHR.<sup>44</sup>

The IACtHR reinforces the articulation of indigenous property rights by regarding the natural resources which lie on and within the land as being a vital component of the rights to be protected under Article 21 ACHR. *Saramaka* confirms the autonomous role of international human rights law upheld in *Awás Tigni* by discussing indigenous rights under the ACHR as separate from rights over lands and resources under domestic law. While it limits the natural resources in question to those which are traditionally used by the group and thus essential for their physical and cultural survival,<sup>45</sup> it does recognize that development activities involving natural resources which are not necessary for the group’s survival may be equally limited under Article

<sup>40</sup> *Sawhoyamaya Indigenous Community*, *supra* note 26, at paras 137–140. This was strongly reaffirmed in the recent case of *Xákmok Kásek Indigenous Community v. Paraguay*, Judgment of 24 Aug. 2010, at paras 148, 149, 170, and 284.

<sup>41</sup> *Yakye Axa Indigenous Community*, *supra* note 29, at paras 149–151.

<sup>42</sup> *Ibid.*, at paras 135, 167.

<sup>43</sup> *Supra* note 27. See also *The Saramaka People v. Suriname, Interpretation of the Judgment on Preliminary Objections, Merits, Reparations, and Costs*, Judgment of 12 Aug. 2008, Series C No. 185.

<sup>44</sup> Arts 3, 21, and 25 in conjunction with Arts 1(1) and 2 ACHR; for more detailed commentary see Pentasuglia, *supra* note 20, *passim*.

<sup>45</sup> *Supra* note 27, at paras 120–123, 125–128.

21 to the extent that they affect the use of natural resources which are. Most crucially, the re-conceptualization of the right to property turns on the relationship between indigenous land and natural resources as being instrumental in protecting indigenous integrity.

On the other hand, the IACtHR relies on the language of Article 21 and – albeit implicitly – a number of jurisdictions to confirm that property rights, including those that accrue to indigenous communities, are not absolute and their restrictions are thus permissible, even if they come in the form of logging and mining concessions for the exploration and extraction of natural resources that are found on the land. This realistic proposition combines with an equally sensible acknowledgment of the complexities involved in indigenous land claims, particularly in relation to natural resources, to delineate special requirements which complement those laid down in Article 21 and the IACtHR's own case law, for the state to be able to justify any restrictions on indigenous property rights. They include effective participation, benefit-sharing, and environmental and social impact assessment. It is precisely those preconditions which permeate the IACtHR's discourse in an effort to explain the scope of each of them, and their implications for future and existing logging and gold-mining concessions affecting the Saramaka territory.

Apart from effective participation in general, to which I will return later, the IACtHR has found a specific obligation upon the state to supervise environmental and social impact assessments (ESIAs) in the context of development or investment projects, as being integral to the duty to guarantee indigenous peoples' effective participation in the decision-making process affecting them.<sup>46</sup> ESIAs provide benchmarks to the parties concerned to measure the individual and cumulative effects of current or future activities on the community. In addition, benefit-sharing, i.e., the capacity of indigenous peoples to share in the benefits expected to derive from the project affecting their land and its natural resources, has been presented as a 'form of reasonable equitable compensation' under Article 21(2), aside from mere compensation for damage resulting from the activities in question.<sup>47</sup> This further elaborates on the implications of indigenous property rights under the ACHR, in conjunction with the IACtHR's more general attempt to balance out indigenous and state concerns.

While the pre-*Saramaka* jurisprudence establishes the process for regaining the land, *Saramaka* sets out general conditions in the event that rights and land use are already there. In that sense, *Saramaka* builds on previous cases, particularly *Yakye Axa*,<sup>48</sup> to expand the justificatory test for permissible restrictions. In terms of natural resources, a question might arise whether such processes also allow for historic claims to be made, in light of the all-encompassing view of indigenous territory upheld by the IACtHR. It seems reasonable to argue that, on the *Sahowhamaxa* approach based on

<sup>46</sup> *The Saramaka People*, *supra* note 43, at para. 41.

<sup>47</sup> *Supra* note 27, at paras 138–140.

<sup>48</sup> *Ibid.*, at para. 157.

proof of a continuing material and/or spiritual relationship of the community to the land, including ‘the use of natural resources associated with their customs’,<sup>49</sup> property rights over ancestral resources must be recognized (regardless of actual use at the time of proceedings), or alternative resources, or (absent those) compensation must be provided where *restitutio in integrum* is not available, i.e., access to the claimed traditional natural resources cannot be restored because of past non-indigenous exploitation.

### D Effective Participation

As I alluded earlier, *Saramaka* importantly elaborates on the crucial requirement of effective participation in the decision-making process affecting existing indigenous property rights. It informs a procedural and contextual management of competing claims in ways which strike a balance between the group’s perspective and wider interests.

First, the IACtHR reinforces the consultation duty by defining minimal, acceptable parameters of the consultation mechanism. The general thrust of this obligation is that consultations ‘must be in good faith, through culturally appropriate procedures and with the objective of reaching an agreement’.<sup>50</sup> Secondly, it singles out large-scale development or investment projects as those activities the major impact on indigenous property of which requires the state to obtain the group’s free, prior, and informed consent in accordance with its customs and traditions.<sup>51</sup> While the IACHR appeared to have endorsed the language of ‘consent’ in earlier cases,<sup>52</sup> the IACtHR’s rationale lies in the wider notion that the level of effective participation is essentially a function of the nature and content of the rights and activities in question.<sup>53</sup> Thirdly, it assesses the effects of any development activities on the group’s territory and way of life also on the basis of the extent to which the group is allowed reasonably to share the benefits of those activities.<sup>54</sup> In this sense, benefit-sharing, besides being a form of ‘reasonable equitable compensation’ under Article 21(2), effectively expands on the principle of effective participation which runs through the whole body of the Inter-American jurisprudence.

Indeed, all of the issues involved in this analysis – i.e., not only the additional requirements for permissible restrictions on indigenous property rights but also the most basic questions of delimiting, demarcating, and titling the land (including overlapping claims from neighbouring communities), land restitution, the choice and delivery of alternative lands (where restitution is not possible), and compensation for the

<sup>49</sup> *Supra* note 36; *Saramaka* should be seen as an elaboration on this connection.

<sup>50</sup> *Supra* note 27, at para. 133.

<sup>51</sup> I.e., consultation would *not* secure effective participation: *ibid.*, at para. 134.

<sup>52</sup> *Dann*, *supra* note 34, at para. 140; *Maya Indigenous Communities*, *supra* note 25, at para. 142.

<sup>53</sup> *Supra* note 27, at para. 137.

<sup>54</sup> *Ibid.*, at paras 129, 138–140.

lack of available lands – are construed as ramifications of what is essentially an all-encompassing participation-based process.<sup>55</sup> In sum, effective participation becomes the central component of a procedural framework where reparation, in the form of *restitutio in integrum* or compensation, is closely linked to the interpretation of indigenous property claims themselves.<sup>56</sup>

#### 4 Appraising the Inter-American Jurisprudence

In the preceding sections I primarily sought to expose the uncertainties reflected in the main specialized instruments on indigenous rights such as ILO Convention 169 and the DRIP in the context of land rights, and the extent to which the areas generating those uncertainties are taken up in the Inter-American jurisprudence. I will now comment on three aspects of this interaction which are central to the present discussion.

First, the ramifications of such jurisprudence can be deemed to exceed the scope of specialized international standards. Whereas the principle of indigenous rights over traditional lands currently in possession of the community is relatively uncontroversial in international instruments on indigenous peoples, the Inter-American jurisprudence is more constructively built around a fundamental obligation upon the state to delimit, demarcate, and title as property the land being possessed, as well as its accompanying process relating to the settlement of disputes arising from competing claims. Specialized instruments are conspicuously silent on both of these aspects. While the practice of ILO supervisory bodies has emphasized demarcation and consultation under ILO Convention 169,<sup>57</sup> that jurisprudence provides greater detail and clarity to the interpretive process, particularly in terms of recognizing specific international legal consequences for domestic law on property titling (following demarcation and in line with indigenous practices) and third-party claims.

Whereas specialized instruments uphold a generic procedural approach to historic claims by emphasizing a duty upon states to establish appropriate mechanisms to settle any differences which may arise in this regard (ILO Convention 169) and/or envisage a broad right to ‘redress’ with no temporal limits (DRIP), the Inter-American jurisprudence more constructively elaborates on the factual and legal basis for restitution claims – i.e., how the past connects to the present – what the implications of this connection are in the face of claims from private parties, and the ‘hierarchical’ sequencing of *restitutio in integrum*, alternative lands of equal size and value, and financial compensation subject to consent from the community.<sup>58</sup>

Whereas specialized instruments seem to assume, albeit implicitly, the centrality of state ownership over natural (sub-soil) resources which lie within traditional

<sup>55</sup> See, e.g., *Yakye Axa Indigenous Community*, *supra* note 29, at paras 149–151.

<sup>56</sup> As a follow-up on *Yakye Axa* see, e.g., *Interpretation of the Judgment of Merits, Reparations and Costs*, Judgment of 6 Feb. 2006, Series C No. 142, at para. 26.

<sup>57</sup> See *supra* note 9.

<sup>58</sup> Contrast with the DRIP, *supra* note 11.

indigenous lands, or else domestic law as a basic parameter in determining the status of such resources, the Inter-American jurisprudence more constructively establishes natural resources, including sub-soil resources, as part of an autonomous right to property under international law (ex Article 21 ACHR). It upholds benefit-sharing as a legal requirement (only tentatively endorsed in Article 15(2) ILO Convention 169 and wholly absent from the DRIP), and crucially confirms ESAs as a clear *ex ante* participation-based obligation upon states, as opposed to merely *ex post* mitigating measures (Article 32(3) DRIP), or more loosely defined standards relating to development activities (Article 7(3) ILO Convention 169). On this approach, neglect by the state of independent impact studies unfavourable to it or prospective private contractors would be in breach of the duty to secure effective indigenous participation. Indeed, whereas specialized instruments endorse the principle of effective participation of indigenous peoples in decisions affecting them, but are unclear as to the ramifications of this principle, including the extent to which indigenous consent is part of it, the Inter-American jurisprudence articulates the practical meaning of such participation in all areas of indigenous land rights. In particular, it elaborates on the relationship between consultation and consent as constitutive of ‘effective participation’, consolidates the benchmarks for a meaningful, ‘effective’ process of consultation – including the basic objective of reaching an agreement with the community – and embraces a sliding scale approach to the circumstances under which indigenous consent to development projects must be obtained, not simply sought.

Recent commentary has taken a cautious view of this jurisprudence when seen from the perspective of international standards. Pasqualucci, for example, argues that, since the IACtHR understands natural resources for purposes of property rights as being only those which have been traditionally used and necessary for the group’s physical and cultural integrity, protection of such resources is more limited than that afforded by specialized international instruments, particularly Article 15(1) ILO Convention 169. This provision recognizes the right of indigenous peoples to participate in the ‘use, management and conservation of these resources’. The argument is tied up to a more general criticism of the notion that the state may still restrict indigenous property rights for the exploration or extraction of natural resources or other development projects within indigenous territory. It is noted that the case-by-case approach to determining the permissibility of those restrictions on indigenous property, first used in *Yakye Axa*, inevitably favours the state or the private party to which the former has granted concessions. In this context, Pasqualucci questions the IACtHR’s approach limiting indigenous consent to large scale or major development projects which affect indigenous property rights, since in his view the DRIP calls for free, prior, and informed consent for all projects affecting indigenous lands and resources.<sup>59</sup>

<sup>59</sup> Pasqualucci, ‘International Indigenous Land Rights: A Critique of the Jurisprudence of the Inter-American Court on Human Rights in the Light of the United Nations Declaration on the Rights of Indigenous Peoples’, 27 *Wisconsin Int’l LJ* (2009) 51, at 79–91.



I respectfully disagree. First, Article 15 does *not* establish property rights over natural resources, as confirmed by the distinction between ‘ownership and possession’ in Article 14 and the extended concept of ‘lands’, which is limited to Articles 15 and 16. It is difficult to read the generic right in Article 15(1) as anything other than a right to be actively involved in the decision-making process in the sense articulated in Article 15(2). The determination of ‘whether and to what degree’ indigenous interests would be affected by any exploration or extraction programme necessarily assumes differing points of connection between the affected resources and the community concerned – from substantial to immaterial – which can hardly cover more than direct and indirect ‘impact’ as found in *Saramaka*. But more fundamentally, whereas ILO Convention 169 rests on the assumption that it is for domestic law ultimately to determine the exact status of sub-soil resources in any particular case, the Inter-American jurisprudence has grounded general protection of such resources in a distinctive right to property under international law. In other words, participation rights under Article 15 ILO Convention 169 operate (albeit implicitly) within the constraints of domestic law, whereas the IACtHR’s line relies on the ACHR (and other human rights instruments) to ensure direct, ‘higher’ protection as a matter of human rights law. If that is the case, direct property rights over natural resources as upheld in *Saramaka*, that is, rights based on a connection between those resources and the identity and way of life of the group, are in themselves hardly unreasonable or unduly restrictive.<sup>60</sup>

Secondly, the test set out in *Yakye Axa* to enable states to handle competing claims does not limit the test set out in *Saramaka* to determine the permissibility of restrictions on indigenous property rights. It is true that in *Saramaka* the *Yakye Axa* test applies to a case where the state has already granted private concessions to harvest resources on lands which are occupied by the community, as opposed to the *Yakye Axa* scenario of lands being titled to third parties and reclaimed by the group. But from this it does not follow that, in the first case, the outcome necessarily favours the state or private party.<sup>61</sup> The rationale for the *Yakye Axa* process is precisely to contextualize decisions and make case-by-case assessments subject to the obligations upon the state *vis-à-vis* indigenous peoples.<sup>62</sup> The key point here is not whose claim prevails in any particular case, but what kind of justifications are provided, and whether they are in line with the IACtHR’s jurisprudence. In this sense, the *Yakye Axa* test is only part of the *wider* test espoused in *Saramaka* regarding the extent to which restrictions on existing indigenous property rights can be made compatible with the ACHR, and international human rights law generally.

Thirdly, reading a straightforward right to consent to all projects affecting indigenous territories into the DRIP is tantamount to stretching the language and logic of this text. As I mentioned earlier, several states expressed reservations about a fully

<sup>60</sup> E.g., this type of link lies at the core of much of the HRC case law on Art. 27 ICCPR; a comparable connection is central to indigenous land rights in Canadian case law: see *infra*, sect. 7.

<sup>61</sup> The presumption being that the second scenario as reflected in *Yakye Axa* will tend to favour the group.

<sup>62</sup> *Yakye Axa Indigenous Community*, *supra* note 29, at para. 157; see also *supra* note 40.



fledged veto right of indigenous peoples over matters affecting them, particularly in respect of lands and resources. Although opposition was especially vocal from those states which voted against the DRIP,<sup>63</sup> the vast majority of states which did support it within the UN General Assembly could not agree on other than compromise language. The contribution of the Inter-American jurisprudence should be understood in terms of reassessing the relationship between consultation and consent in ways which are wholly lacking in ILO Convention 169,<sup>64</sup> and are left unexplored in the DRIP and other international instruments.<sup>65</sup> Here again, the IACtHR takes a practical approach to the matter by establishing a procedural framework for assessing particular cases based on the anticipated degree of impact on the community, as opposed to tracing the legal concept of effective participation to mutually exclusive notions of consultation and free, prior, and informed consent. It fleshes out the otherwise ambiguous role of the latter, while still limiting it to cases where heightened scrutiny of state development policies is most warranted.<sup>66</sup>

This discussion would seem to suggest that the Inter-American jurisprudence on indigenous land rights is somehow detached from existing specialized standards, or is even construed in opposition to them. On reflection, the claim would not be entirely accurate. In reality, the Inter-American body of case law, while going *beyond* standards in the ways that I have just indicated, still relies on them to inform the interpretation of the Inter-American human rights instruments. Unsurprisingly, that jurisprudence operates within the framework of existing hard law obligations and soft law commitments as they are applicable to the case.

Of relevance to this approach is Article 29(b) ACHR which establishes that no provision thereof may be interpreted as ‘restricting the enjoyment or exercise of any right or freedom recognized by virtue of the laws of any State Party or by virtue of another convention to which one of the said states is a party’. The IACtHR has consistently interpreted this clause as enabling it to read the ACHR in light of standards upheld by the party outside the framework of the treaty. In this context, it has emphasized the respondent state’s consent to the relevant norms, be they the Constitution of Nicaragua in *Awasi Tigni*, ILO Convention 169 and its respective domestic legislation in *Yakye Axa*, or the UN Covenants in *Saramaka*.<sup>67</sup> One might argue that this type of clause deals only with the ‘negative’ side of the equation, namely that of disallowing the use of the treaty as a pretext for cutting down higher levels of protection being provided outside that treaty.<sup>68</sup> Also, while domestic property law is not a bar to the protection of

<sup>63</sup> *Supra* note 12.

<sup>64</sup> *Contra* Pasqualucci, *supra* note 59, at 88.

<sup>65</sup> See, e.g., CERD General Recommendation XXIII, *supra* note 16, at para. 4(d).

<sup>66</sup> *Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people*, Rodolfo Stavenhagen, UN Doc. E/CN.4/2003/90, 21 Jan. 2003, at paras 36, 73.

<sup>67</sup> For a similar approach by the IACHR see *Dann*, *supra* note 34, at paras 124, 131; *Maya Indigenous Communities*, *supra* note 25, at paras 85, 111–119.

<sup>68</sup> See, e.g., Liisberg, ‘Does the EU Charter of Fundamental Rights threaten the supremacy of Community law? Article 53 of the charter: a fountain of law or just an inkblot?’, 04/01 *Harvard Jean Monnet Working Papers* (2001) 1.

indigenous property under the Inter-American system, divergent interpretations of the same provision may result from different combinations of external instruments which apply to the state against which a complaint has been brought.

Although the precise implications of the principle of systemic interpretation remain open to debate, particularly under Article 31(3)(c) of the Vienna Convention on the Law of Treaties (VCLT),<sup>69</sup> the interpretive purposes that the Inter-American jurisprudence is meant to serve are reasonably clear. Irrespective of Article 29(b) ACHR, the IACtHR – and indeed the IACHR – have generally embraced a dynamic, evolutionary interpretation in light of a variety of international law texts and (occasionally) national law as well. By regarding the ACHR as having an ‘autonomous meaning’ (compared to domestic law) and being a ‘living instrument’ (i.e., in accordance with present-day conditions and the wider legal system), the IACtHR in *Awas Tigni* essentially reaffirmed (and adjusted) the teleological line endorsed by the European Court of Human Rights (EurCtHR) on several occasions when interpreting the European Convention on Human Rights (ECHR).<sup>70</sup> In its Advisory Opinion on *The Right to Information on Consular Assistance within the Framework of the Guarantees of Due Process*, it elaborated upon the International Court of Justice’s jurisprudence in *South West Africa (Second Phase)* by holding that ‘the interpretation of a treaty must take into account not only the agreements and instruments related to the treaty . . . but also the system of which it is part’.<sup>71</sup> The *Yakye Axa* decision confirmed the understanding of the interpretive context embraced by the IACtHR in that advisory opinion by valuing the ‘*corpus iuris* of international human rights law’ as the relevant framework for interpretation.<sup>72</sup>

In sum, the broad reading of the right to property and its ramifications within the Inter-American system rests on a comprehensive interpretive process, whereby the scope of Article 21 ACHR (and XXIII of the American Declaration on the Rights and Duties of Man, ADRDM) is being expanded on the basis of the wider framework of international human rights (hard and soft) law relevant to indigenous rights, from ILO Convention 169 to the DRIP and Draft American Declaration on the Rights of Indigenous Peoples, from the UN Covenants to elements of regional and national jurisprudence.<sup>73</sup> The interaction between the universal, regional, and national could not be any clearer: the substantive and procedural aspects of Article 21 ACHR have come to embrace elements which elaborate and expand on the jurisprudence

<sup>69</sup> Art. 31(3)(c) VCLT refers to ‘any relevant rules of international law applicable in the relations between the parties’.

<sup>70</sup> App. No. 15318/89, *Loizidou v. Turkey (Preliminary Objections)*, 20 EHRR (1995) 99, at para. 71. See generally Mowbray, ‘The Creativity of the European Court of Human Rights’, 5 *Human Rts LRev* (2005) 57.

<sup>71</sup> AO OC-16/99, Series A No. 16, at para. 113, available at: [www.corteidh.or.cr](http://www.corteidh.or.cr).

<sup>72</sup> *Supra* note 29, at paras 126–128.

<sup>73</sup> As for the IACHR, see *Dann*, *supra* note 34, at paras 124, 131; *Maya Indigenous Communities*, *supra* note 25, at paras 85, 111–119; *Garifuna Community of Cayos Cochinos and its members v. Honduras*, Report No. 39/07, Petition 1118-03, Admissibility, 24 July 2007, at para. 49.

of international and domestic bodies, thereby making the treaty a proxy for cross-fertilization processes.

If evolutionary interpretation by definition accords with wider legal developments rather than the judges' own preferences and values or specific national practices, then the positive reading of Article 29(b) ACHR upheld by the IACtHR, whatever the uncertainties that may surround it, may be said to reinforce this systemic approach and thus its 'neutrality', for more specific, essentially evidential purposes linked to the case at issue. It further supports the applicability of the interpretation to the state in question so as to make it acceptable as much as possible from within that state's legal practice.

This constructive legal reasoning largely captures the relationship between the Inter-American jurisprudence and specialized instruments. The dynamic interpretive interplay of endorsement of and advancement on indigenous standards ultimately generates *autonomous* legal results: while all of the above cases use or refer to ILO and UN instruments, all of them somewhat transcend them in ways which deepen the role of international human rights law relative to indigenous communities. I argue that such jurisprudence reflects a distinctive type of human rights discourse, which is an indispensable point of reference to vest indigenous land issues with greater legal significance. From a practical standpoint, specialized instruments on indigenous land rights are not necessarily at the forefront of the international norm-advancement process. In the following two sections, I turn to elements of recent human rights case law from the HRC and the ACHPR to demonstrate both the real or potential pervasiveness of the Inter-American jurisprudence and the variations on the role of international jurisprudence on indigenous land issues in general.

## 5 Deepening Article 27 of the International Covenant on Civil and Political Rights: *Ángela Poma Poma v. Peru*

The HRC has long addressed indigenous claims, both under Article 27 (minority rights) and – arguably more tentatively – under Article 1 (right to self-determination) of the International Covenant on Civil and Political Rights (ICCPR). For the purposes of this analysis, the recent case of *Ángela Poma Poma v. Peru*<sup>74</sup> invites reflection on what appears to be an evolving conception of indigenous land issues under the ICCPR.

The case was brought by a farmer belonging to the Aymara community of Peru, living in the province and region of Tacna. She complained that government-authorized construction of several wells in the community area in order to divert water from the Andes to the Pacific coast had caused the progressive drainage and degradation of 10,000 hectares of Aymara pasture land. Large quantities of Aymara livestock had died as a result, depriving the families comprising the community, including the

<sup>74</sup> Comm. No. 1457/2006, Views of 27 Mar. 2009, UN Doc. CCPR/C/95/D/1457/2006.

author's, of their only means of subsistence, and seriously encroaching on their identity and way of life.

While the author claimed a breach of Articles 1(2) and 17 ICCPR, the HRC admitted the case in connection with minority rights in Article 27 and the right to an effective remedy in Article 2(3).<sup>75</sup> Indeed, there are two routes which are not directly available under the First Optional Protocol in respect of indigenous land issues. One is the right to self-determination, regardless of any interaction with other (individual) ICCPR rights, particularly Article 27.<sup>76</sup> The other is the right to property, which is not specifically recognized in the ICCPR. The HRC dismissed the Article 1 claim on procedural grounds, in line with its established jurisprudence, despite claims from the author that the environmental degradation of the land impacted on the community's ability to dispose of the land for subsistence purposes. The HRC did not consider the land encroachments in question as raising distinctive property rights matters under the ICCPR, even though the author's ownership of wetland areas was being affected by the water diversion and community practices were clearly rooted in traditional land tenure patterns.

Yet, the HRC did use Article 27 in ways which broadly echoed the wider theme of indigenous land rights as reflected in the Inter-American jurisprudence. Not only did it confirm the role of the land as the fundamental base for the author's and community's way of life and traditional economy. It elaborated on the group's members' 'effective participation' in the decision-making process affecting that base. The HRC took the view that, where state measures 'substantially compromise or interfere with the culturally significant economic activities of a minority or indigenous community', group participation must be seen as a central element of the decision-making process. They clarified that participation is not limited to consultation:

The Committee considers that participation in the decision-making process must be effective, which requires not mere consultation but the free, prior and informed consent of the members of the community.<sup>77</sup>

Reiteration of the mandatory nature of 'effectiveness' further reinforces effective participation as an integral aspect of Article 27. Most crucially, the statement appears to advance on the previously upheld (and largely confirmed) jurisprudence on consultation.<sup>78</sup> A strictly literal interpretation of that statement would suggest that, in order for participation to be 'effective' for purposes of Article 27, states parties are *always* required to obtain the free, prior, and informed consent of the community. But

<sup>75</sup> The HRC noted that the Art. 17 complaint (private and family life) raised issues which were related to Art. 27; see also *Hopu and Bessert v. France*, Comm. No. 549/1993, Views of 29 July 1997, (1997) II Annual Report 70.

<sup>76</sup> See, e.g., *Apirana Mahuika et al. v. New Zealand*, Comm. No. 547/1993, Views of 27 Oct. 2000, UN Doc. CCPR/C/70/D/541/1993, at para. 9.2.

<sup>77</sup> Comm. No. 1457/2006, Views of 27 Mar. 2009, UN Doc. CCPR/C/95/D/1457/2006, at para. 7.6.

<sup>78</sup> See, e.g., *Apirana Mahuika et al. v. New Zealand*, Comm. No. 547/1993, Views of 27 Oct. 2000, UN Doc. CCPR/C/70/D/541/1993.

this understanding, besides stretching the scope of Article 27 beyond what it can actually bear, does not seem to be warranted in the context of the case.

The HRC is arguably linking the sliding scale approach to ‘impact’ on the group’s way of life that is implicit in its previous case law, with a more elaborate view of effective participation as most clearly expounded by the IACtHR in *Saramaka*. As noted, the IACtHR upheld yet limited indigenous consent to large-scale development activities on indigenous lands, because of their necessarily major impact on indigenous property rights. Also, it emphasized the need to assess the individual and cumulative effects of existing or proposed development activities as a way of determining their impact on those rights. Consultation itself was regarded as being inextricably linked to the objective of reaching an agreement with the group. Against this backdrop, the HRC’s reference to measures which ‘substantially’ interfere with the community’s way of life seems to qualify an otherwise sweeping proposition on prior consent, while still deepening the role of effective participation under Article 27. It might be argued that, for the HRC, group consent is required in the event that the activities in question are bound to have a particularly serious substantive impact on indigenous lands, whereas consultation must, *de minimis*, be conducted in good faith with a view to achieving such consent.<sup>79</sup>

The HRC found a breach of Article 27 on the grounds that Peru had failed to consult (in whatever form) with either the author or the community before approving of the water diversion project, had not carried out an impact assessment to determine the effects likely to derive from the construction of the wells, and had consequently made it impossible for the author (and, by implication, for other members of the group as well) to sustain the traditional economy and land use patterns of the community. Although an environmental impact assessment was required under Peru’s environmental legislation, the HRC’s mention of (a lack of) independent studies to measure the activities’ potential level of impact may indicate a wider approach which, in line with *Saramaka*, uses ESAs further to articulate the test of effective participation (and sustainability) under Article 27.

## 6 Breaking New Ground under the African Charter: From *Ogoni* to *Endorois*

Until relatively recently indigenous issues were virtually absent from the human rights discourse in Africa. The legacy of colonialism made national ‘unity’ the most veritable legal and political mantra of newly emerged African states. However, the ACHPR established under the African Charter on Human and Peoples’ Rights (AfrCH) has begun to tackle the plight of indigenous communities in the region and is influencing state practice accordingly. The ACHPR set up the Working Group on

<sup>79</sup> On the process of seeking consent see HRC, Concluding Observations on Panama, UN Doc. CCPR/C/PAN/CO/3, 17 Apr. 2008, at para. 21.

Indigenous Populations/Communities in Africa (AWGIPC) in 2000. It was tasked with conducting a preliminary investigation into this matter.<sup>80</sup> The AWGIPC delivered a report in 2003 which was subsequently endorsed by the ACHPR. The report confirms the existence of indigenous communities in Africa, exposing their special attachment to and use of traditional land, as well as experiences of subjugation, marginalization, and dispossession.<sup>81</sup>

Conceptually, two elements underpin this new approach under the AfrCH. First, the specific and unique category of peoples' rights has been interpreted in such a way as to encompass minority sectors of the state population – regardless of the specific position of the groups concerned. This opposes traditional notions of peoples' rights being associated with whole (effectively pro-dominant) national entities, or even the state.<sup>82</sup> Secondly, the AWGIPC has linked some such rights, particularly the right to existence and self-determination (Article 20), the right to natural resources (Article 21), and the right to development (Article 22), to an expansive conception of African indigeness which is not linked to 'prior occupancy' of traditional communal lands and resources.<sup>83</sup>

Recent jurisprudence indicates a progressive alignment with international jurisprudence, most notably from the Inter-American system.

In *Katangese Peoples' Congress v. Zaire*,<sup>84</sup> concerning a claim that Katanga was entitled to independence under Article 20 AfrCH, the ACHPR refrained from determining whether the Katangese 'consist[ed] of one or more ethnic groups'. Still, it did show, albeit implicitly, a connection between the existing political rights of the Katangese and the possibility for them to achieve internal self-determination in its multiple variants, including self-government.<sup>85</sup> Using this approach the right to self-determination interacts with other rights in ways which provide additional content for expanding the scope of the latter.

<sup>80</sup> ACHPR/Res 51 (XXVIII) 00 Resolution on the Rights of Indigenous Populations/ Communities in Africa (2000).

<sup>81</sup> Report of the African Commission's Working Group of Experts on Indigenous Populations/Communities, submitted in accordance with the 'Resolution on the Rights of Indigenous Populations/Communities in Africa', IWAGIA (Copenhagen) and ACHPR (Banjul) (2005) (hereinafter, '2003 AWGIPC Report'); see also ILO/ACHPR, Overview Report of the Research Project by the International Labour Organization and the African Commission on Human and Peoples' Rights on the Constitutional and Legislative Protection of the Rights of Indigenous Peoples in 24 African Countries (2009) (hereinafter, '2009 ILO/ACHPR Report').

<sup>82</sup> 2003 AWGIPC Report, *supra* note 81, Ch. III; see case law discussed below. The reassessment of 'people' under the AfrCH does not allow for unilateral claims to independence by sub-national groups under Art. 20 (see *infra* note 93). Rather, discrete rights are being recognized within the jurisdiction. For a traditional understanding of peoples' rights see J. Crawford (ed.), *The Rights of Peoples* (1988).

<sup>83</sup> 2003 AWGIPC Report, *supra* note 81, Sect. 4.2; see case law discussed below.

<sup>84</sup> Comm. No. 75/92 (1995).

<sup>85</sup> *Ibid.*, at paras 4–6; for a broadly similar rationale for internal self-determination see the HRC's decision in *Apirana Mahuika*, *supra* note 78.



The ACHPR took a similar line in *The Social and Economic Rights Action Center for Economic and Social Rights v. Nigeria* – the so-called Ogoni case.<sup>86</sup> The case turned on the impact of oil development activities on the Ogoni people living in the area of the Niger delta. The ACHR found that the Nigerian government violated, *inter alia*, the right of the Ogoni people freely to dispose of their wealth and natural resources (Article 21).<sup>87</sup> It articulated the scope of Article 21 in a way which resonated with separate provisions, most notably in relation to property, health, and the environment, and recognized substantive rights which were not explicitly mentioned in the AfrCH, such as the right not to be subjected to forced evictions.<sup>88</sup> Somewhat echoing the themes of indigenous land rights to be taken up in the IACtHR's judgment in *Saramaka* and other decisions of the Inter-American system, the reasoning concerning Article 21 built on the destruction of the Ogoni land, the lack of Ogoni participation in decisions affecting that land as well as the lack of material benefits accruing to the community. Parallel to this, the ACHPR construed protection against forced evictions as integral to the individual right to adequate housing, which was then upheld as a right to be enjoyed by the Ogonis collectively.

Although there is little indication that this decision was inspired by external international standards or jurisprudence, the AWGIPC's 2003 Report unsurprisingly uses this case (together with a few others) to demonstrate the relevance of the AfrCH to indigenous groups.<sup>89</sup> More significantly, in its Advisory Opinion on *The United Nations Declaration on the Rights of Indigenous Peoples*, delivered in May 2007,<sup>90</sup> the ACHPR dismisses the claim made by the African group in the course of the negotiations of the (draft) DRIP that recognition of indigenous land rights would be impractical because 'the control of land and natural resources is the obligation of the State'.<sup>91</sup> Instead, the ACHPR refers to Article 21 AfrCH to indicate that not only do such rights exist and are compatible with the constitutional framework of each country, they are in line with the AfrCH and the participatory requirements over indigenous traditional knowledge and natural resources set out in the African Convention of Nature and Natural Resources, adopted within the African Union.<sup>92</sup> From a broader perspective,

<sup>86</sup> *The Social and Economic Rights Action Center for Economic and Social Rights v. Nigeria*, Comm. No. 155/96 (2001).

<sup>87</sup> *Ibid.*, at para. 55. In connection with the pollution and environmental degradation of the Ogoni land which threatened the survival of the Ogonis and their traditional livelihood, the ACHPR also found a breach of the right to life in Art. 4, and the right to a satisfactory environment favourable to their development (Art. 24).

<sup>88</sup> *Ibid.*, at paras 53, 55; the right to housing and the right to food were found on the basis of a combination of individual and collective rights contained in the AfrCH.

<sup>89</sup> 2003 AWGIPC Report, *supra* note 81, at 13.

<sup>90</sup> ACHPR/Res 121 (XXXII) 07 Resolution on the United Nations Declaration on the Rights of Indigenous Peoples, 28 Nov. 2007.

<sup>91</sup> Advisory Opinion of the African Commission on Human and Peoples' Rights on *The United Nations Declaration on the Rights of Indigenous Peoples*, May 2007, at paras 32–35.

<sup>92</sup> See also F. Viljoen, *International Human Rights Law in Africa* (2007), at 285.



it translates major entitlements to self-determination and land protection under the (draft) DRIP as a 'series of rights' relative to self-government (as opposed to secession or independence), culture, and control over natural resources which are viewed as reinforcing those which are set out in the AfrCH.<sup>93</sup>

The expansive approach to indigenous land rights culminates in the recent case of *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v. Kenya* (hereinafter, the 'Endorois case').<sup>94</sup> The claims related to the establishment of a game reserve on traditional indigenous lands. The Endorois, a pastoralist community, were evicted from their traditional land during the 1970s and 1980s. Private concessions were also granted to a private company for ruby mining. Applicants claimed *inter alia* a breach of property rights (Article 14), the right to natural resources (Article 21), and cultural rights (Article 17). In a landmark decision of May 2009, the ACHPR found that Kenya had violated the Endorois' rights to property over land, natural resources, and development (Articles 14, 21, and 22) and freely to practise their religion and enjoy their cultural identity (Articles 8 and 17). Such rights – in the ACHPR's words – 'go to the heart of indigenous rights'.<sup>95</sup> The decision aligns the AfrCH with the HRC's case law on Article 27 ICCPR by reading Article 17 as affording protection to ethno-cultural minority groups and entailing a duty to take 'positive steps' to achieve this objective.<sup>96</sup> At the same time, based on the community's ancestral patterns of land use and customs, the ACHR recognized the land surrounding Lake Bagoria as the traditional land of the Endorois people. It held that, while a trust land system was in place in order to benefit all of the residents within the relevant jurisdiction and no legislative framework existed on the rights of indigenous pastoralist and hunter-gatherer communities, Kenya had failed to protect the land in question as 'property' of the Endorois within the meaning of Article 14 AfrCH:

[T]he first step in the protection of traditional African communities is the acknowledgment that the rights, interests and benefits of such communities in their traditional lands constitute 'property' under the Charter and that special measures may have to be taken to secure such 'property rights'.<sup>97</sup>

The most striking feature of the findings regarding Articles 14, 21, and 22 is that they draw almost entirely on the Inter-American land rights jurisprudence, as I described it earlier. The autonomous meaning of indigenous property under international law compared to domestic law, the obligation to title the land in fulfilment of

<sup>93</sup> Advisory Opinion, *supra* note 91, at paras 23–24, 27, 35. The ACHPR insists that self-determination must be exercised in a way which is compatible with the territorial integrity of the state. Recent practice appears to be in line with this view in that it focuses on distinctive rights to participation, culture, and land.

<sup>94</sup> Comm. 276/2003 (2009).

<sup>95</sup> *Ibid.*, at para. 157.

<sup>96</sup> *Ibid.*, at para. 248.

<sup>97</sup> *Ibid.*, at paras 155, 187. In addition to domestic law deficiencies, Kenya was not a party to ILO Convention 169 and did not vote in favour of the DRIP.

an international duty to protect such property and secure its judicial protection, the 'hierarchical' sequencing of restitution, provision of alternative lands of equal size and quality and monetary compensation, in the event of involuntary dispossession, the test to be used to justify any restrictions on property rights (as well as rights to natural resources and development) – encompassing effective participation, benefit-sharing, and ESIA<sup>98</sup> – are all understood in accordance with the rulings of the Inter-American bodies.<sup>99</sup> Although the case – like the *Ogoni* case – involved forced evictions, which in themselves constitute serious violations of human rights, the ACHPR's reading of the AfrCH unquestionably diffuses this judicially-generated view of indigenous land rights within the African system of international human rights law.

I will make two observations here. First, the protection of such rights appears to have been spread along a scale of guarantees ranging from basic minority (and land-related) rights, to property rights *stricto sensu*, to rights to natural resources ex Article 21. Based on the interplay of individual and collective dimensions, the abovementioned cross-fertilization process arguably retains an element which is specific to the possibilities offered by the treaty. The interpretation of Article 21 is an illustration of this. The ACHPR has not only confirmed the significance of the right to indigenous peoples as implicitly reflected in its own ('pre-*Saramaka*') case law, i.e., the *Ogoni* case.<sup>100</sup> It has also made the crucial point that, unlike Article 21 ACHR, Article 21 AfrCH protects the whole of the natural resources which are found on or beneath the land. They are not limited to those which are connected to the group's identity and land tenure systems, as indicated in *Saramaka*.<sup>101</sup> Although the IACtHR allows for a flexible understanding of this limitation to include activities which impact on the group indirectly, it is fairly clear that on the ACHPR's line Article 21 AfrCH expands on Article 21 ACHR, though still upholding *Yakye Axa's* case-by-case approach to competing claims, based on consultation with the state.<sup>102</sup>

Secondly, and most importantly, the decision is a case of jurisprudential dialogue rather than specific elaboration upon specialized instruments. Unratified ILO Convention 169 is unused as a 'soft' source, while references to the DRIP are few and far from

<sup>98</sup> A reinforced public interest, proportionality-based test applies to Art. 14 restrictions involving indigenous property rights, while the requirement that such restrictions be imposed 'in accordance with the law' essentially draws on the *Saramaka* test and extends to the right to development (*ibid.*, at paras 227–228). At one juncture, the ACHPR seems ambiguously to point to a duty to both obtain and seek indigenous consent (at para. 226); still, the general thrust of the argument is defined by the approach to consultation/consent in *Saramaka*.

<sup>99</sup> *Ibid.*, at paras 174–238, particularly paras 197, 199, 205–206, 208–209, 216–217, 227–228, 233.

<sup>100</sup> *Ibid.*, at para. 255.

<sup>101</sup> *Ibid.*, at paras 262, 266–267; the private concessions involved in both cases concerned resources – ruby and gold, respectively – which were not *per se* linked to the communities' culture or economy.

<sup>102</sup> '[T]he Respondent State has a duty to evaluate whether a restriction of these private property rights is necessary to preserve the survival of the Endorois community': *ibid.*, at para. 267; 'the Endorois have the right to freely dispose of their wealth and natural resources in consultation with the Respondent State': *ibid.*, at para. 268.

illuminating;<sup>103</sup> at best, they point to general principles or expectations, while lacking the ability to provide significant responses to the issues raised. In contrast with the rather scant reasoning style of the ACHPR in past decisions, international law-based notions of property, remedies for infringements on property rights, as well as access to natural resources and 'development' borrow heavily from global and regional jurisprudence as key sources of inspiration under Article 60 AfrCH.<sup>104</sup>

Specialized indigenous standards help to relate the position of African indigenous groups to more general developments in the field. The ACHPR, for example, has in principle recognized the importance of the DRIP as an interpretive tool within the African system.<sup>105</sup> I argue, though, that there is something distinctively jurisprudential in both the way in which the AfrCH has been interpreted and the kind of case law that it has generated, and is likely to generate in future. Not only have indigenous issues been channelled into a discourse about 'peoples' rights' as a uniquely African human rights category, the very basis for addressing such issues under the AfrCH, unlike in specialized texts, does not seem to rest on a rigid distinction between 'indigenous peoples' and sub-national minority groups generally, other than perhaps in terms of the extent of the threat to the physical and cultural integrity of the former. It is no surprise that, as I mentioned, what constitutes an 'indigenous' community in Africa is itself based on wider interpretation,<sup>106</sup> the exposition or justification of which may not be required in the case at issue.<sup>107</sup>

On the other hand, the trajectory from *Ogoni* to *Endorois* through *Saramaka* does provide more practical and precise guidance to the ACHPR and national courts (as well as African Union institutions generally) as they tackle the complexities of indigenous land issues in the region, especially in the face of competing claims to natural resources as well as domestic (as opposed to international and indigenous) law criteria over group status, land use, and rights.<sup>108</sup> The jurisprudential way of accommodating indigenous (land) issues within the scope and structure of the AfrCH, coupled with cross-fertilizing perspectives across jurisdictions, escapes, or is likely to escape, assumptions about the exhaustive role of specialized indigenous standards, while

<sup>103</sup> *Ibid.*, at paras 204, 207, 232. It should be pointed that, while Kenya is not a party to ILO Convention 169 (see para. 155), the ACHR makes extensive use of the ACHR's jurisprudence notwithstanding the obvious inapplicability of the ACHR as a matter of binding treaty law.

<sup>104</sup> See *supra* note 99, including paras 196, 213.

<sup>105</sup> Advisory Opinion, *supra* note 91; HPR/Res 121 (XXXXII) 07 Resolution on the United Nations Declaration on the Rights of Indigenous Peoples, *supra* note 90.

<sup>106</sup> A similar line transpires from *later* Inter-American case law.

<sup>107</sup> E.g., in the *Ogoni* case the ACHPR does not specifically refer to the Ogonis as 'indigenous peoples' or 'minority'. See also *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v. Kenya*, Comm. 276/2003 (2009), at para. 187.

<sup>108</sup> 2009 ILO/ACHPR Report, *supra* note 81, at 117–120. Arts 60 and 61 AfrCH allow for consideration of a range of sources, including global jurisprudence, such as the HRC's. The current African Court on Human and Peoples' Rights (established in 1998) and the newly set up (but not yet operational) African Court of Justice and Human Rights may have to consider indigenous issues in future, within the context of these jurisprudential developments.

propelling international human rights jurisprudence as a distinctive, if parallel, line of discourse in this fast evolving area of human rights law.

## 7 Indigenous Land Rights as a Global Judicial Practice: Interaction of International and Domestic Jurisprudence

The increasing legalisation of indigenous land rights at the international level exposes a parallel move towards ever greater dialogue between international and domestic jurisdictions. In line with more systemic developments in international and comparative litigation, domestic courts seem to be gradually emerging as real or potential partners with international judicial and quasi-judicial bodies in a dynamic jurisprudential process of (human rights) law-interpretation and application.<sup>109</sup> Unsurprisingly, the modalities of the engagement of domestic courts with international indigenous rights, particularly in relation to land and natural resources, vary depending on the country and its greater or lesser level of commitment to international human rights standards.<sup>110</sup> The following cases illustrate not only varying degrees of compliance with standards by judicial means, but also and more importantly, distinct forms of direct or indirect discursive interaction between international jurisprudence and domestic jurisprudence over substantive or procedural matters.

A string of judgments involves reliance by courts on international law sources to shape or support the interpretation of relevant constitutional or statutory provisions. In *Lemeiguran and ors v. Attorney General of Kenya and ors*,<sup>111</sup> the High Court of Kenya recently found in favour of the IL Chamus people – an indigenous community living around the shores of Lake Baringo – for failure by the government to secure their right to political participation in accordance with the Constitution on constituency boundaries and special interest group representation in Parliament. The community also pleaded for effective representation of its interests in the decision-making process on the basis that oil extraction activities were likely to affect its territory.<sup>112</sup> The court held that several international instruments, including the AfrCH (Article 22) and ILO Convention 169 (Article 7), did require participation, including on issues directly involving the community, and that the Constitution should be interpreted accordingly. More significantly, the court for one thing relied on the AfrCH to benefit indigenous peoples, somewhat in line with the jurisprudence initiated by ACHPR. On the other hand, it endorsed ILO Convention 169's participatory standards even though Kenya was (and is) not a party to that convention.

<sup>109</sup> See, e.g., Benvenisti and Downs, 'National Courts, Domestic Democracy, and the Evolution of International Law', 20 *EJIL* (2009) 59.

<sup>110</sup> Gilbert, 'Historical Indigenous Peoples' Land Claims: A Comparative and International Approach to the Common Law Doctrine on Indigenous Title', 56 *Int'l & Comp LQ* (2007) 583; Pentassuglia, *supra* note 20, at ch. 2.

<sup>111</sup> ILDC 698 (KE 2006), available at: [www.oxfordlawreports.com](http://www.oxfordlawreports.com).

<sup>112</sup> *Ibid.*, at para. 43.

In another major case involving Maya communities of Belize – *Aurelio Cal et al. v. The Attorney General of Belize and the Minister of Natural Resources and Environment*<sup>113</sup> – the Supreme Court affirmed that traditional indigenous land tenure systems constituted property worthy of legal protection. The court heavily relied on specialized international standards, including the DRIP, ILO Convention 169, and CERD Recommendation XXIII (1997) to reassess relevant constitutional rights, most notably rights to property, life, and equality. The case is more complex in that the court engages in a sort of conversation with international human rights bodies on issues spanning from treaty law specifically applicable to Belize to allegedly general principles of international law.<sup>114</sup> In this context, it importantly uses the (pre-*Saramaka*) Inter-American jurisprudence to provide greater detail and substance to central property matters, including the very meaning of indigenous property, its autonomous role in international law compared to domestic law, as well as basic implications for rights over land and resources and indigenous title.<sup>115</sup>

A more recent example of this attitude by national courts is provided by a judgment delivered in February 2009 by the Constitutional Court of Peru (*Tribunal Constitucional*) concerning the impact of prospective oil extraction activities on an environmentally protected area called ‘Cordillera Escalera’.<sup>116</sup> While the *amparo* action was based and decided upon specific constitutional rights to environmental protection, (family) life, and health, the court did provide an assessment of constitutional and international law relevant to several indigenous communities living in the area and likely to be affected by those activities. The most interesting aspect of the case from the perspective of international jurisprudence is that the court not only referred to duties to consult with the communities as set out in (ratified) ILO Convention 169, but also expanded on the theme of rights over land and natural resources by upholding the decisions of the IACtHR in *Awas Tigni* and *Saramaka* in their multiple dimensions.<sup>117</sup>

Other cases reflect broadly similar tendencies, yet they can be distinguished in that they variably rely on international law sources to (at least *de facto*) make up for the lack of regional human rights jurisprudence. The Asian-Pacific context illustrates the point. In *Kayano et al. v. Hokkaido Expropriation Committee*,<sup>118</sup> turning on the impact of a governmental decision to construct a dam in the south-western part of Hokkaido on the identity of the Ainu people, the original inhabitants of the Nibutani region, the Sapporo District Court broke new ground by recognizing the Ainu people as an indigenous minority under Japanese law. The gist of the court’s line was based on the notion that international law (*in casu*, Article 27 ICCPR and developments in the area of indigenous rights) required Japan to respect Ainu identity, although such notion

<sup>113</sup> Claims Nos. 171 and 172 of 2007, Judgment of 18 Oct. 2007.

<sup>114</sup> *Ibid.*, at paras 131–133 (based on Art. 14 ILO Convention 169 and Art. 26 DRIP).

<sup>115</sup> *Ibid.*, at paras 121–122, 129.

<sup>116</sup> *Jaime Hans Bustamante Johnson*, EXP. No. 03343-2007-PA/TC, Lima.

<sup>117</sup> *Ibid.*, at paras 32, 35–36. For a remarkably similar line, see the judgment of the Constitutional Court of Colombia in the Álvaro Bailarín case, Sentencia T-769/2009, at 26–35 (n15, 16, 18, 20, 21, 24), available at [www.corteconstitucional.gov.co](http://www.corteconstitucional.gov.co).

<sup>118</sup> Judgment of the Sapporo District Court, Civil Division No. 3, 27 Mar. 1997, in 38 ILM (1999) 397.

was cast in the language of a connection between international law and the right to life and liberty under the Japanese Constitution. Writing the judgment in 1997, the court recognized the Ainu as an indigenous minority at a time when the HRC's case law was expounding the role of Article 27 ICCPR *vis-à-vis* indigenous communities. Seen retrospectively, the decision paved the way for further internal developments, including the most recent acknowledgment by the legislature of the Ainu as an indigenous people, in response to Japan's support for the DRIP.<sup>119</sup>

In a landmark case before the Malaysian state of Selangor's High Court<sup>120</sup> aboriginal title to ancestral lands under common law was recognized, together with a duty upon the government to pay compensation for forcibly evicting the community from its land. The court was inspired by international and comparative indigenous land rights, although it based its findings on compensation on narrow domestic law grounds.<sup>121</sup> A final example is offered by the case of *Isagani Cruz and Cesar Europa v. Sec. of Environment and Natural Resources, et al.*,<sup>122</sup> whereby the Supreme Court of the Philippines upheld the constitutionality of the 1997 Indigenous Peoples' Rights Act, which was based on the (still unratified) ILO Convention 169, particularly in relation to land rights. While the legislation was challenged on the basis that such rights encroached on the state's entitlement to full property and control over the relevant lands, the court found that indigenous land rights were effectively private property rights which predated Spanish colonization and survived changes in sovereignty. Although the focus of these cases is on international standards rather than jurisprudence, they exemplify the direct or indirect role of domestic courts in reducing or even bridging the gap between specialized instruments and domestic law, in circumstances in which no regional judicial or quasi-judicial human rights body is available.

There are also national courts which themselves have proved influential on other national jurisdictions, and can provide protective models for international courts and court-like bodies, as appropriate. The Canadian courts' approach to indigenous land rights is one – by no means the only case in point.<sup>123</sup> 'Aboriginal rights' – including Aboriginal title and site- or non-site specific rights to engage in traditional land-based activities – have been recognized on the basis of indigenous customary laws and indigenous practices generally. More specifically, courts have taken a dynamic approach to customs and traditions to allow for a degree of change in the content of practice

<sup>119</sup> For an account see McGrogan, 'A Shift in Japan's Stance on Indigenous Rights, and Its Implications', in G. Guliyeva and G. Pentassuglia (eds), 'Minority Groups Across Legal Settings: Global and Regional Dimensions', Special Issue, 17:2 *Int'l J. Minority & Group Rts* (2010) 355.

<sup>120</sup> *Sagong Tasi and Ors v. Negeri Kerajaan Selangor and Ors* [2002] 2 CLJ 543.

<sup>121</sup> The ruling was upheld by the Court of Appeal of Malaysia in 2005, which additionally upheld punitive damages: *Kerajaan Negeri Selagor v. Sagong Bin Tasi* [2005] 6 MLJ 289.

<sup>122</sup> GR No. 135385, 6 Dec. 2000.

<sup>123</sup> For early Australian case law see, e.g., *Mabo v. Queensland II (Mabo II)* (1992) 175 CLR 1, at para. 66; for a review of jurisprudence in New Zealand, including the conflicting role of national courts and the executive over Maori native title see Magallanes, 'Reparations for Maori Grievances in Aotearoa New Zealand', in Lenzerini (ed.), *supra* note 13, at 523, 542–543; for European judicial practice see Errico and Hocking, 'Reparations for Indigenous Peoples in Europe: The Case of the Sámi People', in *ibid.*, at 363, 384.



since colonization.<sup>124</sup> The HRC's equally dynamic approach to the 'traditional' activities protected by Article 27 ICCPR might arguably be seen as a consolidation of this line of reasoning at the international level.<sup>125</sup> Also, judicial interpretation of aboriginal rights, while requiring a connection between past patterns of land use and current activities, do not rest on uninterrupted physical occupation of land at sovereignty (unless there is clear evidence of that), but on the substantial maintenance of the relationship between the people and land.<sup>126</sup> Coupled with a fundamentally contextual understanding of 'occupation',<sup>127</sup> this view of 'continuity' eases the standard of proof that must be met to establish those rights. It is effectively reinforced by the approach of the Inter-American jurisprudence to property claims which are rooted in historic grievances. As I mentioned, the IACtHR seeks to reconcile the past with the present by emphasizing the diverse ties of indigenous communities to their traditional lands rather than a strictly construed physical relationship which inevitably disregards the impact of past disruptions of occupation for reasons outside the group's will. Appropriate changes in the nature of occupation over a period of time will not ordinarily preclude a claim to traditional land and resources.

Another source of inspiration for international jurisprudence is, or can be, the Canadian Supreme Court's interpretation of the duty to consult with indigenous communities.<sup>128</sup> In essence, the court has embraced a sliding scale approach to participation rights. Property rights are to be protected through robust forms of consultation, including full consent to decisions which significantly affect those rights. Absent specific property titles, consultation must be proportionate to the strength of the indigenous claim. In *Haida Nation v. British Columbia (Minister of Forests)*, the court held that meaningful consultation applies also to pre-proof claims, ranging from cases where the claim to title or rights is weak or the potential infringement is minor (requiring only to disclose relevant information to the group) to cases where the claim is *prima facie* a strong one, and the potential for infringement is high. In the latter event, no veto right accrues to the group, yet accommodation in the sense of an obligation to alter the original proposal may be required of the state. Similarly to what transpires from the Inter-American case law on 'effective participation' and the relationship

<sup>124</sup> Gilbert, *supra* note 110, at 600.

<sup>125</sup> See, e.g., *Bernard Ominayak, Chief of the Lubicon Lake Band v. Canada*, Comm. No. 167/1984, Views of 26 Mar. 1990, Annual Report, vol. II, 1990, 1, at para. 9.3; *Apirana Mahuika et al. v. New Zealand*, Comm. No. 547/1993, Views of 27 Oct. 2000, UN Doc. CCPR/C/70/D/541/1993, at para. 9.4.

<sup>126</sup> *Delgamuukw v. British Columbia*, [1997] SCR 1010, at paras 152–154.

<sup>127</sup> *Ibid.*, at para. 149. However, the recent cases of *R. v. Marshall* and *R. v. Bernard* [2005] SCR 220, involving nomadic peoples claiming logging rights for commercial purposes pursuant to Aboriginal title, have sparked off debate over the appropriateness of using the common law test of 'effective control' (i.e., regular and intensive use of land) to establish full title to land as opposed to more limited site- or non-site specific rights.

<sup>128</sup> See, e.g., *Delgamuukw v. British Columbia* [1997] SCR 1010; *Haida Nation v. British Columbia (Minister of Forests)* [2004] SCC 73; *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)* [2004] SCC 74; *Mikisew Cree First Nation v. Canada* [2005] SCR 388.



between ‘mere’ consultation and consent, the right (or pre-proof claim) in question still provides the benchmark, but the precise level of protection of that right/claim against interference in practice arises out of the participatory process which is inextricably linked to it. This type of international and domestic jurisprudence mediates between the parties by guaranteeing the fairness of the exercise, including a heavy or less heavy burden of justification for interference falling on the state.

As I alluded earlier, the Canadian courts’ view of indigenous land rights has influenced – to a greater or lesser extent – other national jurisdictions. Indeed, recent litigation in South Africa, Botswana, Malaysia, and Belize – to name only a few – broadly confirms notions of indigenous property rights over traditional lands, based on indigenous land tenure systems in conjunction with the common law doctrine of native title or specific constitutional entitlements.<sup>129</sup> In some such cases, a flexible standard of proof to establish land rights has been upheld.<sup>130</sup> Other cases present features of their own which can also be appreciated from an international law perspective. For example, in the case concerning the Richtersveld Community of South Africa,<sup>131</sup> the Supreme Court of Appeal and the Constitutional Court engaged with several aspects of indigenous land rights which indirectly resonate with the Inter-American jurisprudence, including the distinctive role of indigenous customary laws in determining the content of indigenous land rights, the non-discrimination rationale for upholding such rights, and a view of natural resources which lie on or beneath the land as integral to the notion of indigenous property.<sup>132</sup>

At the ‘negative’ end of this spectrum of possibilities of jurisprudential cross-fertilization lie national courts whose restrictive conception of indigenous land rights poses the question of the extent to which international human rights jurisprudence can and should constitute a model for achieving greater protection. Australia has come to represent a leading example of this sort of reluctance. Although the requirement of continuity of land tenure systems in the sense of their ‘substantial maintenance’ – as upheld by Justice Brennan in the widely known *Mabo v. Queensland II (Mabo II)*<sup>133</sup> – turned

<sup>129</sup> See, respectively, *Alexkor Ltd and the Government of South Africa v. The Richtersveld Community and Others*, CCT 19/03 (2003), Judgment of 14 Oct. 2003 and *Roy Sesana and Ke/wa Setlohogwa v. The Attorney General*, Misc No. 52 of 2002 (13 Dec. 2006), both available at: [www.saflii.org/](http://www.saflii.org/); *Sagong Tasi and Ors v. Negeri Kerajaan Selangor and Ors* [2002] 2 CLJ 543; *The Attorney General of Belize and the Minister of Natural Resources and Environment*, Claims Nos. 171 and 172 of 2007, Judgment of 18 Oct. 2007, available at: [www.belizelaw.org/](http://www.belizelaw.org/). With regard to Botswana see, though, the recent decision by the High Court in *Matsipane Moseithanyane and Gakenyatsiwe Matsipane & Further Applicants v. Attorney General of Botswana*, MAHLB-000393-09, Judgment of 21 July 2010, available at: [www.saflii.org/](http://www.saflii.org/); the decision was appealed in Sept. 2010.

<sup>130</sup> See, e.g., *The Richtersveld Community and Others v. Alexkor Limited and the Government of the Republic of South Africa*, Case No. 488/2001, Judgment of 24 Mar. 2003, at para. 23, available at: [www.saflii.org/](http://www.saflii.org/); *Aurelio Cal et al. v. The Attorney General of Belize and the Minister of Natural Resources and Environment*, *supra* note 129, at paras 24, 61.

<sup>131</sup> *Supra* notes 129, 130.

<sup>132</sup> Compare with the IACtHR’s decision in *The Saramaka People*, *supra* note 27; particularly on natural resources, *ibid.*, at n. 122.

<sup>133</sup> (1992) 175 CLR 1, at para. 66.

out to be a seminal line of thinking to other common law jurisdictions', particularly Canada's, later judicial practice has interpreted 'continuity' under the 1993 Australian Native Title Act in a considerably restrictive manner, as the recent *Yorta Yorta Aboriginal Community v. Victoria* case illustrates.<sup>134</sup> The end-result has been effectively to require strict continuity in land occupation and cultural practices from the date of judicial inquiry back to acquisition of sovereignty, as opposed to the more flexible Canadian courts' approach.

In its concluding observations on Australia, CERD has indicated in no uncertain terms that such a high standard of proof to obtain recognition of native title is incompatible with the obligations undertaken by Australia under the Convention on the Elimination of All Forms of Racial Discrimination, particularly under Article 5.<sup>135</sup> Aside from individual treaty obligations applicable to Australia, the international jurisprudence on indigenous land rights arguably provides a general model for an Australian-type approach. As noted, the HRC's case law encompasses changes in the nature and method of traditional activities under Article 27 ICCPR. More specifically, the Inter-American case law, particularly *Sawhoyamaxa*, has taken a highly contextual view of the interplay between land and manifestation of identity as the factual basis triggering property claims over ancestral lands. It ranges from traditional spiritual activities to any other significant and time-honoured point of connection with the group's identity.<sup>136</sup> This broad understanding of the community's relationship with the land substitutes for a narrow notion of (current) 'occupation', and is not subject to proof of land use and cultural practices prior to colonization.<sup>137</sup>

The Australian judicial approach to extinguishment of indigenous land rights has also raised serious concerns. It allows the executive unilaterally to extinguish those rights, even in the absence of a specific intention by the legislature to do so, and automatically prioritizes state and third-party rights over them in the event of a conflict between the two sets of rights.<sup>138</sup> Here again, the Inter-American jurisprudence provides a rather different perspective. The point which runs through the body of cases is relatively straightforward: competing (indigenous and non-indigenous) property claims to traditional lands must be considered and decided upon by the state on a case-by-case basis, subject to the general criteria of legality, necessity, and proportionality set out in Article 21 ACHR, effective participation of the community concerned in the decision-making process, and appropriate redress (from land return to financial compensation). A genuine 'democratic and pluralistic society'<sup>139</sup> demands

<sup>134</sup> *Yorta Yorta Aboriginal Community v. Victoria* [1998] FCA 1606.

<sup>135</sup> UN Doc. CERD/C/AUS/CO/15-17, 27 Aug. 2010, at para. 18. For similar concerns see also the recent report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people on the situation of indigenous peoples in Australia, UN Doc. A/HRC/15/ (2010), at para. 26.

<sup>136</sup> *Sawhoyamaxa Indigenous Community*, *supra* note 26, at para. 131.

<sup>137</sup> Pentassuglia, *supra* 20, at 44; on current possession see also Art. 26(2) DRIP.

<sup>138</sup> UN Doc. CERD/C/AUS/CO/14, 14 Apr. 2005, at para. 16; for an overview of the case law and a comparison with the more protective Canadian jurisprudence see Erueti, 'The Demarcation of Indigenous Peoples' Traditional Lands: Comparing Domestic Principles of Demarcation with Emerging Principles of International Law', 23 *Arizona J Int'l & Comp L* (2006) 543, at 575-578.

<sup>139</sup> *Yakye Axa Indigenous Community*, *supra* note 29, at para. 148.

that indigenous rights and interests be adequately protected – preference for the non-indigenous claim must be held in check and strictly construed.

This holds particularly true where mechanisms are in place to determine whether indigenous land rights should be deemed to have been extinguished. In *Mary and Carrie Dann*, involving property claims by an Indian band belonging to the Western Shoshone indigenous peoples in the state of Nevada, the IACHR was asked to determine whether the lack of participation of the claimants in the Indian Claims Commission process set up by the United States in order to consider historic grievances by indigenous communities constituted a breach of Article II ADRDM (equality before the law). The government had conceded, and the US judiciary confirmed, that the Western Shoshone community used to have title to their ancestral lands, but that such title had been extinguished as a result of the findings of the Indian Claims Commission. What was at stake was not the adjudication of indigenous property claims *per se*, but rather the continuing validity of indigenous title. As in other land rights cases, though, the IACHR responded by setting out procedural benchmarks against which the legality of the (extinguishment) process should be assessed. The IACHR did not take issue with the possibility of extinguishment, but with the ‘broad manner in which the State has purported to extinguish indigenous claims, including those of the Dannels, in the entirety of the Western Shoshone territory’.<sup>140</sup> It importantly found an obligation upon the state to guarantee:

[A] process of fully informed and mutual consent on the part of the indigenous community as a whole. This requires, as a minimum, that all of the members of the community are fully and accurately informed of the nature and consequences of the process and provided with an effective opportunity to participate individually or as collectives.<sup>141</sup>

## 8 Conclusions

Recent developments, particularly the adoption of the DRIP in 2007, have reignited the debate over the real or potential international legal significance of indigenous standards. One prominent line of argument posits the implications of specialized standards, including the narrowly ratified ILO Convention 169, for the development or even restatement of international customary law. It is suggested that such standards, coupled with other relevant incidents of international and comparative human rights practice, transcend their own limited legal status by either facilitating the emergence of new norms of general international law or crystallizing customary law on the basis of pre-existing practice.<sup>142</sup> While recognizing the ultimately remedial function of

<sup>140</sup> *Dann*, *supra* note 34, at para. 145.

<sup>141</sup> *Ibid.*, at para. 140.

<sup>142</sup> See, e.g., Anaya and Wiessner, ‘The UN Declaration on the Rights of Indigenous Peoples: Towards Re-empowerment’, *Jurist Legal News & Development*, 4 Dec. 2007, available at: <http://jurist.law.pitt.edu/forumy/2007/10/un-declaration-on-rights-of-indigenous.php>.

specialized standards, this line importantly views them as part of the general framework of international human rights law.

At the other end of the scale is the view that soft law indigenous standards of the kind embodied in the DRIP (as well as presumably the soft *negotium* of the kind embodied in ILO Convention 169)<sup>143</sup> should not be used to ‘find’ new customary rules in the field by stretching the requirements of state practice and *opinio iuris*. Rather, they should be seen as useful platforms to engage states and indigenous peoples within domestic settings.<sup>144</sup> On this view, specialized standards essentially reflect a legitimate international concern for indigenous communities, but should not translate into a comprehensive yet elusive international legal regime which pre-empts what is deemed to be a more constructive role of municipal systems in achieving greater and lasting protection of indigenous rights through discursive political processes.

In light of the previous analysis, I argue that, while both views have merit, neither of them is entirely satisfactory to the extent that neither of them captures the autonomous role of international (and comparative) human rights jurisprudence and its distinctive place within the indigenous rights discourse. By better understanding this role we can achieve a better understanding of how specialized instruments can and should be used to support indigenous land claims within international and domestic legal settings.

I have sought to demonstrate elsewhere that international jurisprudence on minority groups can be captured by four dimensions, referred to as recognition, elaboration, mediation, and access to justice.<sup>145</sup> They all speak to the capacity of judicial discourse to address ethno-cultural claims within the human rights canon from different angles, that is, the acknowledgment of group identity, the re-assessment of rights, process rather than result, and access to the judicial space. For the limited purposes of this article, I have concentrated on the second and third such dimensions, in view of the centrality of regional and – to a lesser extent – global jurisprudence to the articulation of indigenous land rights (e.g., notion of ‘indigenous property’, role of natural resources, etc.) and the concomitant establishment of processes designed to address competing claims within the state (e.g., criteria to measure restrictions on rights, mechanisms to settle disputes involving historic claims, etc.).<sup>146</sup> When taken together, those four dimensions reflect a discursive interplay of substance and process whereby

<sup>143</sup> D’Aspremont, ‘Softness in International Law: A Self-Serving Quest for New Legal Materials: A Rejoinder to Tony D’Amato’, 20 *EJIL* (2009) 911.

<sup>144</sup> See, e.g., Allen, ‘The UN Declaration on the Rights of Indigenous Peoples and the Limits of the International Legal Project in the Indigenous Context’, in S. Allen and A. Xanthaki (eds), *Reflections on the United Nations Declaration on the Rights of Indigenous Peoples* (2010) 225.

<sup>145</sup> Pentassuglia, *supra* note 20.

<sup>146</sup> *Ibid.*; for recent developments on group recognition see the ACHPR’s decision in *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v. Kenya*, Comm. 276/2003 (2009); for further discussion of access to justice see Francioni, ‘Access to Justice, Denial of Justice and International Investment Law’, 20 *EJIL* (2009) 729, at 738–743.

judicial and quasi-judicial rights elaboration combines with findings of positive obligations upon the state to secure group participation or inclusion in decision-making, as well as judicial remedies. They signal international jurisprudence as a distinctive, relatively insulated movement within the wider international and comparative law-making process relating to minority groups.

More specifically, the above analysis suggests that international jurisprudence understands the relationship between indigenous land rights and general human rights categories in a rather hybrid, holistic fashion. While specialized standards inevitably generate a view of such rights (and indeed, indigenous rights more generally) as a set of entitlements separate from general human rights, judicial and quasi-judicial practice as it exists or is being developed under regional and global human rights treaties is effectively shaping up their content and meaning. Indeed, aspects of indigenous land rights, far from generating ‘essentializing’ views of the field, cut across the entire human rights spectrum, from long-established civil rights (e.g., rights to property and life) to minority (or cultural) rights,<sup>147</sup> to evolving peoples’ rights. Also, international jurisprudence has not hesitated to uphold group claims as genuine human rights issues. Classic individual rights, including the right to property, have been re-read to accommodate communal perspectives in ways which challenge rigid dichotomies between the individual and the group in human rights law, as well as resisting attempts to domesticate their scope through self-serving legislation.<sup>148</sup> Peoples’ rights under the AfrCH are being made available at the sub-national level. The right to natural resources in Article 21 works largely (though by no means exclusively) within the constraints of the right to property in Article 14. The latter has been itself re-interpreted to embrace the collective (indigenous) dimension. In short, the jurisprudence discussed in this article stands out for its evolutionary, contextual, and cross-fertilizing interpretation of human rights as indigenous land rights issues arise within the practice. The human rights paradigm does not pre-judge the outcome of the inquiry into a particular claim, yet is capable of engaging with the issues distinctive groups, such as indigenous peoples, raise.

<sup>147</sup> For overlaps with, or wider understandings of, cultural rights see, e.g., the piece by S. Wiessner as part of the present symposium and the first report of the UN independent expert in the field of cultural rights, UN Doc. A/HRC/14/36, 22 Mar. 2010. For a word of caution on ‘culture’ in the human rights discourse, and its allegedly negative impact on indigenous self-determination, see the contribution by K. Engle to this collection. The danger of essentialized representations of indigenous (cultural) rights that she evokes could be usefully contrasted with a more flexible view reflected in international jurisprudence, whereby the common theme of indigenous identity is tackled from multiple human rights perspectives which impact on legal protection within and outside the group.

<sup>148</sup> While this line of thinking has so far affected non-European regional systems, such as the Inter-American and African ones, and partly global regimes, such as the ICCPR, parallel developments under the ECHR, though less forthcoming, are not to be excluded. On a broad notion of ‘possession’ see App. Nos 8803–8811/02, 8813/02 and 8815–8819/02, *Doğan and others v. Turkey*, Judgment of 29 June 2004; in the admissibility decision in App. No. 39013/04, *Handölsdalen Sami Village and Others v. Sweden*, 17 Feb. 2009, at paras 46–56; the ECtHR rejected the Sami villages’ specific property claim on narrow evidential grounds based on domestic law, but did not appear to rule out that the Sami right to reindeer herding may constitute ‘possession’ within the meaning of Art. 1 of Protocol 1. Both cases are available at: [www.echr.coe.int/echr](http://www.echr.coe.int/echr).

The level of legalization of indigenous land rights which is being achieved through human rights jurisprudence, mainly at the regional level, presents some obvious general features. Jurisprudential expansion on treaty obligations works within existing, rather than future, human rights law. It functionally adjusts the relevant regime as a 'living instrument' by locating it within a wider set of developments – or 'subsequent practice' ex Article 31(3)(b) VCLT – in the relevant field. The treaty regimes in question apply to a large number of states, at either the global or regional level. The jurisprudence generated in this context reaches out to a significant sector of the international community which has undertaken obligations under those regimes, and empowered judicial or quasi-judicial bodies to interpret and apply them.<sup>149</sup> Such treaties, ranging from the ICCPR, to the ACHR, to the AfrCH, provide a wide context of rights within which indigenous land considerations can be diffused.

But the key point here is that, as illustrated by *Saramaka* and *Endorois*, judicial and quasi-judicial practice engages in jurisprudential dialogue rather than 'implementing' specialized standards. In fact, given the uncertainties they generate on critical issues such as property, natural resources, consultation/consent, or historic claims to restitution, such standards alone offer limited guidance to treaty interpretation and hardly qualify as 'technical' standards in the sense of detailed regulatory parameters.<sup>150</sup> International human rights jurisprudence is ultimately setting out the terms of an accommodation of indigenous land rights which, while drawing on specialized standards as an explicit or implicit source of inspiration, may not (and does not) resonate with their language or scope. There are of course limits to what this jurisprudence can do: individual cases may prove less progressive or convincing than others; the reach of jurisprudential assessments, including continuing monitoring over the implementation of the decision, varies depending on the contingencies of the regime under which they operate;<sup>151</sup> those assessments alone cannot bring systemic problems which involve intense political hand tailoring and institutional involvement to an end. Overall, though, recent and less recent practice speaks to the capacity of judicial discourse to address indigenous land issues in ways which account for developments under human rights law.

For their part, specialized instruments may well reflect an emerging *opinio iuris*, or even existing customary law in relation to relatively uncontroversial layers of protection which are encompassed by international human rights instruments and practice, such as protection against genocide, protection of cultural identity, or the right to participate in decisions affecting the community. Yet, when it comes to central elements of rights over land and resources, (more) extensive reliance on (mainly soft) standards as a springboard for international customary law appears questionable, or is at least

<sup>149</sup> Pentassuglia, *supra* note 20, at 230–233.

<sup>150</sup> Boyle, 'Some Reflections on the Relationship of Treaties and Soft Law', 48 *Int'l & Comp LQ* (1999) 901.

<sup>151</sup> The case may be further complicated by the lack of ratification of the relevant human rights treaty by a particular state and/or the failure by that state to accept the competence of the relevant monitoring body (see, e.g., the US in respect of the ACHR and the IACrTHR's jurisdiction).



premature. The short- and long-term impact of ‘specially affected states’ as indicated by the International Court of Justice in the *North Sea Continental Shelf Cases*<sup>152</sup> is unclear, as the countries resulting from European colonization, the post-colonial world, and western European countries as well begin to ponder the implications of their support for, partial scepticism about, or rethinking of their recorded objections to the DRIP.<sup>153</sup> Most crucially, as noted earlier, while the notion that indigenous land rights enjoin respect for the cultural and spiritual attachment of indigenous peoples to their traditional lands is widely accepted, a considerable level of detail and clarity in this area rests on judicial and quasi-judicial articulation, not the DRIP, ILO Convention 169, or other specialized standards as such. This raises the question whether the ramifications of *that* elaboration (as opposed to generic endorsement of standards) can develop into reasonably settled *opinio iuris* and state practice across regional systems.<sup>154</sup> For example, while it is plausible to expect land rights jurisprudence progressively to take roots in domestic settings across Latin America and Africa, how persuasive the same body of principles may prove to be within the Asian continent is more difficult to foresee.<sup>155</sup>

There is no question that, whatever the effects of specialized standards within the international legal order, they can and should be considered, *de minimis*, as legitimate internationally-sponsored platforms for internal best practices, and may even become incorporated by reference in constitutional and legislative processes, as recent developments seem to indicate.<sup>156</sup> Although the ‘domestic view’ (as I described it earlier) exposes the difficulties raised by the customary law approach to indigenous land rights and the desirable repercussions of standards on domestic policies, it effectively throws the baby out with the bath water by deconstructing the ‘international legal project’<sup>157</sup> into a mere set of guidelines for almost exclusively internal consumption.

Based on the previous assessment, what this argument overlooks is not only the functional role of international law – including specialized standards – before national courts, but also, and more significantly, direct or indirect forms of practical interplay

<sup>152</sup> Judgment of 20 Feb. 1969 [1969] ICJ Rep 3, at 43.

<sup>153</sup> For some major policy shifts in favour of the DRIP see Barelli, ‘The Role of Soft Law in the International Legal System: The Case of the United Nations Declaration on the Rights of Indigenous Peoples’, 58 *Int’l & Comp LJ* (2009) 957, at 982. While the DRIP as a whole recently won greater political support from countries that voted against it, the extent to which the DRIP’s *land rights provisions* will be actually upheld by the *judiciary* in land disputes brought up in the relevant common law jurisdictions remains to be seen.

<sup>154</sup> *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States) (Merits)*, Judgment of 27 June 1986 [1986] ICJ Rep 14.

<sup>155</sup> A key issue is whether specific domestic developments over issues of property and natural resources (where available) can be said to have occurred out of a sense of a distinctive legal obligation (*opinio iuris*) under customary international law. On divergencies in domestic practice see Charters, ‘Developments in Indigenous Peoples’ Rights under International Law and their Domestic Implications’, 21 *New Zealand U LRev* (2005) 511, at 526 ff; for a different take on domestic practice see S. Wiessner in this issue.

<sup>156</sup> Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, UN Doc. A/HRC/9/9 (2008), at para. 54.

<sup>157</sup> Allen, *supra* note 144.

between international and domestic jurisprudence on indigenous rights. Recent scholarship has highlighted at least three dimensions of this complementarity from a general, systemic point of view. First, international (and national) jurisprudence no longer reflects simply dispute-settling, but is more ambitiously engaged in norm-elaboration, in accordance with the objectives set by the system within which that jurisprudence operates.<sup>158</sup> Secondly, inter-judicial dialogue has signalled greater determination on the part of national courts in interpreting and upholding international law in ways which generate synergies with their international counterparts and make up for the limited enforcement capabilities of the latter.<sup>159</sup> Thirdly, increasing communication between domestic and international courts (and court-like bodies) is most effectively driven by private parties, human rights litigation being the most evident illustration of this.<sup>160</sup> It is the sign of an inchoate global community of courts that enables interaction between different legal orders otherwise constrained or denied by the state's legislative and administrative apparatus. It develops bridges below the surface of the state on the basis of a legal discourse protected from direct political interference.<sup>161</sup>

All of these dimensions are implicitly reflected in the indigenous rights jurisprudence presented in the previous sections. In particular, domestic courts are increasingly exposing their governments' human rights deficiencies by relying on international instruments to inform the interpretation of national provisions, either as a matter of treaty law binding on the state or as a body of allegedly emerging or existing general norms of international law, or simply as a set of non-binding material standards. As the Kenya, Belize, and Peru cases demonstrate, specialized standards, no matter their reach, do remain an important starting point in framing a discourse about indigenous groups and soliciting responses from international law. The broader argument here is that jurisprudential interaction occurs, or may occur, at multiple levels (direct or indirect) and cannot be reduced to a simple exercise in (international) norm-implementation, but should be seen as a global discursive practice of mutual learning. While domestic and international courts may tap into emerging consensus on indigenous land rights under international law, they are more likely to counter (their) governments' reluctance through contextual readings internal to existing human rights regimes than by submitting problematic and somehow remote analyses of *opinio iuris* and state practice. In *Awas Tigni*, for example, the IACHR invoked customary law on property rights against Nicaragua, but the IACtHR upheld the specific property claim only from the 'internal' perspective of Article 21 ACHR. Given the IACtHR's placing of the ACHR in the wider context of international human right standards, as well as the dynamic and cross-fertilizing approach to interpretation

<sup>158</sup> Shany, 'No Longer a Weak Department of Power? Reflections on the Emergence of a New International Judiciary', 20 *EJIL* (2009) 73, at 80–81.

<sup>159</sup> *Ibid.*, at 84–86; Benvenisti and Downs, *supra* note 109, at 65–68; *ibid.*, 'National Courts, Domestic Democracy, and the Evolution of International Law: A Rejoinder to Nikolaos Lavranos, Jacob Katz Cogan and Tom Ginsburg', in *ibid.*, at 1027.

<sup>160</sup> Shany, *supra* note 158, at 79.

<sup>161</sup> A.-M. Slaughter, *A New World Order* (2004), at 79–81.

discussed in this article more generally, one can hardly assume this line of thinking was being constrained by perceived jurisdictional limitations.<sup>162</sup> Unsurprisingly, the IACHR's latest report on indigenous land rights jurisprudence briefly restates the argument in *Awas Tigni*, but does not use it in the wider context of the study.<sup>163</sup>

Specialized standards are a useful source of inspiration. They record expectations and claims, and may often restate the law or develop new law. But to see them primarily through the lens of customary law or for almost exclusively internal consumption does not account for the more complex yet distinctive role of international and (domestic) jurisprudence in articulating the substantive and procedural ramifications of indigenous land rights. From a practical perspective, focussing on human rights judicial and quasi-judicial action to expand existing treaty-based regimes and promote constructive partnerships with national courts, while not a panacea to all the intricacies of indigenous rights, does appear to offer a more realistic alternative to advocacy strategies primarily based on universally binding principles (at least at this stage)<sup>164</sup> or the disengagement of domestic systems from international (human rights) law.

<sup>162</sup> *Contra* S. Wiessner in this issue.

<sup>163</sup> Indigenous and Tribal Peoples' Rights over Their Ancestral Lands and Natural Resources, OEA/Ser.L/V/II. Doc. 56/09 (2010), available at [www.cidh.org](http://www.cidh.org).

<sup>164</sup> Further litigation, such as *Aerial Herbicide Spraying (Ecuador v. Colombia)* before the International Court of Justice (*supra* note 7), could possibly make 'generalist' inroads into the field by building on regional jurisprudence.