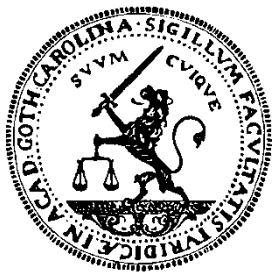

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Indigenous Peoples' Right to Land and Natural Resources When Companies Act In their Traditional Territory

An Enquire of International Human Rights Systems with a Focus on the Inter-American Court of Human Rights and the African Regional System of Human Rights

JAMM07 Master Thesis

International Human Rights Law
30 higher education credits

Supervisor: Dr. Alejandro Fuentes

Term: Spring 2019

Summary

This thesis approaches how International Human Rights Law is addressing the protection of indigenous peoples' right to land when States give concessions for companies to act inside indigenous traditional territory. Cases of harmful conducts committed by companies in indigenous territory are continuously happening around the world. Regional systems of human rights protection, through their state-centric lines, are not capable of holding companies accountable. Their institutions therefore still have to act through the structure of State responsibility and depend on domestic legislations and expect that States will comply with their decisions.

At the same time, although international standards on business and human rights have been developed, there is still no binding legal document on the subject. There are only voluntary principles that bring accountability to companies, which are not enough for effective litigation in human rights courts. The regional Courts, though, have appropriated those voluntary principles to point towards a need for regulation of business practices.

The regional bodies of human rights protection, become therefore, the interpreters that have handled the issue. This study then understood how the regional systems are addressing corporate activity and whether they are capable to provide protection and safeguards to indigenous peoples' right to land and natural resources. The Inter-American Court has taken a progressive approach to corporate activity in indigenous land, mixing its own instruments with the United Nations Guiding Principles on Business and Human Rights. This gives a stronger argument to the Inter-American Court as there are instruments outside of its sphere pointing towards the same direction. The African Regional System, on the other hand, has a decision from the Commission that addressed how action of companies inside indigenous territory should be addressed in the state responsibility spectrum, and one decision of the Court affirming the right of indigenous community to their land. It has not, however, given one decision capable of tying together the need to protect indigenous land and natural resources to the need to protect them from corporate action inside their territory.

Keywords: Indigenous Rights / Communal Property / Non-State Actors / Business and Human Rights / Inter-American Court of Human Rights / African Court of Human and Peoples Rights / Right to Land and Natural Resources / Regional Systems of Human Rights Protection / UNGPs / Private Companies / International Law / International Human Rights Law

Acknowledgements

Primarily, I want to thank my supervisor Alejandro Fuentes for all the guidance and comprehension throughout not only the thesis but the entire Master Programme. To him and to the Raoul Wallenberg Institute I say thank you for the internship opportunity that gave me so much clarity on the nuances of human rights and cultural diversity, and specifically on the regional systems of human rights and indigenous rights.

To my family and friends, for being my light and for all the support even when I didn't know I was in need of it.

Abbreviations

ACHPR	African Charter on Human and Peoples' Rights;
ACmmHPR	African Commission on Human and Peoples Rights;
ACHR	American Convention on Human Rights;
ACtHPR	African Court on Human and Peoples Rights;
ADRDM	American Declaration of the Rights and Duties of Man;
ADRIP	American Declaration on the Rights of Indigenous Peoples;
CERD	Committee on the Elimination of Racial Discrimination;
CESCR	Committee on Economic, Social and Cultural Rights;
IACHR	Inter-American Commission on Human Rights;
IACtHR	Inter-American Court on Human Rights;
ICERD	International Convention on the Elimination of all Forms of Racial Discrimination;
ICESCR	International Covenant on Economic, Social and Cultural Rights
IHRL	International Human Rights Law;
IL	International Law;
ILO	International Labour Organization;
NNPC	Nigerian National Petroleum Company;
NSA	Non-State Actors;
OAS	Organisation of the American States;
SPDC	Shell Petroleum Development Corporation;
UN	United Nations;
UNDRIP	United Nations Declaration on the Rights of Indigenous Peoples;
UNGPs	United Nations Guiding Principles on Business and Human Rights;

Contents

1 Introduction

This thesis aims at addressing the gap in International Law (IL) that prevents companies to be held responsible in human rights law for their harmful actions inside indigenous peoples' territory. This gap exists because of the state-centric lines in which IL and International Human Rights Law (IHRL) are built, and that leave private companies in the category of Non-State Actor (NSA) and therefore not a subject of IHRL.

In order to achieve this aim, an enquiry will be made to identify how the Inter-American and African regional human rights systems are tackling the situation through their jurisprudences and how they formulate the protection of indigenous peoples' right to property an natural resources when there are harmful corporate action authorized by the State in their territory.

1.1. Background

In its report on *Indigenous People, Communities of African Descent and Extractive Industries*, the Inter-American Commission of Human Rights (hereinafter IACHR or Inter-American Commission) recognized that multiple extractive activities in the Americas take place within the territories of indigenous and Afro-descendent communities. Due to the scarcity of available mechanisms, there is no supervision from States on the human rights violations that occur in and against those communities, as well as no access to justice and no reparations.[1] This situation is not exclusive to the Americas. It has also been noted in the jurisprudence of the African regional system of human rights.

In this scenario, there are different actors involved. First are indigenous communities, the land owners who for centuries had their rights denied and abused. Second are private companies, whose actions more often than not go impune due to a lack of rules, both domestically and internationally, able to hold them accountable. Third are States, responsible for controlling companies' actions in their territory through their domestic legislation and internationally responsible for the protection of indigenous peoples' rights to land and natural resources. This is therefore a situation where the financial and judicial capabilities of the actors involved are

[1] IACHR. "Indigenous People, Afro-Descendent Communities and Natural Resources: Human Rights Protection in the Context of Extraction, Exploitation and Development Activities", OEA/Ser.L/V/II.Doc.47/15, pp. 09

extremely unbalanced and merit closer scrutiny to understand how the situation can be addressed in legal terms.

Those private companies, usually transnational corporations, are not easily controlled by the States from which they originate nor by the States in which they operate. States may not be able to control their actions or may sometimes depend on their operations for the benefits of investments.[2] The structure of IHRL is based on state-centric lines that largely ignore acts committed by NSA in a way that makes their actions in no way a violation of international human rights while States are not fully capable of controlling all of their activities. This structure creates a situation that does not recognize the actions committed by companies, which range from the use of slave labour to environmental damage that affects standards of living.[3]

The latest measure to address the scenario was the adoption of the United Nations Guiding Principles on Business and Human Rights (UNGPs) in 2011. Since then there has been no new regulations for business activities and to ensure accountability when those activities affect human rights. Thus, there is a need to discuss the steps that have been taken and how the efforts to regulate and create a legal structure is being guided, to ensure that corporate action will no longer stay impune.

1.2. Purpose

This thesis aims at providing reflections of how the human rights systems are addressing violations of indigenous peoples' right to land and natural resources when States give concessions for private companies to act inside their territory. This thesis therefore will contribute with reflections on whether the regional systems judicial bodies are pointing towards a way of fully addressing the problem, or, if not, how far they have taken the discussion.

The literature available on the interaction between human rights courts and the possibility of regulating companies' actions in IHRL is very enlightening and growing exponentially. The literature on indigenous communities is also very abundant inclusive on how regional courts interpret and apply those rights. There is, however, very limited research on how different regional systems approach the relations between those two sensitive and developing topics as

[2] McCorquodale, Robert. "Overlegalizing Silences: Human Rights and Nonstate Actors", In: Proceedings of the Annual Meeting of the American Society of International Law, Vol. 96, Cambridge, 2002, pp. 385.
[3] Ibid., pp. 384.

well as on how the regional Courts learn from and influence each other when it comes to cases involving the actions of private companies in indigenous communities.

Hence, the comparative approach on the subject aims to identify the similarities and differences in the ways that the two regional Courts are conceiving this challenging issue. It also gives a broader view on the topic, making it possible to see the outcomes and consequences of each system and build on how they could address the overlapping problems in indigenous rights to property and corporate activity in ways that more effectively solve or work towards solving the issue.

1.3. Research Questions

From all the exposed, the questions that this thesis seeks to answer are:

> How are indigenous peoples' rights protected in International Human Rights Law when companies act in their traditional territory with concessions given by the State?

a) Which is the level of protection afforded to indigenous people by International Law? What is that level in the Inter-American and African regional instruments?

b) Does the regulatory framework of companies in International Human Rights Law provide additional safeguards that could protect or guarantee the rights of indigenous people to their land and natural resources?

c) Do the Inter-American Court and the African system of Human Rights interpret International Law and the regulatory framework of companies to protect indigenous peoples' rights? If so, how?

1.4. Theory and Method

As a work on human rights law, this paper will first understand how IL was developed in both of the topics addressed, namely indigenous peoples' right to land and natural resources, and the possible regulations on private companies' actions by IHRL, with a posterior focus on the intersection between the two bodies of norms.

The theoretical analysis consists of a literature and jurisprudence review. The jurisprudence review will be done using the different bodies of IL as the Inter-American Court of Human Rights (IACtHR or Inter-American Court), the African Regional Bodies and different institutions of the United Nations (UN). The literature review will make use of scholar articles that discuss how each of these institutions developed their treaties and norms that built the corpus juris. Both jurisprudence and literature review will be focused on what concerns to indigenous peoples' right to land and natural resources and to regulation in IL on the actions of private companies, correspondently.

The final stage of this thesis is a comparative analysis of the IACtHR and the African Regional System of Human Rights in their decisions on cases involving human rights violations where States gave concessions to private companies in indigenous territory. The jurisprudence of both bodies are compared to each other and contrasted in their fundaments and outcomes. Using the theoretical framework established in the preceding stages, each relevant decision will be scrutinized in order to fully comprehend the norms and theories assessed and applied by the Courts, and the particular conclusions they reach.

1.5. Delimitations

This thesis revolves around the protection of indigenous peoples and therefore the first delimitation that has to be made is the definition of indigenous peoples that will be used throughout the work. The UN has attempted a definition on its Study on the Problem of Discrimination Against Indigenous Populations, crafted by Martinez Cobo, and presented that common indicators of indigenous populations are having a common ancestry, occupying the ancestral lands before they were occupied by colonial settlers, the self-identification and the consciousness of belonging to an indigenous group, as well as the cultural identity that is expressed through their language and other cultural manifestations.[4]

[4] J Martínez Cobo, Study on the Problem of Discrimination against Indigenous Populations, UN Doc E/CN.4/Sub.2/1986/Add.4 (1986). Chapter V.

Some of the Conventions approached in this thesis indicate possible definitions of indigenous peoples as the ILO Convention No. 169[5], the UNDRIP[6] and the ADRIP[7]. This thesis does not make an attempt for a final definition of who are indigenous peoples, but uses the term according to the existent definition efforts make in those instruments, following, above all, the indication of self-determination as indigenous.

The comparative analysis was made between the IACtHR on one side and the African Court on Human and Peoples Rights (ACtHPR or African Court) together with the African Commission on Human and Peoples Rights (ACmmHPR or African Commission) on the other. The decision was made to include jurisprudence from the ACmmHPR because the ACtHPR only has one case that involves corporate activities in indigenous territory that resulted in human rights violations. This case is *African Commission on Human and Peoples Rights v. Kenya*, also known as the Ogiek case. The ACmmHPR also had one case on the subject, *Social and Economic Rights Action Center (SERAC) and Center for Economic and Social Rights (CESR) v. Nigeria*, also known as the Ogoni case. These two cases will be analysed in this study with the goal of understanding how the African System is directing its jurisprudence on the theme.

The IACtHR has several cases on the actions of private companies and several on indigenous peoples, all of which take relevant standard-setting positions. In this study, however, only the cases that deal with intersection of both topics will be analysed, in order to acquire the deepest possible understanding on the thesis subject.

According to a report published by the IACHR in 2015,[8] there were two cases taken to the IACtHR that involved State responsibility for situations involving the exploitation of natural resources by private companies in the territories of indigenous and tribal peoples. Those cases

[5] ILO Convention No. 169, art. 1: "*1. This Convention applies to: […] (b) peoples in independent countries who are regarded as indigenous on account of their descent from the populations which inhabited the country, or a geographical region to which the country belongs, at the time of conquest or colonisation or the establishment of present state boundaries and who, irrespective of their legal status, retain some or all of their own social, economic, cultural and political institutions. 2. Self-identification as indigenous or tribal shall be regarded as a fundamental criterion, for determining the groups to which the provisions of this Convention apply.*"

[6] UNDRIP, preamble, explains that indigenous peoples have suffered "*historical injustices as a result of colonization and dispossession of their lands, territories and resources*", and that their rights derive from their "*political, economic and social structures and from their cultures, spiritual traditions, histories and philosophies"* as well as that they should not be denied their right to self-determination.

[7] ADRIP, art. I.2: *"Self-identification as indigenous peoples will be a fundamental criterion for determining to whom this Declaration applies."*

[8] IACHR. OEA/Ser.L/V/II.Doc.47/15, para.50.

were *Saramaka People v. Suriname* and *Kichwa Indigenous People of Sarayaku v. Ecuador*. Subsequent this report, the IACtHR presided over the case of *Kaliña and Lokono Peoples v. Suriname*, involving the same situation.

There are, however, other cases on the discussion of ownership of traditional land involving indigenous peoples and concessions granted by the State to private companies. As those cases are solely on the title of property, not involving further actions from the company inside the indigenous territory, they will also be briefly addressed. Those cases are the cases of the *Yakye Axa Indigenous Community*, *Sawhoyamaxa Indigenous Community*, and, *Xákmok Kásek People*, all of them against Paraguay.

It is relevant to explain that the European Court of Human Rights, the third regional system of human rights protection, will not be approached in this study. This decision was made based on the fact that the European Court's jurisprudence focuses more on minority rights than on indigenous peoples' rights, *per se.* There is a very small number of cases involving indigenous peoples taken to the European Court and most of these cases were declared inadmissible.[9]

1.6. Outline

The first topic to be addressed on this thesis is the current status of indigenous peoples and their right to land and natural resources on IL, on chapter two. The chapter will develop in separate analysis of how the right of indigenous peoples was developed to include the right to their traditional territory and the natural resources therein in each of the regional systems to be discussed afterwards, the Inter-American and African Systems. It is the first of two chapters that will make use mostly of literature review to understand how this right was established in its specific way in each regional system.

On the chapter three, a similar approach will be made. Through a literature review, an exposition of the different efforts made in IL to regulate private companies will be made. This is done in order to access the different movements that were tried and what was effectively used from each of them, until the presentation of the most authoritative recommendations there is in IL at this moment: the United Nations Guiding Principles on Business and Human Rights. The chapter includes also the study of the Inter-American and African Systems on how each

[9] Saul, Ben, "Indigenous Peoples and Human Rights: International and Regional Jurisprudence", Hart Publishing, 2016, pp. 201.

of them built the lines for the regulations of private companies in the State-centric lines of both regimes.

Chapter four consists of a jurisprudential analysis of the three cases in the Inter-American Court of Human Rights that concerned private companies' actions inside indigenous territory in chronological order. The idea is to understand how the Inter-American Court developed its jurisprudence, so it becomes somewhat clearer the direction it is going and the signals towards the responsibility of companies made in the last judicial decision.

On the fifth chapter, the same jurisprudential analysis will me made but on one case of the African Commission on Human and Peoples' Rights and one case of the African Court on Human and Peoples' Right. The aim of the chapter is to understand as well how the regional system designed the lines of responsibility and to understand how it structured the position of private companies that acted inside indigenous territory leading to human rights violations.

Finally, conclusions will be presented on the comparative analysis between the two bodies of jurisprudence of the Inter-American Court of Human Rights and the African Regional human Rights System, to understand how they complement, distance, and borrow from each other and whether they are making a true development in addressing the issues brought by the cases. This comparative analysis will be followed by possible ways in which the problem could be further addressed.

2 Indigenous Peoples and the Right to Land

This first chapter has the aim of addressing the level of protection afforded by IL to indigenous peoples and to assess whether that level of protection is higher or lower in the Inter-American and African regional instruments of human rights.

In order to reach those answers, this chapter will introduce the existent norms on the right to land of indigenous peoples in IHRL and to understand the logic of the movement that led to the creation of these norms. Afterwards, a second analysis will be made of the regional systems of human rights approached in this paper: the Inter-American and African regional systems. Each of the regional systems separately will address the regional development of the right of indigenous people to land and natural resources.

2.1. The Development of Indigenous Rights in International Law

Historically, IL followed a normative discourse that was complicit with colonization practices and forceful removal of indigenous peoples from their lands, what asphyxiated their cultures and let them in a very precarious situation.[10] After centuries of dispossession being dealt with in domestic law jurisdiction, IL through IHRL, is recently shifting the way it addresses indigenous peoples claim to property rights and reparation. This shift is said by authors to have taken indigenous people from a position of being only a victim of human rights violations to actors of IHRL.[11]

In the contemporary international legal system there is a distancing from the traditional state centred positivism in favour of bigger concern for individuals and groups human rights.[12] Due to the increase in attention to values that support human beings tendencies to associate and create its own culture despite of state structures[13], the current framework of indigenous peoples rights entitles them to all the basic individual human rights as protection from discrimination, children's rights, cultural rights, property rights, and further group rights.[14]

[10] Anaya, S. James, "Indigenous Peoples in International Law", Oxford University Press, 2nd edition, 2004, pp. 49.
[11] Gilbert, Jérémie, "Indigenous Peoples' Land Rights under International Law: From Victims to Actors", Leiden: Brill Publishers, 2006, pp. 85.
[12] Anaya, S. James, op. cit., pp. 49.
[13] Ibid., pp. 52.
[14] McCorquodale, "Group Rights" in Moeckli, Shah and Sivakumaran, "International Human Rights Law", 2nd edition, Oxford, 2014, pp. 352.

The first international measure that had a real impact in the human rights scenario about indigenous groups in consonance with the decolonization process going on at the time was the International Labour Organization (ILO) Convention No. 107 of 1957. The Convention No. 107 was established after several studies and meetings that signaled the vulnerability of indigenous peoples in the workplace. It did not, however, count with the participation of indigenous peoples' representatives which led to the Convention reflecting the politics of assimilation to the dominant socio-political order.[15]

Afterwards, indigenous peoples together with institutions and non-governmental organizations (NGOs) started getting attention to their demands in their pursuit to protect their cultural survival, the distinctiveness of their communities and political institutions and their right to land.[16]

In 1989 the ILO adopted the Convention No. 169 on Indigenous and Tribal Peoples which remains the only binding instrument in IL on the topic.[17] Even though it has only been ratified by 23 countries[18] so far, which makes the capacity of universal standard-setting of the Convention weaker, it has been widely used by multiple countries as a reference and guidance for domestic legislation.[19] The Convention No. 169 was built together with indigenous groups representatives and distanced itself from the assimilatory stand of Convention No. 107.[20]

During the developmental stages of the ILO Convention No. 169 indigenous representatives were invited to attend the Expert Meetings and the governments that were participating in the process were advised by the ILO to consult the indigenous and tribal populations in their countries. Those measures were taken as a form of making sure that indigenous peoples concerns were taken in account on the Convention No. 169. Those efforts were however still criticized by indigenous representatives that complained about a lack of effective participation on the process.[21]

[15] Anaya, S. James, 2004, pp. 54-55
[16] Ibid., pp. 56
[17] McCorquodale, op. cit., pp. 352.
[18] ILO website, Labour Standards, available on: <https://www.ilo.org/dyn/normlex/en/f?p=1000:11300:0::NO:11300:P11300_INSTRUMENT_ID:312314>, acessed on April 28, 2018.
[19] Xanthaki, Alexandra, "Indigenous Rights and United Nations Standards: Self-Determination, Culture and Land", Cambridge University Press, 2010, pp. 91
[20] Anaya, S. James, op. cit., pp. 59.
[21] Xanthaki, Alexandra, 2010, pp. 67-68

The ILO Convention No. 169 recognized the aspirations of indigenous peoples to cultural integrity, land and resource rights and non-discrimination, all through the control of their own institutions, costumes and development, in addition to the maintenance of the identity, language and religions.[22] The Convention requires that governments identify the traditional lands of indigenous peoples and protect their rights to ownerships and possession[23], and establishes fundamental guarantees that ensure the participation of indigenous peoples in matters that affect their right to communal property.[24]

The United Nations (UN) then adopted at its General Assembly the Declaration on the Rights of Indigenous Peoples (UNDRIP), on 2007 ratified by 144 countries.[25] Even though the declaration does not have a binding character, the wide adoption by states of the UNDRIP made it a universal framework that establishes the minimum standards for the rights of indigenous people around the globe.[26] It has been questioned by some authors whether or not it can be considered customary IL, but it has been affirmed that the rights it protects, as indigenous peoples right to land, could potentially constitute customary law.[27] In any case, it has been consolidated with "*status of key interpretative guide for other sources of international law*"[28].

The UN Working Group on Indigenous Populations, that prepared and created the UNDRIP, ensured the participation of indigenous representatives and States in its deliberative process[29] making it so that this Declaration reflects central demands indigenous peoples had about ownership and control over their lands, territory and natural resources, besides the requirement

[22] Anaya, S. James, 2004, pp. 59
[23] ILO Convention 169 on Indigenous and Tribal Peoples in Independent Countries, June 27, 1989, art. 14: "*1. The rights of ownership and possession of the peoples concerned over the lands which they traditionally occupy shall be recognised[…] 2. Governments shall take steps as necessary to identify the lands which the peoples concerned traditionally occupy, and to guarantee effective protection of their rights of ownership and possession.*"
[24] ILO Convention 169, art. 17.2: *"The peoples concerned shall be consulted whenever consideration is being given to their capacity to alienate their lands or otherwise transmit their rights outside their own community.*"; art.6.1: "[…]*Governments shall: (a) consult the peoples concerned, through appropriate procedures and in particular through their representative institutions, whenever consideration is being given to legislative or administrative measures which may affect them directly; (b) establish means by which these peoples can freely participate, to at least the same extent as other sectors of the population, at all levels of decision-making in elective institutions and administrative and other bodies responsible for policies and programmes which concern them*;" and art. 6.2: "*The consultations carried out in application of this Convention shall be undertaken, in good faith and in a form appropriate to the circumstances, with the objective of achieving agreement or consent to the proposed measures.*"
[25] United Nations Declaration on the Rights of Indigenous People, A/RES/61/295, from 02 October 2007.
[26] McCorquodale, 2014, pp. 352-353.
[27] Doyle, Cathal M., "Indigenous Peoples, Title to Territory, Rights and Resources: The transformative role of free prior and informed consent", Routledge, 2015, pp. 103.
[28] Ibid., pp. 104
[29] Saul, Ben, 2016, pp. 07

for free, prior and informed consent[30] on matters regarding communal property of indigenous communities in its articles 19[31], 30(2)[32], 32(2)[33] and 38[34].

Those two instruments, the ILO Convention No 169 and the UNDRIP, even though ground setting, do not invent any new rights. What they do is articulate the existing universal human rights that States had already bound themselves to respect, protect and fulfil to the context of indigenous peoples. Their starting point is the recognition of the cultural and spiritual values that the land has to indigenous people. The instruments stipulate that they have the right to decide on their strategies for development and use of land, territory and resources, according to the right to self-determination established on art. 3 of the UNDRIP.[35]

Still on the universal sphere of protection, indigenous rights to land are also protected by the International Covenant on Civil and Political Rights (ICCPR) on art. 27[36]. The International Covenant on Economic, Social and Political Rights (ICESCR) on art. 15[37] further protects the strong communal dimension that the cultural life has to indigenous peoples and recognizes how it is indispensable for their existence. The General Comment 21 of the Committee on Economic, Social and Cultural Rights (CESCR) explained that this communal dimension encompasses the right to land, territory and resources traditionally owned[38]:

> "The strong communal dimension of indigenous peoples' cultural life is indispensable to their existence, well-being and full development, and includes the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise

[30] Doyle, Cathal M., 2015, pp. 107
[31] UNDRIP. Art. 19: "States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them."
[32] UNDRIP. Art. 30(2): "In conjunction with indigenous peoples, States shall take effective measures to recognize and protect the exercise of these rights" [to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions]
[33] UNDRIP. Art. 32(2): "States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources."
[34] UNDRIP. Art. 38: "States in consultation and cooperation with indigenous peoples, shall take the appropriate measures, including legislative measures, to achieve the ends of this Declaration."
[35] Rainforest Foundation Norway, IWGIA, EU, "Global Report on the Situation of Lands, Territories and Resources of Indigenous Peoples", Indigenous Peoples Major Group for Sustainable Development, 2019, pp. 15.
[36] ICCPR, art. 27: "In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language."
[37] ICESCR, art. 15: "1. The States Parties to the present Covenant recognize the right of everyone: (a) To take part in cultural life; (b) To enjoy the benefits of scientific progress and its applications; (c) To benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author. 2. The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for the conservation, the development and the diffusion of science and culture.[…]"
[38] CESCR. General Comment No. 21 on Right of everyone to take part in cultural life (art. 15, para. 1(a) of the ICESCR), E/C.12/GC/21, pp. 09.

> used or acquired. Indigenous peoples' cultural values and rights associated with their ancestral lands and their relationship with nature should be regarded with respect and protected, in order to prevent the degradation of their particular way of life, including their means of subsistence, the loss of their natural resources and, ultimately, their cultural identity. States parties must therefore take measures to recognize and protect the rights of indigenous peoples to own, develop, control and use their communal lands, territories and resources, and, where they have been otherwise inhabited or used without their free and informed consent, take steps to return these lands and territories."[39]

Also, the International Convention on the Elimination of all Forms of Racial Discrimination (ICERD) on its art. 5[40] entitles all persons to the right to property without any kind of discrimination. The Committee on the Elimination of Racial Discrimination (CERD) on the General Recommendation No. 23 asks states to recognize and protect indigenous peoples right to ownership, development, control and use of their communal land.[41]

With the understanding of the universal sphere of protection, the next subchapters focus on how the Inter-American and African regional human rights systems approach indigenous rights, specifically the right to land through their institutions.

2.1.1. Indigenous Rights to Land in the Inter-American Regional System of Human Rights

The ACHR stablishes on article 1.1 the State duty to prevent violations of human rights through the obligations to respect the rights and freedoms recognized in the Convention and to guarantee to every person in its jurisdiction the free and full enjoyment of these rights[42]. Article 2 complements the duty to guarantee with the need to adequate the domestic legislation to the provisions of the American Convention[43]. The IACtHR has clarified that the duty to prevent

[39] Ibid., pp. 36

[40] ICERD, art. 5: "States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights: (v) The right to own property alone as well as in association with others;"

[41] CERD, General Recommendation 23 on Rights of Indigenous Peoples, 1997. A/52/18, annex V.

[42] ACHR, art. 1.1: "The States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition."

[43] ACHR, art. 2: "Where the exercise of any of the rights or freedoms referred to in Article 1 is not already ensured by legislative or other provisions, the States Parties undertake to adopt, in accordance with their constitutional processes and the provisions of this Convention, such legislative or other measures as may be necessary to give effect to those rights or freedoms."

embraces all the possible actions to protect human rights, in the judicial, political, administrative and cultural spheres.[44]

On article 29 the American Convention furthers the right to guarantee and explicits that the recognition of the rights by States cannot be implemented with a more restrictive interpretation than the one given by the American Convention or any other convention to which the State is a party.[45] These provisions make it already comprehensible that indigenous rights would already be protected in the Inter-American system to the same extent that they are protected in IL even if there were no specific provisions in the system. Further from this general level of protection, the Inter-American System has furthermore its own mechanism to protect indigenous peoples right to their land and natural resources.

The regional instruments of human rights normally do not address indigenous rights pointedly but do so through the interpretations inserted in the judgements of the regional systems' courts, using the general standards of human rights as a reference and applying them with the nuances of the cultural characteristics and specific context of indigenous peoples.[46]

In the Inter-American regional system of Human Rights one of the first manifestations towards the protection of indigenous peoples was a resolution from 1972[47] that identified the patterns of discrimination against indigenous peoples and asserted that States have a sacred commitment to the protection of indigenous populations.

In the instruments themselves territorial rights are protected on art. XXIII[48] of the American Declaration of the Rights and Duties of Man (ADRDM), that already explains that the right to own property is essential for a decent living, and in art. 21[49] of the American Convention on Human Rights (ACHR), that states the right to use and enjoy one's own property. On the

[44] IACtHR. Case Velásquez Rodrígues v. Honduras. Judgement of 29 july 1988. Para. 175.
[45] ACHR. Art. 29: "No provision of this Convention shall be interpreted as: a) permitting any State Party, group, or person to suppress the enjoyment or exercise of the rights and freedoms recognized in this Convention or to restrict them to a greater extent than is provided for herein; b) restricting the enjoyment or exercise of any right or freedom recognized by virtue of the laws of any State Party or by virtue of another convention to which one of the said states is a party; [...]"
[46] Saul, Ben, 2016, pp. 131
[47] IACHR. Resolution on Special Protection for Indigenous Populations, from December 28, 1972, OEA/Ser.P, AG/doc.305/73
[48] ADRDM. Art. XXIII: "Every person has a right to own such private property as meets the essential needs of decent living and helps to maintain the dignity of the individual and of the home."
[49] ACHR. Art. 21: "1. Everyone has the right to the use and enjoyment of his property. The law may subordinate such use and enjoyment to the interest of society. 2. No one shall be deprived of his property except upon payment of just compensation, for reasons of public utility or social interest, and in the cases and according to the forms established by law. 3. Usury and any other form of exploitation of man by man shall be prohibited by law."

ACHR, however, the right comes already with a following restriction: that this use and enjoyment may be restricted for reasons of public utility or social interest. On the instruments themselves, thus, the right to property is recognize and indigenous people are not explicitly excluded from that right.

Further, a Special Rapporteur on the Rights of Indigenous People was assigned in 1990, by request of the Organization of American States (OAS).[50] With the basis that already exists in the Inter-American instruments, the IACtHR and the IACHR have been addressing issues related to indigenous peoples and making major developments in the area.[51]

More recently, in 2016, the OAS (Organisation of American States) issued the American Declaration on the Rights of Indigenous Peoples (ADRIP), recognizing it as a minimum standard for the survival and well-being of indigenous peoples in the Americas together with the UNDRIP[52]. This instrument finally spelled out the collective rights of indigenous peoples to "*own, use, develop and control the lands, territories and natural resources*"[53] which they have traditionally occupied[54]. It also ensures the right to free, prior and informed consent for indigenous peoples[55] and that the State must recognise all the different forms of property, possession and ownership that indigenous peoples may have[56]. Before the ADRIP this was only achieved through the interpretation by the Inter-American Court in its decisions[57].

The recognized right to communal property of indigenous peoples then goes further than the right to own land since it is a safeguard of their survival, both physically and culturally. Consequently, it is indispensable that they have access to their traditional territory and the natural resources therein to protect their identity, culture, survival and to maintain a life with

[50] Saul, Ben, 2016, pp. 132
[51] Anaya, S. James, 2009, pp. 253
[52] OAS. American Declaration on the Rights of Indigenous Peoples, AG/Res. 2888 (XLVI-O/16), article XLI
[53] ADRIP, article XXV.3
[54] ADRIP, article VI and XXV
[55] ADRIP, article XXVIII
[56] ADRIP, article XXV.5
[57] IACtHR. Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua. Merits, Reparations and Costs. Judgement of August 31, 2001. Series C No. 79; Case of the Kichwa de Sarayaku v. Ecuador, Judgement of 27 june 2012, para. 145-146. Case of the Sawhoyamaxa Indigenous Community; Case of the Saramaka People v. Suriname, para. 121

dignity[58], and has to be protected by the State in its obligations to create conditions to protect indigenous peoples special relationship to their land and resources.[59]

Because the right to property is not absolute in IHRL[60] and the protection to communal property in the Inter-American System is not absolute,[61] the protection to property does not hold a rigid and strict interpretation.[62] Thus, it is possible for States to give concessions inside indigenous territories as long as it doesn't represent a denial of subsistence to the people.[63] The resources in indigenous lands that are not recognized as being traditionally used can, however, still be exploited by the State[64], as long as they follow a set of safeguards established by the Inter-American Court.

The IACtHR also has explained that there are situations when the State can restrict the use and enjoyment of property without infringing on art. 21 of the ACHR. This limitation is possible when the State follows the guarantees that the situation is previously established by law, that there is a necessity to do so, that it is done proportionally, with the finality to reach a legitimate aim in a democratic society.[65] Further, to reach the natural resources in indigenous communities, the State has to verify that whatever restrictions are imposed on the community do not deny the survival of the indigenous people.[66]

Because the right to land is not only about the territory itself, but about the cultural survival of the community, the IACtHR has imposed safeguards that have to be considered whenever the State needs to impose a limitation on the right to ancestral land and natural resources of a indigenous people, but this has been done through the jurisprudence of the Court and is not

[58] Fuentes, Alejandro, "Protection of Indigenous Peoples' Traditional Lands and Exploitation of Natural Resources: The Inter-American Court of Human Rights' Safeguards", In: International Journal on Minority and Group Rights 24, Brill Nijhoff, 2017, pp. 234-235
[59] IACtHR. Case of Yakye Axa, Separate Dissenting Opinion of Judges A.A. Cançado Trindade and M.E. Ventura Roble, para. 20, *apud* Fuentes, Alejandro, "Protection of Indigenous Peoples' Traditional Lands and Exploitation of Natural Resources: The Inter-American Court of Human Rights' Safeguards", In: International Journal on Minority and Group Rights 24, Brill Nijhoff, 2017, pp. 237
[60] ECtHR. Dogan and others v. Turkey, para. 145; IACtHR. Perozo and others v. Venezuela, para. 399; Abrill and Alosilla v. Peru, para. 82.
[61] IACtHR. Ivcher Bronstein v. Peru, para. 128; Salvador Chiriboga v. Equador, paras. 60-61
[62] IACtHR. Case Saramaka v. Suriname, para. 127
[63] IACtHR. Case Case Kichwa de Sarayaku v. Equador, para. 156; Case Yake Axa, paras. 144-145; Case Saramaka v. Suriname, para. 128
[64] IACtHR. Case of the Saramaka People v. Suriname, para. 126
[65] IACtHR. Case Yake Axa v. Paraguai, para. 144; Case Saramaka v. Suriname, para. 127; Case Sawhoyama v. Paraguai, para. 137; Case Kaliña and Lokono v. Suriname, para. 155.
[66] IACtHR. Case Saramaka v. Suriname, para. 129.

fully developed on the instruments themselves.[67] For that reason they will be addressed in chapter 4.

2.1.2. Indigenous Rights to Land in the African Regional System of Human Rights

In the African system of Human Rights, there was a reluctance from States to recognize the need for protection of indigenous peoples since they had the notion that all Africans are indigenous to their land and that the acknowledgement of specific minorities as indigenous would foster ethnic division or even lead to the secession of eventually recognized groups.[68] In 2000, the African Commission established the Working Group of Experts on the Rights of Indigenous or Ethnic Communities[69]. The Working Group then instrumentalized the adoption of the UNDRIP by the ACmmHPR and released an Advisory Opinion supporting it with the expectation that this would consolidate the already established indigenous rights in the international sphere inside African States.[70] For this reason, indigenous issues have been dealt with increasingly by the African system.[71]

The African system has one specificity that goes one step further from the American Convention: it recognizes already on article 14 of the African Charter the right to communal property[72]. As explained by the ACmmHPR the right to property in the charter includes the protection of the legitimate expectation to obtain and to peacefully enjoy property of an individual, a group and a people.[73] Not only the right of property of a group, the article protects

[67] IACtHR. Case Saramaka v. Suriname, para. 126-127, 143; Case Yake Axa v. Paraguai, para. 144-145; Case Kichwa de Sarayaku v. Equador, para. 156; Case Kaliña and Lokono v. Suriname, para. 201.
[68] Wachira, George Mukundi. "Rights of Indigenous People in Africa" In: Ssenyonjo, Manisuli (Ed.), "The African Regional Human Rights System: 30 Years after the African Charter on Human and Peoples' Rights", Martinus Nijhoff Publishers, 2012, pp. 195 and 197.
[69] ACHPR, Resolution No. 51 on the Rights of Indigenous Peoples' Communities in Africa, adopted in November 6, 2000.
[70] Advisory Opinion of the African Commission on Human and Peoples' Rights on the United Nations Declaration on the Rights of Indigenous Peoples adopted by the African Commission on Human and Peoples' Rights at its 41st Ordinary Session held in May 2007 in Accra, Ghana: "On the basis of this Advisory Opinion, the ACHPR recommends that African States should promote an African common position that will inform the United Nations Declaration on the rights of indigenous peoples with this African perspective so as to consolidate the overall consensus achieved by the international community on the issue. It hopes that its contribution hereof could help allay some of the concerns raised surrounding the human rights of indigenous populations and wishes to reiterate its availability for any collaborative endeavor with African States in this regard with a view to the speedy adoption of the Declaration.", pp. 37
[71] Saul, Ben, 2016, pp. 133
[72] ACHPR, art. 14: "The right to property shall be guaranteed. It may only be encroached upon in the interest of public need or in the general interest of the community and in accordance with the provisions of appropriate laws."
[73] ACmmHPR. Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights, para. 53.

traditional custom and "*land and other natural resources held under communal ownership*"[74] with imposed duties on the State to ensure the security of ownership to rural communities and their members.

Even with this protection of communal ownership of land the African Commission talks about the tenure of rural communities. Not unlike the Inter-American System, in the instruments of the African system there is also a lack of specific indigenous rights and this is dealt through the interpretation of other general rights foreseen in these regional instruments. In this sense the recognized collective rights to both wealth and resources on article 21[75] of the African Charter and the right to development on article 22[76], together with the right to property from article 14[77] have been essential in the recognition of the right to land and resources of indigenous peoples. [78]

In the Ogoni case[79], that will be analysed in further depth on chapter 5, the African Commission on Human and Peoples Rights accepted that the Ogoni were a people and therefore entitled to the right to freely dispose of their wealth and resources. This right was considered on the fact that they are a people, which can mean that they are a distinct people or part of the Nigerian people. There was, however, no recognition of the Ogoni as specifically indigenous or tribal peoples. [80]

In 2009 for the first time[81] the African Commission explicitly recognised that indigenous peoples have the right to development, in the Endorois case.[82] In the same case the right to cultural identity and the collective dimension of the cultural life of indigenous peoples and communities were understood to be protected by the African Charter on Human and Peoples' Rights (ACHPR).[83] The rights of the Endorois, as a "distinct people" to property and free

[74] ACmmHPR. Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights, para. 54.
[75] ACHPR. Art. 21: "1. All peoples shall freely dispose of their wealth and natural resources. This right shall be exercised in the exclusive interest of the people. In no case shall a peo- ple be deprived of it."
[76] ACHPR. Art. 22: "1. All peoples shall have the right to their economic, social and cultural development with due regard to their freedom and identity and in the equal enjoyment of the common heritage of mankind."
[77] ACHPR. Art. 14: "The right to property shall be guaranteed. It may only be encroached upon in the interest of public need or in the general interest of the community and in accordance with the provisions of appropriate laws."
[78] Saul, Ben, 2016, pp. 133 and 159
[79] Social and Economic Rights Action Center (SERAC) and Center for Economic and Social Rights (CESR) / Nigeria, application No. 155/96, 30th Ordinary Session, 13-27 October 2001
[80] Saul, Ben, 2016, pp. 159
[81] Wachira, George Mukundi. "Rights of Indigenous People in Africa" In: Ssenyonjo, Manisuli (Ed.), "The African Regional Human Rights System: 30 Years after the African Charter on Human and Peoples' Rights", Martinus Nijhoff Publishers, 2012, pp. 205
[82] ACHPR. Case Endorois, para. 298
[83] ACmHPR. Case Endorois. Communication No. 276/2003, para. 241, 250-251

disposition of natural resources were also understood to have been violated, confirming that indigenous peoples right to property are protected by article 14 of the African Charter.[84]

As previously said about the Inter-American System, in the African System as well the protection of communal property is not absolute,[85] and the State can give concessions to companies to act inside them in case of public need or when it is in the general interest of the community.[86] This provided that any interferences inside indigenous lands and the resources therein goes through a consultation process with indigenous communities, respecting their traditions, and that environmental and social assessments are conducted. The free, prior and informed consent is also required for projects with high impact probabilities and the benefits must be shared as a form of compensation to indigenous people in case of decrease in their well-being.[87]

2.2. Conclusive Remarks

All the above points to the principal idea that the protection of indigenous peoples right to own their land and natural resources goes beyond the protection of property, but it is the protection of their cultural identity and ultimately of their cultural survival.

In International Law, the ownership and possession of traditional lands of indigenous people are protected by ILO Convention No. 169 since 1989 with States bound to identify and protect that right and to stablish guarantees to make sure indigenous peoples participate in the matters that affect their communal property. In 2007 the UNDRIP, even though not a binding instrument, has brought the protection of indigenous peoples' right to land to a wider range of countries. Both instruments were created to convey to the specific context of indigenous people's rights that were already afforded to the general population. Those rights were confirmed as a part of IL by other bodies of international law as the CESCR and CERD in their comments and recommendations on the same directions as those instruments.

The instruments of IL created a robust body to protect indigenous peoples right to their communal property and the natural resources therein. However, the right to property can be

[84] ACmHPR. Case Endorois, para. 238
[85] ACmHPR. The Social and Economic Rights Action Center and the Center for Economic and Social Rights v. Nigeria, Communication 155/96 (2001), paras. 42, 54 and 55
[86] ACmmHPR. Principles and Guidelines on the Implementation of Economic, Social and Cultural Rights in the African Charter on Human and Peoples' Rights, para. 55.
[87] Ibid., para. 164.

restricted if there is a necessity to do so. This broad concept keeps the open space for States to give concessions to companies to act inside that communal territory.

The way how this protection of the right to property was done in order to safeguard the cultural survival was through different ways in the two analysed regional systems. As Ben Saul accurately pointed, the Inter-American Court uses its jurisprudence to interpret the general right to property existent in article 21 of the ACHR and expand it to the right to own their traditional property and natural resources. The African Court, on a different movement, departs from the rights to wealth and resources on article 21, the right to development on article 22 and the right to communal property on article 14, all of the ACHPR[88] and apply them by analogy to indigenous peoples.

Despite the different procedures to reach the protection of indigenous peoples right to their communal land and natural resources, both regional bodies protect the indigenous peoples' right to ownership of their communal property and the natural resources therein and require effective legal protection of the ownership from States. In both systems, this right to property is not absolute and the State can give concessions with the conditions that they respect safeguards established by the jurisprudence of the IACtHR.

With the adoption of the ADRIP the Inter-American System advance in the protection of indigenous rights to land and natural resources with a proper instrument that protects these indigenous rights. However beneficial, the ADRIP does not address the safeguards necessary to protect those rights when states give concessions for companies to operate inside indigenous territory.

It is relevant to note that those requirements for the State to permit activities inside indigenous territories were stablished not in the legal instruments, but by the Inter-American Court in the Saramaka case and the African Commission then built on the Inter-American jurisprudence on its own Endorois case, adopting the same safeguards, as will be observed in chapters four and five. The regional systems with their focused judicial bodies could have the possibility to further develop indigenous rights to land and natural resources in their continents and to deal with the situations where companies act with state concessions in their lands. However, in the Inter-American and African instruments the protection of indigenous peoples' rights is not even explicit, and there is also no direct mention to actions of companies therein. The only protection

[88] Saul, Ben, 2016, pp. 163-164

that exists in both regional system from the acts of companies are through the obligations of the State of due diligence to protect human rights through dispositions of domestic legislation.

This development of the protection of indigenous peoples right to land is however a process of interpretation of the instruments made by the regional bodies of protection. The hard lard themselves are not enough to protect indigenous people of the acts of companies inside their lands. For this reason, it is necessary to analyse whether companies themselves are able to afford this protection through self-regulations in IL, which will be done in the following chapter.

3 The International Regulation of Companies Actions

As the instruments that are used to protect indigenous peoples' right to their traditional territory and natural resources do not protect them explicitly from the concessions given by States to companies, this chapter aims to understand how the actions of companies are regulated in IL and in the regional systems analysed in this study. An approach will be made of the relationship between the state-centric structure in IHRL and how companies' actions are regulated by the norms existent and under development.

It is necessary to first understand that many factors stimulated the growth of Non-State Actors, category where companies are included, and augmented their relevance in the international scenario and in the human rights regime. The wave of privatization since the 80s, for example, that led to private companies realizing previous State activities; the mobilization of capital and flows of private foreign investments motivated by deregulation that boosted the growth of transnational companies making some of them economically bigger than various countries; the expansion of multilateral institutions that started exercising multiple functions that previously were exclusive to the State; and, the growth of civil society organisations that became providers of basic services and projects in diverse fields.[89] The negative duties to abstain from conducts that could violate human rights started mixing up with positive obligations that previously belonged to the State such as the hiring and payment policies and price and conditions to be negotiated with suppliers and clients.[90]

Non-State Actors, in principle, are entities that are not the State. Definitions of NSA have a very wide range and includes diverse actors. Some focus on actors with transnational dimensions while others estipulate that they are entities not acting within lawful directives of

[89] Alston, Philip. "The "Not-a-Cat" Syndrome: Can the International Human Rights Regime Accommodate Non-State Actors?" In: Alston, Philip (ed.), Non-State Actors and Human Rights, Oxford, 2005, pp. 17-18
[90] Schutter, Olivier de. Corporations and Economic, Social and Cultural Rights. In: Riedel, Giacca and Golay (Eds.) "Economic, Social and Cultural Rights in International Law: Contemporary Issues and Challenges". Oxford University Press, 2014. pp. 202

States.[91] Between them are present also corporations, international organizations and financial institutions[92].

These agents have a limited action and standing in the IHRL setting due to the limitation of the state centric lines in which international systems of human rights protection are built, as explained by Andrew Clapham:

> "The problem is that the human rights regime has developed along state-centric lines. **Human rights treaties were traditionally written by states as sets of obligations for states.** The accompanying monitoring mechanisms that provide for state accountability are based on traditional rules of state responsibility. To adjust this system, and to revise the assumptions that have grown up around it, tends to trigger considerable resistance."[93]

The broad denomination of Non-State Actors has been criticised by Philip Alston for its reinforcement of the notion that the State is the central actor and that all other entities gravitate around it, deliberately excluding the notion that the world has developed in rather poly-centric ways that goes further than the closed notion of the State as the sole center of IL. Alston claims that this unidimensional focus is misleading and an obstacle to make the necessary changes to the human rights regime and adequately answer the changes made in the global structure.[94]

This excluding approach to NSA creates a compromised scenario when it comes to seeking accountability for their actions since most of them do not fit on the international human rights norms and institutional definitions. The lack of ability of IL to establish a framework that effectively addresses the involvement of NSA in human rights violations was said by Alston to make the whole human rights movement lose its credibility and might make IHRL irrelevant towards those relevant issues.[95]

The focus of this paper is specifically on corporations and companies as defined by Olivier de Schutter as service providers, groups of companies and networks of business partners, being this an exemplary list,[96] and will be addressed as such to avoid the general denomination of

[91] Alston, Philip. 2005, pp. 16
[92] Clapham, Andrew. 'Non-State Actors' in Moeckli, Shah and Sivakumaran, "International Human Rights Law", Oxford University Press, 2014, pp. 531
[93] Ibid., pp. 532
[94] Alston, Philip. Op. cit., pp. 03-04
[95] Ibid., pp. 06/19
[96] Schutter, Olivier de. 2014. pp. 204, 208 and 2015.

Non-State Actors. The UNGPs, that will be further discussed on the next subchapter, clarifies their definition of companies in the following way:

> "14. The responsibility of business enterprises to respect human rights applies to **all enterprises regardless of their size, sector, operational context, ownership and structure**. Nevertheless, the scale and complexity of the means through which enterprises meet that responsibility may vary according to these factors and with the severity of the enterprise's adverse human rights impacts."[97]

The reasons why companies are not subjects of IHRL are very clear. They do not have the basic constituent characteristics that States have, namely a delimited territory, its own jurisdiction or regulatory power. With that, companies can only be expected to apply its negative duties and abstain from conducts that may violate human rights.[98]

The following subchapter will address the efforts made in International Law to regulate the actions of companies in relation to human rights abuses. All the information in this subchapter will clarify the agents involved and the rules that apply to situations where companies act inside indigenous peoples' territory through concessions given by the State.

The final subchapters will expose how the actions of companies are laid out in the Inter-American Regional System of Human Rights and in the African Regional System of Human Rights.

3.1. The Efforts to Regulate Corporate Activity in IHRL

This subchapter aims to show the international movements that are under development to undertake how companies' actions are currently addressed in IL and in IHRL. This is done to understand whether the regulations and safeguards within the regulatory framework of companies could protect the rights of indigenous people to their land and natural resources.

When companies act inside of indigenous territory, for them to be held responsible for any harmful actions there is a dependency on the domestic legislation of the States. There are no mechanisms in the current international system to impose its norms on companies, once they are not subjects of IHRL. It falls to the States to establish those mechanisms in the domestic level and guarantee that the actions of those actors are in accordance with human rights law.[99]

[97] UN Guiding Principles on Business and Human Rights, HR/PUB/11/04, 2011, pp. 15.
[98] Schutter, Olivier de. 2014. pp. 199
[99] Schutter, Olivier de. 2014. pp. 197

In 2003 the UN attempted on paving the way for coerciveness through law on the topic and proposed the Norms on the Responsibilities of Transnational Corporations with Regard to Human Rights, with the aim of making businesses bound to IL as much as States. They also had some provisions with the aim of imposing liability on parent companies for the actions of its subsidiaries, as the parent company would be the one with the power to control or at least influence them, and so it should be the risk holder. Those Norms were disconsidered in 2004 on account of the opposition from both states and businesses.[100]

Due to the lack of legal resources to make private companies responsible, international human rights treaties have structured positive obligations for States to protect its individuals against their actions.[101] This has been clarified by the Human Rights Committee of the ICCPR in its General Comment 31:

> "the positive obligations on States Parties to ensure Covenant rights will only be fully discharged if individuals are protected by the State, not just against violations of Covenant rights by its agents, but **also against acts committed by private persons or entities that would impair the enjoyment of Covenant rights in so far as they are amenable to application between private persons or entities**. There may be circumstances in which a failure to ensure Covenant rights as required by article 2 would give rise to violations by States Parties of those rights, as a result of States Parties' permitting or failing to take appropriate measures or to exercise due diligence to prevent, punish, investigate or redress the harm caused by such acts by private persons or entities."[102]

The Committee on Economic, Social and Cultural Rights (CESR) pointed accordingly on its General Comment 12 by explaining that by the duty to protect the State member should take the required measures to guarantee that both companies and individuals do not take from people their access to adequate food.[103] In its General Comment 14 the CESR went further and highlighted that even though States are the parties to the Covenant and therefore the ones accountable for the compliance with it, all members of the society, and in that included non-

[100] Mares, Radu. "Three baselines for business and human rights", Raoul Wallenberg Institute of Human Rights, 2017, pp. 02/03
[101] Clapham, Andrew. 'Non-State Actors' in Moeckli, Shah and Sivakumaran, "International Human Rights Law", Oxford University Press, 3rd edition, 2018, pp. 563
[102] UN Human Rights Committee, General comment no. 31 on The nature of the general legal obligation imposed on States Parties to the Covenant, 26 May 2004, CCPR/C/21/Rev.1/Add.13, para. 08
[103] UN Committee on Economic, Social and Cultural Rights, General Comment No. 12 on The Right to Adequate Food, 12 May 1999, para. 15

governmental organizations, civil society organizations and the private business sector, *"have responsibilities regarding the realization of the right to health"*[104].

A position more focused in explaining what is expected of companies themselves, contraposing the usual state obligation approach, was taken by the UN Committee on the Rights of the Child in its General Comment 16 where it was made very clear that the duties and responsibilities to respect children's right apply not only to the State and State-controlled services but also to private actors and business enterprises.[105] It explicitly stated that:

> "all businesses must meet their responsibilities regarding children's rights and States must ensure they do so. In addition, business enterprises should not undermine the States' ability to meet their obligations towards children under the Convention and Optional Protocols thereto."[106]

The Organisation for Economic Co-operation and Development (OECD) also created its Guidelines for Multinational Enterprises and in 2000 implemented National Contact Points (NCPs) to accept complaints from victims about companies acting in non-compliance with the guidelines. A report from 2015 however concluded that there were very few examples of successful results that had led to any remedies and between the ones that had, involved only optimistic policy changes to corporations.[107]

In 2008 the UN Human Rights Council approved the "Protect, Respect and Remedy Framework" developed by the then Special Representative on the issue of human rights and transnational corporations and other business enterprises John Ruggie. This Framework is based on three pillars: a) the duty of the State to protect against human rights abuses from third parties, including companies; b) the corporate responsibility to respect human rights, and; c) wider access to effective remedies, judicial and non-judicial, for the victims.[108]

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[104] UN Committee on Economic, Social and Cultural Rights, General Comment No. 14 on The Right to the Highest Attainable Standard of Health, 11 August 2000, para. 42

[105] UN Committee on the Rights of the Child, General Comment No. 16 on State Obligations Regarding the Impact of the Business Sector on Children's Rights, CRC/c/GC/16, 17 April 2013, para. 08

[106] Ibid., para. 08

[107] Daniel, Caitlin; Wilde-Ramsing, Joseph; Genovese, Kris; Sandjojo, Virginia, "Remedy Remains Rare: An analysis of 15 years of NCP cases and their contribution to improve access to remedy for victims of corporate misconduct", OECD Watch, 2015, pp. 05

[108] OHCHR. The UN Working Group on Business and Human Rights. "The UN Guiding Principles on Business and Human Rights: an Introduction", pp. 3-4, accessible on: https://www.ohchr.org/Documents/Issues/Business/Intro_Guiding_PrinciplesBusinessHR.pdf

The Framework confirms the idea that the duty to respect of companies is a passive responsibility but requires active conducts.[109] In 2011 it was implemented through the Guiding Principles on Business and Human Right, the most authoritative declaration on the corporate responsibility and correspondent State duties in IHRL adopted on a global level.

Principle 11 of the UNGPs, that addresses the corporate responsibility to respect human rights explains that *"Business enterprises should respect human rights. This means that they should avoid infringing on the human rights of others and should address adverse human rights impacts with which they are involved"*. Inside this responsibility to respect, companies should address the adverse human rights impacts their activities might have and take the appropriate measures to prevent, mitigate and remediate them. They should also abstain from actions passible of undermining the state's capability to fulfill their obligations.[110]

Another protection foreseen by the UNGPs is the duty of human rights due diligence, with the assessment of actual and potential human rights impacts that the actions of the companies might cause or contribute to[111], with meaningful consultation with affected groups and stakeholders.[112] In case of adverse impact caused by the companies actions, they should provide or cooperate to remediate the situation.[113]

This obligation to respect encompasses all internationally recognized human rights[114], with special focus on the core rights recognized in the International Bill of Rights and the ILO Conventions. It is, however, not a legal liability and there is no enforcement which are still left to domestic legislations.[115] Even though this pushed initiatives to change the policies of both governments and business there are still claims for a stronger international legal framework that can establish this concrete legal accountability of companies, beyond the moral responsibility of planning and reporting.[116]

Since then, the UN has composed a working group to try to elaborate this legally binding instrument, which would regulate the activities of transnational corporations as well as other

[109] UN Human Rights Council. A/HRC/8/5. 07 April 2008. para. 55.
[110] UN. Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect, Remedy" Framework, 2011, p. 13.
[111] UNGP Principle 17.
[112] UNGP Principle 18.
[113] UNGP Principle 22.
[114] UNGP Principle 12.
[115] UN. Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect, Remedy" Framework, 2011, p. 14.
[116] Clapham, Andrew. 2018, pp. 568-569

companies in the light of IHRL. The group has received many different proposals that range from treaties that may create obligations for states to establish legal remedies in domestic law to the creation of an international court of human rights capable of hearing cases against corporations.[117]

There are divergent opinions about the creation of this binding instrument by the UN working group. It is said that in one hand the UNGPs and the possible upcoming binding instrument can become a complementary framework of soft law and hard law. Others claim that if the binding instrument follows the steps of the first drafted document it will find barriers such as changes in the global economy that make transnational companies with more complex value chains instead of the previous vertical hierarchy described in the idea of liability for parent companies. For those who agree with the latter, the new treaty needs to be carefully drafted so it gives legal incentives that are aligned with the current scenario, designed also with the UNGPs.[118]

At the same time, Andrew Clapham points to three shifts that are occurring in international criminal law that are distancing from the notion that it only applies to individuals.[119] This might in the long term influence the structures in the IHRL movement. Those shifts are happening for example with the adoption of a new treaty on Corporate Criminal Liability by the African Union with the addition of a criminal chamber to the African Court of Justice and Human Rights[120]. With this new treaty the application of international criminal law to corporations is very clear to the State members of the African Union, and as much as it can be considered to be limited to a regional system, it is a treaty created by States that foresees international obligations and accountability for corporations.[121]

Other developments in the same direction have been made by the Special Tribunal for Lebanon, that ruled that corporations can be prosecuted based in international standards that allow legal entities to be interpreted in the term 'person'[122], and The Drafting Committee of the

[117] Clapham, Andrew. 2018, pp. 569
[118] Mares, Radu. “Three baselines for business and human rights”, Raoul Wallenberg Institute of Human Rights, 2017, pp. 08
[119] Clapham, Andrew. 2018, pp. 569
[120] AU. Protocol on Amendments to the Protocol on the Statute of the African Court of Justice and Human Rights, adopted on June 27, 2014
[121] Clapham, Andrew. 2018, pp. 569-570
[122] Special Trbiunal for Lebanon, Interlocutory Appeal Concerning Personal Jurisdiction in Contempt proceedings, STL-14-05/PT/AP/AR126.1 from 02 October 2014

International Law Commission that adopted a provisional text that establishes the liability of legal persons for crimes against humanity[123].

As there is no legal way of making companies internationally responsible for their actions that might lead to violations of human rights, specially inside indigenous territory, IL is increasingly calling for the accountability of international organisations and non-state actors. Accountability has been said to be the *"duty to account for the exercise of power"*[124] by the International Law Association (ILA) Committee on Accountability of International Organizations. [125]

3.1.1. Private Companies in the Inter-American Regional System of Human Rights

In the Inter-American instruments, there is no direct mentions on how to address harmful conducts committed by companies other than through the obligation of due diligence of States. Since its first judgment the IACtHR considers art. 1 of the ACHR to be essential to determine when a violation can be attributed to a State party. [126] From there come the two general obligations to respect and guarantee human rights. Those two obligations are considered as a negative and a positive obligation, respectively.[127]

The obligation to guarantee makes the State bound to promote all the necessary condition for its people to have access to the rights prescribed in the ACHR. The governmental bodies and structures must be capable to guarantee by law the free and fulfilled enjoyment of human rights.[128] This obligation culminates in the duty of the States to prevent, investigate and punish every violation that might occur of the rights recognised by the American Convention.[129]

Since 2003 the IACtHR has recognized that the obligation to respect human rights is extended to private employers, on its Advisory Opinion 18 when it expressed that:

[123] Drafting Committee of the ILC. A/CN.4/L.892, from 26 May 2017, Draft article 6
[124] ILA, Committee on Accountability of International Organizations, Final Report, Berlin Conference (2004) 5. *apud* Crawford, James. "State Responsibility: The General Part", Cambridge University Press, 2014, pp. 84
[125] Crawford, James. "State Responsibility: The General Part", Cambridge University Press, 2014, pp. 84
[126] IACtHR. Case Velásquez Rodríguez v. Honduras. Judgement of june 29, 1988. para. 164.
[127] Gomes, Luiz Flávio and MAZZUOLI, Valerio de Oliveira. "Comentários à Convenção Americana de Direitos Humanos: Pacto de San José da Costa Rica", Revista dos Tribunais, 4th edition, 2013. pp. 27
[128] IACHR. OEA/Ser.L/V/II.Doc.47/15. para. 40
[129] IACtHR. Case Velásquez Rodríguez v. Honduras. para. 166

> "the effects of the obligation to respect human rights in the relations between private parties are specified in the framework of the private labour relations, in which the employer must respect the human rights of its workers."[130]

On its Advisory Opinion 23 of 2017[131], while discussing the relationship of human rights with the environment and sustainable development the Court adopted dispositions of the CESCR and the CERD to explain that the State must guarantee that human rights of people under their jurisdiction even if those people are physically outside the State's territory and that one of the measures to do so is to avoid that companies registered in the State but carrying out activities in other countries violate economic, social and cultural rights in the countries they operate through legal and political enforcement. In the same sense the Court points that legal and administrative measures should be taken by the State in order to avoid that violations of human rights are committed through the actions of transnational companies affecting people outside the State's territory.[132]

Further from stating the obligations of States with transnational corporations operating outside the territory of the state, the Court uses the UNGPs[133] and draws even further then the Guidelines did, stating that companies should not only respect and protect but also *"prevent, mitigate and take responsibility for the negative consequences of its activities over human rights"*[134].

The Inter-American System, however, has no direct mention to how to deal with the actions of companies inside indigenous territory. What they have is the potential interpretation of the duty of due diligence that can be applied in the regional system by the Inter-American Court.

3.1.2. Private Companies in the African Regional System of Human Rights

In the same way the structure of State responsibility in the African system is in line with the IHRL rules previously presented. When it comes to the position of NSA under the African Charter, the topic has been approached by the ACHPR in the Case Zimbabwe Human Rights NGO Forum v. Zimbabwe. In the case, the Commission clarifies that NSA were not only

[130] IACtHR. Advisory Opinion OC-18/03, from 17 September 2003, requested by the Mexican United States, on the Juridical Condition and Rights of Undocumented Migrants, para 146.
[131] IACtHR. Advisory Opinion OC-23/17, from 15 November 2017, requested by the Republic of Colombia, on Environment and Human Rights
[132] Ibid., para. 151.
[133] More specifically principles 11 to 15, 17, 18, 22 and 25 of the UNGPs.
[134] IACtHR. Advisory Opinion OC-23/17, para. 155 (free translation).

individuals but also corporations and other structures of business and finance.[135] It then explained that under article 1 of the Charter States have the responsibility to recognize the rights and do what is adequate to adopt legislative and other measures required to give effect to the recognized rights.[136]

The Commission showed that it is in consonance with IL by highlighting that the violation of rights committed by action of a private individual, that wouldn't be directly imputable to the State, can generate State responsibility because of the lack of due diligence of the state to avoid the violation or for not providing the suitable reparations to the victims.[137] However, the Commission went on to explain that the State will only be liable if it further is in collusion to assist the non-state actor in its actions that led to the violation.[138]

The African System in its instruments has no direct mention to the actions of companies inside indigenous territory, and therefore, the situation is also one of a potential interpretation of its judicial bodies that could make use of the international guidelines to business and human rights to further develop the rights of indigenous people in the African system.

3.2. Conclusive Remarks

There is an effort in IHRL to develop a set of rules and regulate the actions of companies so that their activity doesn't amount to possible violations of human rights. However, those efforts have shown to be at best just authoritative suggestions. There is, then, a set of indications for companies to decide whether or not they want to adopt those indications and how far are they willing to change their operations to respect the rights protected by international instruments.

In the traditional universal system of protection there are some pointers that companies can cause harm through their actions, as put by the UN Human Rights Committee, and that they also have responsibilities towards the realization of human rights, which was affirmed by the CESR. Those are however very general pointers which have had no practical consequences in the scenario.

The international regulations have no hard law that regulates corporate activity in a way to guarantee the rights of indigenous people to their land and natural resources. There are

[135] IACHPR. Case of Zimbabwe Human Rights NGO Forum v. Zimbabwe, para. 136.
[136] Ibid., para. 142.
[137] Ibid., para. 143.
[138] Ibid., para. 163.

additional elements in Business and Human Rights Framework that do enhance the protection of indigenous peoples' right to land and natural resources through the regulation of corporate activity. So far what exists are the UNGPs, with their respect, protect and remedy framework.

Principle 11 of the UNGPs is so far the stronger argument towards the existence of a corporate responsibility to respect human rights. Through its wording it seems that companies have two obligations: to avoid the infringement of human rights and to address any adverse human rights impacts the company is involved with. It comes with expectations that companies would prevent, mitigate and remediate adverse impacts to any of the human rights protected in IHRL.

There is a further expectation on the UNGPs that companies will act with due diligence to realise a meaningful consultation with affected groups in the areas they will operate on. The idea of consulting affected groups is aligned with IHRL but that companies are responsible for the due diligence in the consultation goes beyond the regular State obligation to guarantee.

Those elements however lack coerciveness. It exists an indication of rule of law, but no obligation to abide to it. In the UNGPs the duty to respect human rights that encompasses companies is still a moral and passive responsibility. Even though the UN Human Rights Council affirms that there is a requirement of active conducts, it would be more accurate to state that there is a guidance for action.

The lack of coerciveness is already being addressed in IHRL with the efforts to create a new binding instrument capable of regulating different types of companies. Among the different paths that this instrument might take it is crucial that previous efforts be taken in consideration so that companies do not refuse it like the previous proposed Norms. It is essential for the next steps of regulation that the treaty is created in ways that fill the existent gaps and address the issue, and that it is designed in a dialogue with the UNGPs.

In the Inter-American and African Systems, there are no prevision for how to regulate the actions of companies other than through domestic legislation, due to the structure that will only have the State as the responsible for the violations of human rights and the subject of IHRL. In that sense, the only possibility to hold companies accountable for their actions is through the interpretation of the obligation of due diligence of the State that exists in both systems.

The IACtHR has pointed that further from adopting the UNGPs, it built on it to explain that companies should protect, respect, and also prevent, mitigate and take responsibility for the

negative consequences that its activities might have. With the Court being the most authoritative body in the Inter-American system, this statement comes with s lot of strength and can show the direction that a next judicial decision can take.

The African system, on the other hand, stops on the stablished obligation of due diligence of the States. It is even harder for companies to be held responsible for their actions when in the African system it needs to exist a collusion from the State to assist in the commitment of the harmful companies' activities for there to be a State responsibility. This means indigenous populations are even less protected from companies' actions than in the Inter-American or universal systems.

For now, while the instruments of the regional bodies have coerciveness but no direct rules on how to protect indigenous rights to land from companies' actions, the UNGPs have explicit suggestions on how companies could respect human rights but imposes no obligation. In this scenario, the only organs able to interpret both are the regional bodies of protection. To understand how they are making use of the existent norms the next two chapters will study the jurisprudence of the IACtHR and the African System.

4 The Inter-American Court of Human Rights on Companies' Actions in Indigenous Lands

This chapter will analyse the cases in the Inter-American Court of Human Rights that address the actions of companies authorized by the State in Indigenous Community's territory. It will show how the jurisprudence was developed and where it is at the moment. In this chapter, only the cases in the Inter-American Court will be addressed since it is the authoritative/binding organ of the Inter-American System.

As presented in the report of the Inter-American Commission of Human Rights on Extractive Industries[139], there were two cases taken to the Inter-American Court of Human Rights that involved State responsibility for situations of exploitation of natural resources by private companies in the territory of indigenous and tribal peoples, those were the cases of the Saramaka People v. Suriname and the case of the Kichwa Indigenous People of Sarayaku v. Ecuador. Since this report, the Inter-American Court further published the case of the Kaliña and Lokono Peoples v. Suriname involving the same situation.

Beyond those three judgements on situations of human rights violations in indigenous territory caused by active conduct of private companies, there are three other cases judged by the IACtHR on the intersection of indigenous right to land and the presence of private companies. On those cases, however, the companies were passive agents given property titles to the land by the State. Because of this distinction, those three cases will be explained as a form to show how the Court's jurisprudence was developed but will not be discussed in further depth.

4.1. Cases of the Yakye Axa Indigenous Community, Sawhoyamaxa Indigenous Community, and, Xákmok Kásek People v. Paraguay

The IACtHR has three cases that involve private companies and the right of indigenous people to land but where there were no active conducts of the companies involved that led to the violations of human rights committed by the State, all the three cases against Paraguay.[140]

[139] IACHR. OEA/Ser.L/V/II.Doc.47/15, para.50.
[140] The three cases were already presented as a group in Carmelina Londoño-Lázaro, María; Thoene, Ulf; Pereira, Catherine. The Inter-American Court of Human Rights and Multinational Enterprises: Towards

Those three cases only involve companies insofar as that Paraguay gave to the companies the title of property over the indigenous peoples' ancestral territory. Because the issue revolves around indigenous right to land and companies, but there is no further action of the companies that led to a violation of human rights, they will be briefly addressed in this subchapter.

In the Yakye Axa case, members of the community had their rights to decent living, personal integrity, housing and property violated when three multinational enterprises from Britain claimed property over the community's ancestral territory. The IACtHR decided that Paraguay had violated the right to property of the Yakye Axa community for the lack of protection and ordered that their ancestral land be returned to the community.[141]

The same situation occurred with the Sawhoyamaxa Indigenous Community that had their ancestral territories claimed and registered as private property of two private companies. In this case the Inter-American Court established that it is a duty of the State to provide the due procedures to posibilitate indigenous peoples to claim their ancestral lands and as a reparation Paraguay had to return their ancestral land.[142]

In the case of the Xákmok Kásek People once more Paraguay failed to delimitate the indigenous people's ancestral land. Part of the communal property was declared a Protected Wild Area under Private Domain. In the same way it did on both previous cases, the IACtHR ordered that Paraguay return the lands to the community or give them alternative lands.[143]

4.2. Case of the Saramaka People v. Suriname

The case of the Saramaka People differs from the three previous cases in the sense that here the company did not only have property over land that was ancestrally indigenous territory but had active conducts that led to violations of indigenous peoples' human rights.

The judgement is built on allegations that Suriname had not taken the effective measures to recognize the Saramakas' right to the use and enjoyment of their territory, which they have

Business and Human Rights in the Americas?, In: The Law and Practice of International Courts and Tribunals, 2017.

[141] IACtHR. Case of the Yakye Axa Indegenous Community v. Paraguay. Merits, Reparations and Costs. Judgement of June 17, 2005. Series C No 125.

[142] IACtHR. Case of the Sawhoyamaxa Indigenous Community v. Paraguay. Merits, Reparations and Costs. Judgment of March 29, 2006. Series C No. 146.

[143] IACtHR. Case of the Xákmok Kásek People v. Paraguay. Merits and Reparations. Judgement of august 24, 2010. Series C No. 214.

traditionally occupied and used, that the right to judicial protection was violated to the detriment of the people by not providing access to justice and the failure to adopt domestic legal provisions to ensure and guarantee their rights.[144]

In Suriname's domestic law the State grants to indigenous communities only a privilege to use the land, instead of a guarantee of the right to effectively control the territory[145], in contradiction with previous jurisprudence of theCourt that members of indigenous and tribal communities must obtain the title to their territory as a guarantee of its permanent use and enjoyment.[146]

Both the Saramaka and the State claimed their right over the natural resources in the territory in the case. For the Saramakas, their right to use and enjoy all the natural resources comes from being a necessary condition to fully enjoy their right to property under art. 21 of the ACHR. For the State, all right to land, including subsoil natural resources, are granted to the State and therefore it supposedly can freely dispose of them and give concessions to third parties.[147]

From 1997 to 2004, Suriname stated four logging concessions and other mining concessions within Saramaka traditional territory to members of the community and to foreign companies.

This decision has been echoed for the recognition that the members of the Saramaka people are a tribal community with social, cultural and economic characteristics diverse from the national community[148] and they require the special measures under IHRL to guarantee both their physical and cultural survival[149] presented on chapter 2 of this paper. The Court also made clear that they have the right to the use and enjoyment of the communal property they have traditionally used and occupied[150] and concluded that Suriname has not complied with the duty to give domestic legal effect to Saramaka's property rights[151].

What is more relevant to this study, however, is the approach to the rights of the Saramaka people over the subsoil natural resources and their traditional land. The IACtHR analysed the right of the Saramakas to use and enjoy the natural resources on their traditional territory and

[144] IACtHR. Case of the Saramaka People v. Suriname, Judgment of November 28, 2007, para. 2.
[145] Ibid., para. 115.
[146] IACtHR. Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua, para. 153 and others.
[147] IACtHR. Case of the Saramaka People v. Suriname, para. 118.
[148] Ibid., para. 84.
[149] Ibid., para. 86.
[150] Ibid., para. 96.
[151] Ibid., para. 116.

the State's grant of concessions for exploration and extraction of those subsoil resources, as well as the guarantees that exist in IL about the exploration and extraction concessions that were already issued by Suriname.[152] The Constitution of Suriname on art. 41 and art. 2 of the 1986 Mining Decree establishes that the State owns the rights to all natural resources and therefore the State would have an inalienable right to explore and exploit the resources according to domestic law. The customary laws of the Saramaka, however, gives the community the right over all the natural resources that pertains to their traditional territory.[153]

As previously explained, the Inter-American Court jurisprudence states that members of indigenous communities have the right to own their traditional land and their natural resources, since without them that community's physical and cultural survival becomes compromised.[154] The Court decided that for the concession to be legitimate the State has to consult with the affected community, share the benefits with them within reason and complete a prior assessment of possible environmental and social impacts.[155] In analysing the extent to which Suriname could grant concession for exploration and extractions of natural resources in the Saramaka territory the Court highlighted that the protection of the right to property, present on art. 21, is not absolute under the ACHR, so, even though the exploitation and extraction in the area could affect to some degree the enjoyment of natural resources by the Saramakas, this should not prevent the State from granting concessions in the territory if it fulfils the requirements of being to the interest of the society and of not denying their cultural survival.[156]

While analysing the concessions granted by Suriname, the Court understood that timber had been traditionally harvested, used and traded by the Saramaka people and stated that therefore:

> "the State should not have granted logging concessions within Saramaka territory unless and until the three safeguards of effective participation, benefit-sharing, and prior environmental and social impact assessments were complied with."[157]

In this sense, the State failed to guarantee the effective participation of the community in the decision making process and did not share the benefits as required with the Saramaka as it also did not realise the prior environmental and social impact assessment.[158] The logging activities were defined as *"below minimum acceptable standards"*, *"most damaging and wasteful*

[152] IACtHR. Case of the Saramaka People v. Suriname, para. 118.
[153] Ibid., para. 119.
[154] Ibid.,, para. 121, referring to case Yakye Axa, para. 137; Indigenous Communit Sawhoyama, para. 118
[155] IACtHR. Case of the Saramaka People v. Suriname, para. 143
[156] Ibid., para. 126-128
[157] Ibid.,, para. 146
[158] Ibid., para. 147-148

logging possible" and *"not done to any acceptable or even minimum specifications, and sustainable management was not a factor in decision-making"*. Also, the companies built unnecessary bridges over creeks, making water that water unavailable for the Saramaka people.[159]

In this sense, the Court decided that:

> "the logging concessions issued by the State in the Upper Suriname River lands have damaged the environment and the deterioration has had a negative impact on lands and natural resources traditionally used by members of the Saramaka people that are, in whole or in part, within the limits of the territory to which they have a communal property right. The State failed to carry out or supervise environmental and social impact assessments and failed to put in place adequate safeguards and mechanisms in order to ensure that these logging concessions would not cause major damage to Saramaka territory and communities. Furthermore, the State did not allow for the effective participation of the Saramakas in the decision-making process regarding these logging concessions, in conformity with their traditions and customs, nor did the members of the Saramaka people receive any benefit from the logging in their territory."[160]

About the gold mining concessions, the Court understood that even though gold itself is not a part of the cultural life of the Saramaka community, its extraction has an impact in their lives and other resources.[161] In the mining concessions Suriname also failed to comply with the required safeguard and violated their right to property.[162]

Finally, it was explained that Suriname's Mining Decree of 1986, that allows the minar and a rightful claimant to reach an agreement on the amount of compensation required for the mining activities, is inadequate since the communal property of the Saramaka is not recognized by Suriname, making it impossible for them to seek an agreement with the miners.[163]

On the reparations, the Court also decided that the State should:

> "refrain from acts that might give rise to agents of the State itself or third parties, acting with the State's acquiescence or tolerance, affecting the right to property or integrity of the territory of the Saramaka people; repair the environmental damage caused by the logging concessions awarded by the State in the territory traditionally occupied and used by the Saramaka people."[164]

[159] IACtHR. Case of the Saramaka People v. Suriname, para. 151-152
[160] Ibid., para. 154
[161] Ibid., para. 155
[162] Ibid., para. 158
[163] Ibid., para. 183
[164] Ibid., para. 191

The Saramaka case was the first one that the Inter-American Court decided on the subject of human rights violations in an indigenous community caused by the mining activities of a company in their territory. Throughout the decision the company is treated as a passive agent and all the actions as well as the consequent responsibility for violations are solely attributed to the State.

Even though the Court examines in detail the actions committed by the company, beyond the simple analysis of State actions and legislation, companies are not subjects of IHRL so this outcome is in no way surprising or groundbreaking when it comes to the judgement of the mining industry actions. This understanding of companies as having a passive role does shift as the Court develops its jurisprudence in the topic.

4.3. Case of the Kichwa Indigenous People of Sarayaku v. Ecuador

This case revolves around a grant by Ecuador from the 1990s that permitted a private oil company to explore oil and other activities in the Kichwa territory. There was no previous consultation with the community and no obtention of consent. During the exploration the company made use of high-powered explosives in different places inside the indigenous territory, creating a risk for the population.[165]

In 1996 the State Oil Company of Ecuador (PETROECUADOR) contracted a partnership with the Compañía General de Combustibles S.A. (CGC) and the Petrolera Argentina San Jorges S.A. The partnership was for the exploration of hydrocarbon and exploitation of crude oil in the Amazonian Region[166], where several indigenous communities inhabit, between them the Sarayaku[167].

The CGC, together with Chevron-Burlington, followed the contract they had and hired a company to realise the environmental impact assessment for sysmic survey.[168] Before the realisation of the impact assessment, however, the CGC made attempts to have access to Sarayaku's territory in order to obtain consent to oil explorations through actions as sending medical teams and requiring that people sign a list to receive care, and paying wages to a few members of the community so they would recruit others to support the survey. They even

[165] IACtHT. Case of the Kichwa Indigenous People of Sarayaku v. Ecuador, Judgement of june 27, 2012, para. 2.
[166] Ibid., para. 63.
[167] Ibid., para. 65.
[168] Ibid., para. 69.

offered U$60.000,00 for projects and 500 jobs for community members. In a meeting, the Sarayaku people rejected this offer but other communities in the region accepted it.[169] The Sarayaku Association afterwards informed the Ministry of Energy and Mines that it opposed the entry of oil companies in its ancestral territory.[170]

The Ministry of Defense, then, signed a military cooperation agreement with the oil companies. Through this agreement the State agreed to guarantee the security of both oil facilities and its workers.[171]

In 2002 the CGC reactivated its seismic exploration in Sarayaku territory which led the Association of the Kichwa People of Sarayaku to declare an emergency and all community members who were old enough to walk to go to "Peace and Life Camps" in the jungle where they stayed for several months, relying solely in life and food supplies from the jungle[172]. Meanwhile, the company loaded hundreds of wells with explosives on the surface and on deeper levels, leaving them across the territory where they still remained by the time of the judgement by the Inter-American Court.[173]

The CGC destroyed a site of spiritual significance to the community as well as caves, water sources and underground rivers and cut down trees of environmental and cultural value. The Congress of the Republic issues a report on 2003 stating that the Ministry of Environment and of Energy and Mines had violated the Constitution by not consulting the community about the plans for the exploration of their territory and but not recognising their leadership structure, besides the damage it caused to the local fauna and flora.[174]

After the termination of the partnership between the State and CGC in 2009[175], an agreement was made to remove all the pentonite from Sarayaku territory[176]. The Sarayaku were not informed of the terms of this agreement.[177]

During the proceedings before the IACtHR, the Secretary for Legal Affairs of the Presidency of the Republic of Suriname stated that the government considers itself responsible for the

[169] IACtHT. Case of the Kichwa Indigenous People of Sarayaku v. Ecuador, para. 73-74
[170] Ibid., para. 80.
[171] Ibid., para. 193
[172] Ibid., para. 100.
[173] Ibid., para. 101.
[174] Ibid., para. 105-106.
[175] Ibid., para. 119.
[176] Ibid., para. 120.
[177] Ibid., para. 123.

events denounced on the case and recognizes the need for reparations. He also addresses the fact that the State, together with the indigenous leadership should work together to *"bring charges against the companies that steal ancestral rights from indigenous communities"*.[178]

The Court understood that the ILO Convention 169 is applicable in this case in relation to the impacts and decisions that resulted from oil projects, meaning the State should have guaranteed, as it was its obligation, the rights to prior consultation, communal property and cultural identity of the Sarayaku People. This would guarantee that the implementation of the concession wouldn't violate their ancestral history, subsistence and survival.[179]

It was established in the decision that during the consultation process there should be a climate of mutual trust, which means there cannot be situations of coercion by the State or third parties as were present in this case.[180] The responsibility to consult, however, is of the State and delegating it to the company interested in the local exploitation of resources does not mean it can be avoided.[181]

The CGC was considered by the IACtHR to have failed to respect the structures of authority and representation of the communities it was acting in during its attempted to legitimate its oil exploration activities.[182] The company was found to have attempted to negotiate directly with members of the Sarayaku community, disrespecting their political organization.[183] The obligation to consult however belonged to the State and the Court declared that it delegated it inappropriately to a private company and discouraged the necessary climate of respect.[184]

The judgement also says that the company damaged areas of great environmental, cultural and subsistence food value, explicitly saying that *"the destruction of sacred trees such as the Lispungu tree, by the company entailed a violation of their worldview and cultural beliefs"*.[185] The Court then concludes that the failure to consult the Sarayaku People has affected their cultural identity as the intervention and destruction of the cultural heritage meant a lack of respect for their cultural identity, customs, traditions and worldview.[186]

[178] IACtHT. Case of the Kichwa Indigenous People of Sarayaku v. Ecuador, para. 23.
[179] Ibid., para. 176.
[180] Ibid., para. 186.
[181] Ibid., para. 187.
[182] Ibid., para. 194.
[183] Ibid., para. 203.
[184] Ibid., para. 199.
[185] Ibid., para. 218.
[186] Ibid., para. 220

It is relevant to point that it is explicit from previous and posterior paragraphs that the duty to consult and the responsibility for it laid on the State, but in this paragraph the judgement makes it clear that it was the company's actions that gave place to the violations. This framing of the situation takes a less passive position towards the company than it did previously in the Saramaka case. The State is responsible for the violations that occurred, but the Court identifies the company as the active subject that performed the actions that resulted in the violations of the right to communal property and cultural identity.

On the right to life, the IACtHR decided that the State was responsible for placing the members of the Sarayaku community at risk through its acquiescence and protection of the oil company that planted almost 1400kg of explosives in the territory.[187]

The Court repeatedly shows that the oil company disrespected the rights of the Sarayaku People, but follows every time saying that for that reason the State violated the rights of the indigenous community. This reasoning is built on the fact the State is the subject of human rights and not the company.

There is somewhat a development from the judgement in the Saramaka case. Even though the Court does not yet present a possible responsibility of companies, it also takes the company away from the previous purely passive position. The Court discusses in detail the company actions and how it disrespected or ignored the indigenous community's rights. The judgement still puts the responsibility solely on the state, but it does so in a way of portraying the company in a slightly more active role than in the Saramaka case.

4.4. Kaliña and Lokono v. Suriname

The most recent case of the IACtHR that deals with companies working in indigenous lands is the case of the Kaliña and Lokono peoples v. Suriname, judged in November 2015. The judgement maintained the previous understandment of State responsibility for human rights violations committed by companies, but, at the same time innovated by pointing to the need to observe international law instruments as the Guiding Principles on Business and Human Rights, that establish the need for companies to also *"prevent, mitigate and assume responsibility for the negative consequences of its activities"*[188].

[187] IACtHT. Case of the Kichwa Indigenous People of Sarayaku v. Ecuador, para. 248
[188] IACtHR. Case of the Kaliña and Lokono Peoples v. Suriname. Judgement of 25 November 2015.

Until the judgement Suriname laws did not recognise the possibility for indigenous peoples to be constituted as legal persons and therefore they don't have access to hold collective property titles, in the words of the State *"the laws of Suriname only grant [legal personality] to natural and legal persons, and not [...] to the indigenous and tribal peoples"*[189]. The State had, however compromised to establish legal mechanisms to provide protection of indigenous and tribal peoples since the 1992 Lelydorp Peace Accord but had not taken any actions in this direction.[190]

In 2002 the residents of the Pierrekondre community filed a complaint[191] with the intention to revoke a sand mining concession granted by the state on a land where the indigenous residents already had a previous logging license. In their defence, the State argued that the domestic law did not stablish the recognition of ancestral territory and that the discussed area had not been demarcated. The petition was denied on the ground of lack of competence to request the cancellation of the mining concession since members of indigenous community had no legal standing as a collective entity.[192]

Afterwards, communications were submitted to the President of the Republic contesting the construction of summer houses, a gas station and a shopping center in the Pierrekondre community and a casino in Marijkedorp, with no consultation with the indigenous peoples in the areas.[193] This development meant a great risk for the indigenous communities in the area that could be expelled from its lands at any time.[194]

On the extractive industry more specifically, Suriname granted to the Suralco company the concession to extract bauxite in an area that included the Wane Creek reserve, before the country was independent from the Netherlands. The concession was granted for 75 years and would expire only in 2033. The operation started in 1997 and in 2003 BHP Billington-Suralco took over the mining activities in the area.[195]

Among its activities, the joint-venture built a highway for the transportation of bauxite and access to the mine, as well as for logging activities. The indigenous people were forbidden to

[189] IACtHR. Case of the Kaliña and Lokono Peoples v. Suriname. para. 50
[190] Ibid., para. 51
[191] Cantonal Court of Suriname, First Canton, Paramaribo, Case Celientje Martina Joeroeja-Koewle and Others v. Suriname & Suriname Stone & Industries N.V.
[192] IACtHR. Case of the Kaliña and Lokono Peoples v. Suriname, para. 64
[193] Ibid., para. 68-69
[194] Ibid., para. 99
[195] Ibid., para. 88

the area of the concession and to use the highway in order to hunt and fish.[196] This highway facilitated legal and illegal logging activities in the area, together with poaching and mining of sand, gravel and kaolin. Even though the State granted a logging permit to the indigenous community in Alfonsdorp, indigenous leaders claim that non-indigenous persons took the logging activities irresponsibly, destructing the forest and logging trees that are sacred to the Kaliñas and Lokonos.[197]

The first Environmental Impact Assessment realized in the area determined that the company avoid further disturbances on the area, rehabilitate the damages done by the exploration programme, and complete all mining as soon as possible.[198]

The impacts of mining activities in the natural reserve lead to a considerable decline in the traditional activities of fishing and hunting, once the contamination of lands and rivers and the destruction of fruit-bearing trees caused the animals to flee the area.[199] Since the operations ended in 2009 the area is being reforested by the mining companies, with two of the extraction section having been rehabilitated according to the Bauxite Institute of Suriname. The local indigenous communities, however, disagree. They claim that the trees planted grew very little and are not appropriate to feed the animals because they don't provide fruits or seeds. The IACtHR also assessed that the area has been radically altered.[200]

As in all the cases previously, in this decision the Inter-American Court remembered that to guarantee that the restrictions imposed on the right to property of indigenous communities due to a concession inside their territory does not result in a denial of their survival, the State must guarantee that (a) the effective participation of the community members over any plans on development, investment, extraction or exploitation; (b) the community members receive reasonable benefits for the implementation plan on its territory, and; (c) no concession will be given before the realization of a socio-environmental impact study with State supervision.[201]

Following, the IACtHR observed that the negative impacts were caused by mining activities that were undertaken by private agents; initially by Suralco and then BHP Biliton-Suralco.[202]

[196] IACtHR. Case of the Kaliña and Lokono Peoples v. Suriname. para. 89
[197] Ibid., para. 94-95
[198] Ibid., para. 91
[199] Ibid., para. 92
[200] Ibid., para. 93
[201] Ibid., para. 201 and 129, and; Case of the Saramaka People v. Suriname, para.133 and 129
[202] IACtHR. Case of the Kaliña and Lokono Peoples v. Suriname. para. 223

On the corporation activities, the Court referenced the Guiding Principles on Business and Human Rights to make its assessment:

> "224. In this regard, the Court takes note of the 'Guiding Principles on Business and Human Rights,'261 endorsed by the Human Rights Council of the United Nations, which establish that **businesses must respect and protect human rights, as well as prevent, mitigate, and accept responsibility for the adverse human rights impacts directly linked to their activities.** Hence, as reiterated by these principles, 'States must protect against **human rights abuse within their territory and/or jurisdiction by third parties, including business enterprises**. This requires taking appropriate steps to prevent, investigate, punish and redress such abuse through effective policies, legislation, regulations and adjudication.'"[203]

It was understood by the Court that once the State did not guarantee the realization of the social and environmental impact study in the beginning of the extraction process, and did not supervise the study that was made posteriorly, it failed on its duty to prevent.[204] In this sense, the court decided that Suriname violated the rights to property and to participate in the government of the Kaliña and Lokono peoples was violated.[205]

On the reparations section, it was highlighted the need for the rehabilitation of the territory and established that the State must implement the required and sufficient actions, with the elaboration of an action plan for the effective rehabilitation of the area together with the company in charge of it, and with the participation of representatives of the Kaliña and Lokono peoples.[206]

At first it can seem that the IACtHR only judged another case of state responsibility for the actions of third parties based on its duty to prevent, like it did in the previously analysed cases. However, the court says explicitly that "*businesses must respect and protect human rights"*, which had been previously established in its jurisprudence. Afterwards, it goes beyond and affirms that not only must business respect human rights but also *"prevent, mitigate, and accept responsibility for the adverse human rights impacts directly linked to their activities"*.[207]

With this finding, the IACtHR does not only apply the recurrent practice in IL of shaming the actor of human rights abuses but also assists in structuring the customary norms of international

[203] IACtHR. Case of the Kaliña and Lokono Peoples v. Suriname, para. 224
[204] Ibid., para. 226
[205] Ibid., para. 230
[206] Ibid., para. 290
[207] Ibid., para. 224

law through its jurisprudence.[208] Even though the Court lacks the jurisdiction to judge the acts of a mining company, as has been explained in the previous chapter, it decided to make the appointment in its judgement of the direction that IHRL needs to follow and that is of the responsibilization of companies.

4.5. Outcomes of the Inter-American Court of Human Rights' Jurisprudence

The reiterated position of the IACtHR throughout its cases is that the interpretation of human rights instruments must always take in consideration the evolution of social conditions.[209] The Court has also made it clear that human rights treaties are *"live instruments whose interpretation must adapt to the evolution of the times and, specifically, to current living conditions"*[210] and elucidated that:

The three cases that were the focus of this chapter were decided in 2007, 2012 and 2015, respectively. The first case, of the Saramaka People, was judged before the UN Human Rights Council approved the Ruggie Framework in 2008 and before the Guiding Principles on Business and Human Rights were implemented by the UN in 2011. Thus, the possible reflections of the developments made in IHRL, in the form of the UNGPs, can only be accurately discussed in relation to the Kichwa de Sarayaku and Kaliña and Lokono cases.

It has been previously asserted by scholars that the safeguards stablished by the Court of the necessity of the environmental and social impact assessment and of previous consultation with the affected community through free, prior and informed consent, are a form of the IACtHR to recognize and promote responsible business practices in an indirect reference to the UNGPs.[211] However complicated it is to make such statement, since those safeguards were first brought up in the Saramaka case, before the UNGPs were implemented, the authors did bring up relevant connection points between the IACtHR's safeguards for indigenous people in case of concessions granted by the State to private companies in their territories and the UNGPs.

[208] Carrillo-Santarelli, "Part 1: The Intersection of Business and Human Rights at the Inter-American Court of Human Rights", Oxford Human Rights Blog, 10 march 2016, available at: <https://ohrh.law.ox.ac.uk/part-i-the-intersection-of-business-and-human-rights-at-the-inter-american-court-of-human-rights/>, accessed on May 24, 2018.
[209] IACHR. OEA/Ser.L/V/II.Doc.47/15. para. 64
[210] IACtHR. Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua, para. 145
[211] Carmelina Londoño-Lázaro, María; Thoene, Ulf; Pereira, Catherine. The Inter-American Court of Human Rights and Multinational Enterprises: Towards Business and Human Rights in the Americas?, In: The Law and Practice of International Courts and Tribunals, 2017, pp. 454-455.

The requirement for companies to realize the Environmental and Social Impact Assessment is aligned with the requirement of corporate process of due diligence in the UNGPs that require companies to not only identify but also assess adverse human rights impacts.[212] The obligation to guarantee the effective participation of the communities through the free, prior and informed consent suggest the need for collaboration between the State and the company in their actions and is indicative of the need of a practice of corporate due diligence.[213] The right to compensation, or the need that the indigenous community reasonably benefit from the development made in their territory was pointed to be a form to mitigate the negative impacts of corporate activity, or in the UNGP words, the need to redress adverse impacts.[214]

The relevance of the IACtHR' decisions needs to be given due relevance. It's jurisprudence has shown as in the Saramaka case and in other previous cases how the Court decisions are, if not stablishing the standards, at least point the direction in advance for international instruments developed afterwards on what touches indigenous rights protection as was the case with the UNGPs and the ADRIP.

Since the Saramaka case, the IACtHR has used its decisions to make detailed examinations of the companies' activity that led to the violations of human rights, not restricting its argumentation to State actions and legislation. The Court builds then the safeguards required to protect indigenous peoples when the State gives concessions to private companies to act inside their territory, which were then adopted in the following cases:

> "(i) conduct an appropriate and participatory process that guarantees the right to consultation, particularly with regard to development or large-scale investment plans;
> (ii) conduct an environmental impact assessment, and
> (iii) as appropriate, reasonably share the benefits produced by the exploitation of natural resources (as a form of just compensation required by Article 21 of the Convention), with the community itself determining and deciding who the beneficiaries of this compensation should be, according to its customs and traditions."[215]

On the case of the Kichwa of Sarayaku the Court is even more explicit to identify that the company's actions were the ones that gave place to the violations and that the oil company disrespected the rights of the Sarayaku People.

[212] Carmelina Londoño-Lázaro, María; Thoene, Ulf; Pereira, Catherine. 2017, pp. 454.
[213] Ibid., pp. 455
[214] Ibid., pp. 456
[215] IACtHT. Case of the Saramaka People v. Suriname, para. 129; Case of the Kichwa Indigenous People of Sarayaku v. Ecuador, Judgement of june 27, 2012, para. 157

In the Kaliña and Lokono decision, the Court kept following the expected lines of making the State responsible for the companies' actions because of its obligation of due diligence. The IACtHR, however, for the first time made use of the UNGPs and was firm about the fact that businesses must respect, protect, and also mitigate and accept responsibility for the harmful impacts that its activities might have on human rights.

Ultimately, the Court follows through with the interpretation of the State obligation of due diligence to hold companies accountable and make use of the international framework stablished in the universal system to address the situation in its regional system. Not only that, but the Court also points further from the others when it affirms that companies are responsible for its harmful impacts.

5 The African System of Human Rights on Companies Actions in Indigenous Land

This chapter will analyse the only two existent cases in the African System of Human Rights, one in the Court and one in the Commission, that address the actions of companies authorized by the State in Indigenous Community's territory. Because those are the only two cases in the system, both organs are needed to understand how the African system addresses the protection of indigenous peoples' right to land when companies act in their territory.

5.1. Case SERAC and CESR v. Nigeria in the African Commission on Human and Peoples Rights[216]

The case is about the direct involvement of the military government of Nigeria with the oil production by the State oil company Nigerian National Petroleum Company (NNPC) in consortium with the Shell Petroleum Development Corporation (SPDC) in Ogoniland and the contamination they caused with the consequent environmental degradation and health problems to the Ogoni People.[217]

The oil consortium composed by NNPC and SPDC exploited oil reserves in Ogoniland disposing toxic wastes to the local environment and to waterways. They also neglected the maintenance of its facilities and caused diverse avoidable spills in near villages. Those actions entailed in water, soil and air contamination, and led to both short and long term health impact for the local population.[218]

The Nigerian government not only did not monitor the consortium operations or taken standard safety measures, but it also condoned and facilitated the violations since it placed its legal and military powers at the oil companies disposal.[219] The government did further not require the production of health and environmental impact studies and supressed protests that happened against the oil extraction with massive violence, as it shows:

> "Nigerian security forces have attacked, burned and destroyed several Ogoni villages and homes under the pretext of dislodging officials and supporters of the Movement of

[216] ACHPR. Case Social and Economic Rights Action Center (SERAC) and Center for Economic and Social Rights (CESR) v. Nigeria, application No. 155/96, judgement of 13th to 17th October 2001
[217] ACHPR. Ogoni Case, para. 01
[218] ACHPR. Case SERAC v. Nigeria, para. 02
[219] Ibid., para. 03-04

> the survival of Ogoni People (MOSOP). These attacks have come in response to MOSOP'' non-violent campaign in opposition to the destruction of their environment by oil companies. Some of the attacks involved uniformed combined forces of the police, the army, the air-force, and the navy, armed with armoured tanks and other sophisticated weapons."[220]

In the decision, the Commission understood the Ogoni as a distinct people entitle to the right to freely dispose of their wealth and natural resources. There was, however, no recognition of them being an indigenous people. Then, it approached the concept of State responsibility and brought up that States have to undertake to respect, protect, promote and fulfil human rights by universal human rights standards. It also clarified that the African Charter, as a human rights instrument, also abides by these norms.[221] To respect, the State should refrain from any interference in the enjoyment of fundamental rights, as well as respect right holders and their freedoms, autonomy and resources. On socio economic rights, this requires the State to respect *"the free use of resources owned or at the disposal of the individual alone or in any form of association with others"* including with regards to collective groups.[222]

On the obligation to protect, it was explained that the State has the obligation to take measures in order to protect the beneficiaries of the protected rights from any political, economic or social interferences. The obligation to protect is then intertwined with the obligation to promote the enjoyment of human rights, though which the State must make sure that all individuals are able to exercise their rights and freedoms.[223] Finally, to complete the obligation to fulfil the State has to take measures towards the actual realisation of the rights.[224]

While analysing the rights to physical health and to freely dispose of their natural resources, the ACHPR exposed that Nigeria had the right to produce oil through the NNPC, but in doing it should have taken the required actions to protect the rights of the victims. Instead, the government attacked, burned and destroyed Ogoni villages and homes.[225] Therefore, the Commission found that the State had committed a violation by allowing private actors, in particular oil companies, to affect the well-being of the Ogoni people in devastating ways.[226]

[220] ACHPR. Case SERAC v. Nigeria, para. 07
[221] Ibid., para. 44
[222] Ibid., para. 45
[223] Ibid., para. 46
[224] Ibid., para. 47
[225] Ibid., para. 54
[226] Ibid., para. 58

The right to food was also considered to have been violated by the State through the actions of its on security forces and the actions of private oil companies that destroyed food sources and created obstacles to the Ogoni community members that tried to feed themselves.[227]

Conclusively, the Commission alerted that multinational corporations can be a positive force for development if the State and concerned actors are mindful of the sacred rights that individuals and communities hold.[228]

On the final holding, the Commission determines that Nigeria conducts an investigation into the violations of human rights recognized in the decision and prosecutes officials of the security forces and of the NNPC as well as other agencies involved in the violations.

Like the judgements from the Inter-American Court, the African Commission frames throughout the case the actions of companies that were violating human rights of the Ogoni People and resulted in the responsibilisation of the State. All the violations can be traced back to the companies in the consortium, as the contamination of the environment, the lack of regard to community health during the exploitation of oil reserves, the disposition of toxic waste in local waterways, and the lack of maintenance in the companies facilities. The violations that were attributable directly to State actions the use of military powers and the failure in the monitoring of the oil companies operations.

The African Commission used the Velasquez-Rodriguez judgement from the Inter-American Court to build the state's duty to protect against damaging acts from private parties, through appropriate legislation and effective enforcement. In doing so, it followed the same structure of responsibilisation of the State for companies actions in indigenous territories as the decisions from the Inter-American Court.

Even though the decision follows the traditional understanding of international law that the State is the duty bearer on IHRL and therefore the one to be responsibilized for non-state actors' actions, it has been affirmed that the relationship between governments and multi-national corporations, such as the SPDC, have additional elements in less developed countries that would require a different approach.[229] Developing countries in the search for economic

[227] ACHPR. Case SERAC v. Nigeria, para. 66
[228] Ibid., para. 69
[229] O. Amao, Olufemi, "The African Regional Human Rights System and Multinational Corporations: Strenghtening Host State Responsibility for the Control of Multinational Corporations" In: The International Journal of Human Rights, Routledge, 2009, pp. 772-773

investments of multinational companies are most times not strong enough to regulate or control the multinationals that operate in their territories, further from not having enough technical expertise and legal development to regulate the complex activities that the companies bring. Multinationals, on their turn, show certain preference for those countries with looser regulations.[230]

There are also critiques to the decision in the sense that the African Commission could have indicated the liability of SPDC since it was directly involved with the with Nigeria, the host country and therefore direct liability should be implied. This is justified as possible since the African Regional System is a treaty-based commitment and consequently it could be up to the AU institutions to decide on the direction the system should take.[231] In addition to the critiques, it has been pointed that the Commission could have been more clear in its disposition of the remedies. An explicit pronunciation of liability of the NSA could have been of assistance to the State responsible to act accordingly.[232]

5.2. Case of African Commission on Human and Peoples' Rights v. Kenya in the African Court of Human and Peoples Rights[233]

The case revolves around the eviction of the Ogiek Community of the Mau Forest together with other settlers from the area they lived in[234] in order to grant logging concessions on their ancestral land without the consent from the Ogieks and without sharing with them the benefits from the resources.[235]

The Ogieks were evicted from their territory and Kenya justified the eviction order based on the fact that the forest constitutes a reserved water catchment zone, without taking in account the importance of this forest for the survival of the Ogieks, who were not involved in this decision. The Ogiek community had been subjected to many other eviction measures since the

[230] Duruigbo, E. "Multinational Corporations and Compliance with International Regulations Relating to the Petroleum Industry" In: annual Survey International & Comparative Law, 2001, p. 139 *apud* O. Amao, Olufemi, "The African Regional Human Rights System and Multinational Corporations: Strenghtening Host State Responsibility for the Control of Multinational Corporations" In: The International Journal of Human Rights, Routledge, 2009, pp. 773
[231] F. Viljoen and L. Louw, 'State Compliance with the Recommendations of the African Commission on Human and Peoples' Rights', American Journal of International Law, Vol.101, No.1 (2007), p.32 *apud* O. Amao, Olufemi, "The African Regional Human Rights System and Multinational Corporations: Strenghtening Host State Responsibility for the Control of Multinational Corporations" In: The International Journal of Human Rights, Routledge, 2009, pp. 773
[232] O. Amao, Olufemi, 2009, pp. 773
[233] ACtHPR. African Commission on Human and Peoples' Rights v. Republic of Kenya, application No. 006/2012, judgement of 26 May, 2017
[234] ACtHPR. ACHPR v. Republic of Kenya, para. 03.
[235] Ibid., para. 191

colonial period and through the country's independence[236], which they always objected through local and national administrations and judicial proceedings.[237]

In its decision, the Court first recognised the Ogieks as an indigenous population[238] and demonstrated that the right to property does not only apply to individuals but also to groups or communities.[239] Further, it should be interpreted in light of applicable principles, like those established by the UN of recognising ancestral lands rights and also the right to dispose of land.[240]

It is also considered that the right to property can be restricted if it is in the public interest, necessary and proportional.[241] The State alleged that the Ogieks were evicted in favor of the preservation of the natural ecosystem, but did not give any evidence that this measure was necessary, hence the eviction was not necessary or proportional in the Court's view. On the contrary, reports showed that the main causes of environmental degradation on the Mau Forest were caused by excisions for settlements made by the government and logging concession granted with poor advising.[242] The Court understood that this also violated the right to enjoy and freely dispose of the abundance of food produced by their ancestral lands[243] and the right to development[244].

The Court explains that the right to life found in article 4 is more related to the physical life than the existential understanding of this right, and even though the eviction affected their decent existence in the forest it didn't affect the physical aspect of the right to life[245].

It is analysed by the Court also the inextricable link between the practice of religion and the environment for indigenous societies in particular. For the Ogieks, the Mau Forest held the religious sites and was their spiritual home, being where they buried their deads.[246] Being evicted from there, they had to pay for a license to have access to the Forest, interfering with

[236] ACtHPR. Case ACHPR v. Kenya, Judgement of 25 May 2017, para. 8.
[237] Ibid., para. 9.
[238] Ibid., para. 112.
[239] Ibid., para. 123.
[240] Ibid., para. 127.
[241] Ibid., para. 129.
[242] Ibid., para. 130.
[243] Ibid., 201.
[244] Ibid., para. 210.
[245] Ibid., para. 154-155
[246] Ibid., para. 164-165

their freedom of worship[247] and made it impossible for the community to continue its religious practices, in an unjustifiable way.[248]

The protection of the right to culture is presented by the Court as beyond the duty not to destroy minority groups, but also requires respect and protection of the cultural heritage essential to that group's identity.[249] Finding support on the UN Declaration on Indigenous Peoples, the Court affirms that the Ogiek way of life is dependent on the Mau Forest and their culture and spiritual and traditional values differ them from other communities, and this cultural rights suffered interference by the state.[250] The Court understood that Kenya violated their right to culture.[251]

The right of the Ogiek to freely dispose from their wealth was alleged to have been violated by the eviction from the Mau forest and the consequent denial of access to the vital sources and by the grant of logging concessions by the State on Ogiek ancestral territory with no prior consent or share of benefits from the resources with the Ogiek People.[252] The Court agrees that their right to enjoy and freely dispose of their traditional resources was violated by the expulsion from the Forest[253] but does address the granting of logging concessions in the area.

To conclude, the Court observed that Kenya has taken some legislative measures to ensure the enjoyment of rights and freedoms but those were enacted relatively recently, and also, the State failed to recognise the Ogieks as a distinct tribe. For those reasons, it violated article 1 by not taking adequate legislative and other measures to give effect to the rights enshrined in the African Charter.[254]

The Ogiek case was a landmark decision by the fact that it recognised the Ogiek as n indigenous people and therefore recognised all the right they should have as the right to own their ancestral land.

However, when faced with the chance to advance the Court's jurisprudence even more on the point of the logging concessions given by the State, brought as one of the reasons why the right

[247] ACtHPR. ACHPR v. Republic of Kenya, para. 166
[248] Ibid., para. 169
[249] Ibid., para. 179
[250] Ibid., para. 182-184
[251] Ibid., para. 190
[252] Ibid., para. 191
[253] Ibid., para. 200
[254] Ibid., para. 216

to freely dispose of their resources by the applicant, the Court simply did not address the issue. The ACtHPR judged that this right was violated by the eviction of the Ogiek People but did not address the second part of the claim.

5.3. Outcomes of the African System's Jurisprudence

The African Commission gave a huge step, and even though its decision on the Ogoni case was not that long, it made an in depth analysis of the actions committed by the companies and thoroughly appointed the structure of state responsibility for the action of private actors, in the case oil companies. The decision does not recognise the Ogoni as an indigenous people, but only as a distinct people. This could be a limitation in the African system, but, the Ogoni case is from 2001 and the ACtHPR only released its Advisory Opinion supporting the implementation of the UNDRIP and therefore started recognising the rights of indigenous peoples in 2007.

The Court decision, from 2017, has a different focus. The Ogiek case is a landmark decision for the rights of indigenous peoples and their right to own their ancestral territory, safeguarding the rights that are consequent to this recognition. However, the Court did not even address the fact that Kenya then gave logging concession in the area, which means the eviction from the Mau forest was an action in the benefit of a NSA.

By not addressing the grant of logging concession by the State in the area after the evictions, the Court missed the opportunity to make some appointment as made by the Commission or even go further to establish the right indigenous people should have on top of the State decision to turn their ancestral land in an area for logging activities.

On a hopeful note, it could be possible that the Court will follow the steps taken by the African Commission in a future decision, but so far, it fell short to deliver a decision that fully protected the rights it was recognising to indigenous peoples.

6 Conclusion

The main instruments of protection of indigenous peoples' rights in IHRL are the ILO Convention No. 169 and the UNDRIP. Together, they convey already existing human rights to the specific context of indigenous peoples. Both instruments protect the rights of identification and protect the ownership of indigenous traditional lands as well as the participation in matters of communal property, with the UNDRIP guaranteeing the right to Free, Prior and informed Consent in relation to projects that might affect their territory.

In the Inter-American regional system, the right to own property is protected by the ADRDM and the right to use and enjoy property is afforded by the ACHR. The ADRIP has expanded the existent rights of indigenous peoples in the Inter-American system since its adoption and has also included the rights in the UNDRIP as protected by the Inter-American System. Before the ADRIP, indigenous rights to land were only established through the interpretation of the regional bodies in their decisions. Even the ADRIP, however, has not addressed the safeguards necessary to protect indigenous rights to land and natural resources from the actions of companies operating inside their territory.

In the African regional system, it is a different scenario. The right to communal property is already protected in the ACHPR. The issue that had to be addressed was whether there should be a special recognition to indigenous peoples'. This was done through an Advisory Opinion of the ACmmHPR that understood that there are indigenous peoples' that should be protected in the African system and instrumentalised the use of the UNDRIP in the African System.

The rights to own communal property and the natural resources in it, and the requirement that States must give effective legal protection to this ownership are protected by the Inter-American and the African regional systems as a way of safeguarding the cultural survival of indigenous peoples. According to both regional bodies, however, States have the right to give concessions to private companies inside indigenous territory with the condition that it respects the safeguards established in the jurisprudence of the IACtHR that were later adopted by the African system.

On a different note, the regulatory framework of companies in IHRL so far has no hard law that regulates the actions of companies in order to guarantee the right of indigenous peoples to

land and natural resources. The most authoritative regulation are the UNGPs through the respect, protect and remedy framework. The UNGPs stablish a corporate responsibility to respect human rights by avoiding the infringement of human rights through their actions and by addressing the possible adverse human rights impacts that their actions might have.

The UNGPs are aligned with IHRL when they expect that there is a process of consultation with affected communities, but they also expect a due diligence in this process from companies, not only from the State. As much as the UNGPs are an important step for the regulations of companies, they still lack the coerciveness and impose to companies only a moral and passive responsibility.

In the Inter-American and African systems the only way to regulate the activity of companies is through the obligations of due diligence imposed on States by each regional instrument. In this way, the only regulation is still in the sphere of domestic legislation of the State parties.

The ultimate safeguards that exist to protect indigenous communities' right to land from the actions of companies when States give concessions inside their territory were stablished by the IACtHR in the Saramaka case. Those safeguards are that an appropriate process of consultation must be conducted with participation of the community, there must be an environmental impact assessment and when there is an exploitation of natural resources the benefits must be reasonably shared with the community. The Inter-American Court has pointed in the direction that it is looking for ways to further seek companies' responsibility for their actions when in the Kaliña and Lokono case it stated that companies should not only protect and respect human rights as foreseen in the UNGPs but also prevent, mitigate and take responsibility for the negative consequences of its actions.

The African system it seems like the possibility of companies being held responsible for their harmful actions towards human rights is lower. This because even for the State to be held responsible for actions committed by companies there is a need to prove the existence of a collusion of the State to assist the company in the harmful actions. In its jurisprudence, however, the African Commission made an in-depth analysis in its judgement of the Ogoni case of the state responsibility for the harmful actions committed by companies. One issue that remained from the Ogoni decision was the lack of the recognition of them as indigenous peoples. The Decision of the ACtHPR on the Ogiek case, although, made use of the UNDRIP and recognised the indigenous rights protected in the system and with them the rights to

ancestral territory. In this case, however, the Court did not address the actions of companies acting in indigenous territory with concessions given by the State, which is a step back from the decision in the Ogoni case. The African system has however given two separate decisions that recognise the indigenous rights to communal property and point to the need to make companies responsible for their actions. Maybe a future decision will use both and stablish more specific protection for indigenous peoples' when companies are acting in their territory.

Ultimately, the regional bodies follow through with the interpretation of the State obligation of due diligence to hold companies accountable and make use of the international framework stablished in the universal system to address the situation in its regional system. This is a positive approach, but there are already efforts to create a binding instrument of IL in order to regulate the actions of companies. If this instrument finds a way of solving the issues that previous efforts faced and is developed in line with the UNGPs it could be a way of solving this lack of coerciveness and to create a more efficient system capable of holding companies responsible for their harmful actions once this future binding instrument is instrumentalised in the regional systems. This would be a positive step in removing the sole responsibility to hold companies accountable from States and to move it to a possibly more coercive IHRL sphere.

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