
FACULTY OF LAW

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# Indigenous peoples' access to justice in the light of rights to lands, territories and natural resources

## An overview of the judicial development in America

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# Summary

The thesis's purpose is to look into the effectiveness of access to justice for indigenous peoples in the light of the rights to lands, territories and natural resources. This will be done by looking into both the jurisprudence of the Inter-American Court of Human Rights (and one case from the Supreme Court of Brazil), the legislative framework on an international level and other relevant sources. The scope of protection to access justice will be examined to help understand what challenges are faced to ensure effective access to justice in disputes related to lands, territories and natural resources. A legal dogmatic method is used.

The cases analysed are the following: *the Mayagna (Suma) Awas Tingni community v. Nicaragua (IACtHR), the Yakye Axa indigenous community v. Paraguay (IACtHR), the Saramaka people v. Suriname (IACtHR), the Kichwa indigenous people of Sarayaku v. Ecuador (IACtHR)* and *the Xokleng people v. Brazil* (Brazilian Supreme Court).

The thesis concludes that all cases presented concerned conflicts that have lasted for many years and even though the Court have concluded violations against rights, it is not an effective way to access justice when the time frame is so long. The struggle to include indigenous peoples in various ways such as in the consultation process, accepting their parallel judicial systems, respecting their close connection with their lands, territories and natural resources, unique knowledge and ways of living are just to mention a few obstacles indigenous peoples face to access justice more effectively. Getting marginalised, discriminated and problems with not getting their judicial personality recognised are other issues that hinder effective access to justice. Overall, the situation is better than it was in the past and there are more focus and resources targeted to help indigenous peoples access justice more effectively, but there is still a great need for states to take increased responsibility and for mechanisms to continue evolve to make the situation better in the future to effectively access justice.

**Key words:** access to justice, America, American Convention on Human Rights, customary law, fair trial, human rights, indigenous people, Inter-American Court of Human Rights, land, territories and natural resources, judicial personality, judicial protection, public international law, reparation mechanism

# Sammanfattning

Avhandlingens syfte är att undersöka effektiviteten av tillgång till rättvisa för ursprungsbefolkningar i ljuset av rättigheterna till landområden, territorier och naturresurser. Detta kommer att göras genom att undersöka både rättspraxis från Interamerikanska domstolen för mänskliga rättigheter (och ett fall från Högsta domstolen i Brasilien), den rättsliga ramen på internationell nivå och andra relevanta källor. Omfattningen av skyddet för tillgång till rättvisa kommer att undersökas för att hjälpa till att förstå vilka utmaningar som ställs inför för att säkerställa effektiv tillgång till rättvisa i tvister relaterade till landområden, territorier och naturresurser. En rättsdogmatisk metod används.

Fallen som analyseras är följande: *Mayagna (Suma) Awas Tingni community v. Nicaragua (IACtHR), Yakye Axa indigenous community v. Paraguay (IACtHR), Saramaka people v. Suriname (IACtHR), Kichwa indigenous people of Sarayaku v. Ecuador (IACtHR)* och *Xokleng people v. Brazil* (Brasiliens högsta domstol).

Avhandlingen drar slutsatsen att alla mål som presenterades gällde konflikter som pågått i många år och även om domstolen har kommit fram till kränkningar av rättigheter är det inte ett effektivt sätt att få tillgång till rättvisa när tidsramen är så lång. Kampen för att inkludera urbefolkningar på olika sätt såsom i samrådsprocessen, acceptera deras parallella rättssystem, respektera deras nära koppling till deras landområden, territorier och naturresurser, unika kunskap och sätt att leva är bara för att nämna några hinder urbefolkningar möter för att få tillgång till rättvisa mer effektivt. Att bli marginaliserad, diskriminerad och problem med att inte få sin domarpersonlighet erkänd är andra frågor som hindrar effektiv tillgång till rättvisa. Sammantaget är situationen bättre än den var tidigare och det finns mer fokus och resurser inriktade på att hjälpa urbefolkningar att få tillgång till rättvisa mer effektivt, men det finns fortfarande ett stort behov för stater att ta ökat ansvar och för mekanismer att fortsätta utvecklas för att situationen bättre i framtiden för att effektivt få tillgång till rättvisa.

**Nyckelord:** access to justice, America, American Convention on Human Rights, customary law, fair trial, human rights, indigenous people, Inter-American Court of Human Rights, land, territories and natural resources, judicial personality, judicial protection, public international law, reparation mechanism

# Preface

Four and a half years as a law student is soon over, and it has been an interesting journey that started with two years of home studies due to the pandemic and was followed by two more normal years as a student. When I reflect on why I decided to study law, I saw it as an opportunity to learn to handle a powerful tool that could make a real difference. Today, I see the power of law even more clearly and how the knowledge I have attained during my studies is a privilege that I hope to use in meaningful ways in the future. The law has the power to change people's lives, and it is with great responsibility and awareness of the power of law that I now enter the “real world” as a lawyer.

Through the law program, I have met friends for life that I am very grateful for, and together we have a unique experience as law students. Thanks to all the amazing people who have crossed my path during these years and who have inspired me and been a brick of support on this journey. Also a big thanks to all the other amazing people that I have around me for your support throughout the years.

I also want to thank my supervisor Nicole Citeroni for good advice and support throughout this project that I have highly appreciated.

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*Emma Engfelt Telhag*

# Abbreviations

| | |
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| ACHR | American Convention of Human Rights |
| ADRIP | American Declaration on the Rights of Indigenous Peoples |
| DESA | United Nations Department of Economic and Social Affairs |
| ECLAC | United Nations Economic Commission for Latin America and the Caribbean |
| ECOSOC | United Nations Economic and Social Council |
| ECtHR | European Court of Human Rights |
| FAO | Food and Agriculture Organisation of the United Nations |
| IACtHR | Inter-American Court of Human Rights |
| ICJ | International Court of Justice |
| IDLO | International Development Law Organisation |
| IFAD | International Fund for Agricultural Development |
| ILO | International Labour Organisation |
| ILO 169 | International Labour Organisation Convention no 169 |
| OAS | Organisation of American States |
| Para | Paragraph |
| Paras | Paragraphs |
| Res | Resolution |
| UN | United Nations |
| UNDRIP | United Nations Declaration on the Human Rights of Indigenous Peoples |
| UNGA | United Nations General Assembly |
| UNGP | The UN Guiding Principles on Business and Human Rights |
| UNHRC | United Nations Human Rights Council |
| UNPFII | United Nations Permanent Forum on Indigenous Issues |

# 1 Introduction

## 1.1 Background

Indigenous people have experienced a lifetime of structural discrimination with ancestral lands being ripped away and they have witnessed an expansion of extractive industries, large-scale agriculture projects and various development projects on their ancestral lands. Also, indigenous peoples' human rights defenders have been threatened, being victims of crimes and have even been killed for defending their rights related to their traditional lands, natural resources, and territories. Despite these grave violations and discrimination, indigenous people still face difficulties in accessing justice and reparation for violations of their rights.[1]

Across the world, there are over 476 million indigenous people who live in over 90 countries. They account for around 6.2 per cent of the global population and consist of more than 5,000 distinct groups, speaking 7,000 languages which constitutes an overwhelming majority of languages spoken across the globe. Indigenous people are also three times more likely to be living in extreme poverty compared to non-indigenous people, and face many other challenges as well such as their right to control their development based on their needs, priorities and values, insufficient political representation and access to social services.[2] Since a lot of indigenous communities live on the American continent, they live on territories with a lot of natural resources of interest for corporations, and there have been several landmark cases concerning their rights to their lands, territories and natural resources, the thesis will focus on the American continent.

Apart from in general being marginalised, exploring indigenous peoples' access to justice in the light of the right to lands and natural resources is a highly relevant topic at the moment. The relationship to indigenous peoples' territories, lands and resources is at the heart of their identity, culture and well-being with their knowledge about the environment being passed down through generations. When the world has increased its focus on climate change and the environment, it has become more relevant with indigenous knowledge and their territorial rights also being more acknowledged by the society at large. The Sustainable

[1] UN High Commissioner for Human Rights - Türk, V, 'Türk calls urgently for Indigenous Peoples to have full access to justice' (United Nations Human Rights - Office of the High Commissioner, 25 October 2023) <https://www.ohchr.org/en/statements-and-speeches/2023/10/turk-calls-urgently-indigenous-peoples-have-full-access-justice> accessed 9 May 2024.

[2] UN, 'Indigenous People - Respect not dehumanisation', n.d., available at <https://www.un.org/en/fight-racism/vulnerable-groups/indigenous-peoples> accessed 10 May 2024.

Development Goals, such as Goal 15 – restoring and protecting ecosystems, are highly connected to indigenous people, since indigenous peoples, due to their ways of living, have a unique knowledge of taking care of their lands and natural resources in an environmentally friendly way, serving an important role to protect the environment. Indigenous peoples also have an important role in the green transition because indigenous lands are often attractive for corporations since they consist of land areas of untouched land with a lot of natural resources used in the green economy such as minerals used for electrification.[3] There have however been a lot of conflicts regarding indigenous communities being run over by corporations that do not care about the indigenous communities that live on the land that they have an interest in and some of these conflicts have gone to court with interesting outcomes that in several cases has strengthened the position for the indigenous communities and their rights.

Furthermore, Sustainable Development Goal 16 recognises the importance of access to justice for all, highlighting the demand for the rule of law and justice. Since indigenous peoples are known for having their parallel justice systems, the intense movement and interests of indigenous lands and natural resources, and indigenous people having a history of being marginalised, it is of interest to understand how the scope and quality of justice systems can improve for indigenous people and how effective access to justice indigenous peoples have when it comes to disputes related to these areas.[4]

## 1.2 Purpose and research question

The thesis aims to provide insights, reflections and suggestions for improvement regarding the effectiveness of access to justice for indigenous peoples in the light of the rights to lands, territories and natural resources. By looking into both the jurisprudence of the Inter-American Court of Human Rights ("IACtHR") (and one case from the Supreme Court of Brazil), the legislative framework and other relevant sources, the scope of protection to access justice will be examined to help understand what challenges are faced to ensure effective access to justice in disputes related to lands, territories and natural resources.

Therefore, the thesis seeks to answer the following main research question and three sub-research questions of which answers aim to help answer the main research question:

[3] IFAD, 'Partnering with indigenous peoples for the SDGs', (October 2019), <https://www.ifad.org/documents/38714170/41390728/policybrief_indigenous_sdg.pdf/e294b690-b26c-994c-550c-076d15190100> accessed 15 May 2024.

[4] IDLO, 'Navigating complex pathways to justice: engagement with customary and informal justice systems', (International Development Law Organisation), (2019), <https://www.idlo.int/sites/default/files/pdfs/publications/IDLO-Policy-and-Issue-Brief-Customary-and-Informal-Justice-web-FINAL.pdf> accessed 15 May 2024.

*What are the challenges to ensuring effective access to justice for indigenous people on the American continent in the light of rights to lands, territories and natural resources and how can these challenges be resolved?*

a. *How do indigenous people on the American continent experience access to justice connected to their rights to lands, territories and natural resources?*
b. *What protection to ensure effective access to justice is afforded to indigenous people on the American continent by the legal framework?*
c. *How has the case law of the Inter-American Court of Human Rights progressed the rights of indigenous people to access justice in the light of rights to lands, territories and natural resources?*

## 1.3 Method and material

### 1.3.1 Method

A legal dogmatic method will be used to answer the research questions since it is the most suitable method to answer the research questions the thesis aims to answer. The legal dogmatic method is a commonly used method within legal research and is a method that aims to reconstruct the legal system, primarily by reconstructing applicable law and its limitations that have been set up by the exercise of power, the legislative body and courts. The method is used to understand the legal situation, criticise it and propose changes for more optional outcomes for its purpose.[5] Further, the basis of the legal dogmatic method is to conclude what is the applicable law, *de lege lata*, by examining different sources of law such as case law, legislation, doctrine and legislative history. However, the legal dogmatic method can also widen the perspective and go beyond applicable law to find better solutions and new answers.[6]

One downside of the legal dogmatic method is that the analysis plays a central role, leading to a more subject method than other scientific methods that for example are based on experiments. The method can also be seen as vague, contradictory and having a harder time meeting originality compared to other scientific methods.[7] However, some issues are hard to avoid due to the nature of the subject being studied. What is important is to include the

[5] Nils Jareborg, 'Rättsdogmatik som vetenskap', SvJT (Svensk Juristtidning), 2004, no. 1, pp.1–10.
[6] Jan Kleineman, '*Rättsdogmatisk metod*', in Nääv, M and Zamboni, M (ed.) Juridisk metodlära, 2nd ed., 2018, Lund: Studentlitteratur, p.102.
[7] Jan Kleineman, '*Rättsdogmatisk metod*', in Nääv, M and Zamboni, M (ed.) Juridisk metodlära, 2nd ed., 2018, Lund: Studentlitteratur, p.31.

critical perspective and be aware of the limitations such as the risk for subjectivity to be included in the analysis. Another downside of the legal dogmatic method is the norm focus, since it tends to view norms as fixed and therefore might fail to catch the full complexity and dynamics of how norms function.[8]

The legal dogmatic method will be used to examine and manifest indigenous peoples' access to justice by looking into case law, relevant legislation and other relevant sources. The results will then be used to examine how effective access to justice is. The critical part of the legal dogmatic method is then suitable since it allows one to examine how well the current legislation works and if it fulfils its purpose, enabling a critical discussion about current legislation, its flaws and how it can be improved.

The thesis will use an international perspective since its focus is to examine the international legislative framework, together with a critical perspective by critically analysing the development of indigenous people's access to justice concerning disputes related to lands, territories and natural resources. The law presented will be analysed according to *de lege lata*, the law as it is.

### 1.3.2 Doctrine of sources in international law

The doctrine of sources in international law is not the same as the doctrine of sources in Swedish law and is not straightforward to understand. International law has expanded rapidly and the doctrine's explanatory power has increasingly been challenged. Treaties are seen to be international law, however, empirical evidence suggests that treaties are not good predictors of state practice. Some scholars suggest that there should be a new doctrine of sources that is focused on *opinio juris*, an essential element of customs, meaning that state practice shall amount to a legal obligation and not mere usage.[9]

International conventions and international customs are the generally accepted two main sources of international law. These are stated in Article 38(1)(a) and (b) of the Statute of the International Court of Justice.[10] The first one, international conventions, refers to both multilateral and bilateral conventions/treaties.[11] A convention/treaty enters into force when a

[8] Jan Kleineman, '*Rättsdogmatisk metod*', in Nääv, M and Zamboni, M (ed.) Juridisk metodlära, 2nd ed., 2018, Lund: Studentlitteratur, p.24.

[9] Harlan Grant Cohen, 'Finding International Law: Rethinking the Doctrine of Sources'. Iowa Law review, 2007, vol. 93 no. 1, pp.75-76.

[10] Statute of the International Court of Justice, (adopted in San Francisco 26 June 1945, entered into force on 31 August 1965), Article 38(1)(a) and (b).

[11] Harlan Grant Cohen, 'Finding International Law: Rethinking the Doctrine of Sources'. Iowa Law review, 2007, vol. 93 no. 1, pp.75-76.

specific number of nations has exceeded the mere adoption and ratified the treaty/convention. Once ratified, a nation is bound to fully comply with all the terms in the treaty/convention.[12] Treaties/conventions have the strength of being certain and clearly defined, carry a perceived legitimacy when being negotiated and the general rule has been codified and agreed to. However, the downsides are that once ratified, conventions/treaties are hard to change which can risk making them outdated and not serve their purpose and many treaties/conventions are not ratified by many states. The second one, international customs, refers to customary international law. Customary international law requires two elements; 1) the general practice by states and 2) evidence that these practices come from a sense of legal obligation rather than self-interest or coincidence, also known as *opinio juris*. Customary international law has its power in being flexible and highly fluid, allowing for change and evidence is often open to various interpretations. However customary law is also difficult to identify, there can be contradictory opinions and courts that apply customary law might be criticised to a higher extent. It can change quickly and be challenging to understand what is the rule. Lastly, sources of international law such as unsigned treaties/conventions and UN declarations can be included in the mix of customary law and be used as evidence for customs, however, this has been considered controversial.[13] General principles of law that are recognised by civilised nations are also part of the sources of international law but are considered to be more controversial.[14] The last source of international law is judicial decisions and the teachings of the most qualified publicists, but serves as a subsidiary means for the determination of rules of law.[15]

### 1.3.3 Material

The material will consist of various reports related to the subject, UN material, legislations, court cases from the IACtHR and the Supreme Court of Brazil, scholarly articles and literature from experts within the field. The material will be focused on indigenous peoples' rights on the American continent, but when suitable and for more general discussions, other material that is not focused on the specific geographic area this thesis is delimited to, will be used.

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[12] John K. Setear, 'Treaties, Custom, Iteration, and Public Choice', Chicago Journal of International Law, 2005, vol. 5 no. 2, p.717.

[13] Harlan Grant Cohen, 'Finding International Law: Rethinking the Doctrine of Sources'. Iowa Law review, 2007, vol. 93 no. 1, pp.75-76.

[14] Statute of the International Court of Justice, (adopted in San Francisco 26 June 1945, entered into force on 31 August 1965), Article 38(1)(c).

[15] Statute of the International Court of Justice, (adopted in San Francisco 26 June 1945, entered into force on 31 August 1965), Article 38(1)(d).

The thesis will focus on several selected cases from the IACtHR that concern disputes regarding rights to land and natural resources. The cases that will be included are the following: *the Mayagna (Suma) Awas Tingni community v. Nicaragua, the Yakye Axa indigenous community v. Paraguay, the Saramaka people v. Suriname, the Kichwa indigenous people of Sarayaku v. Ecuador.* Also, one important case from the Brazilian Supreme Court, *the Xokleng people v. Brazil*, will be used. The cases have been chosen since they have played an important role in the development of the jurisprudence and therefore suit to show the effectiveness of accessing justice for indigenous people in these types of disputes. Not all cases that concern indigenous people have been included, rather the most significant cases for the purpose of this thesis, have been included. Since the jurisprudence of the IACtHR heavily refers to previous case law, the chosen cases are some years old, but function as the foundation of the judicial development by the IACtHR regarding effective access to justice in the light of rights to lands, territories and natural resources for indigenous peoples.

## 1.4 Delimitations and outline of thesis

### 1.4.1 Delimitations

Indigenous people are present all over the world and therefore there are interesting court cases from all over the world, such as from the African Court on Human and Peoples Rights and the European Court of Human Rights. The thesis delimits to only focus on the American sphere and case law from the Inter-American Court of Human Rights since the IACtHR has been at the forefront of developing its jurisprudence regarding indigenous peoples' rights and since the individual cases from the IACtHR are very extensive, constituting a rigorous basis to understand how indigenous peoples rights have developed and progressed as well as to understand the court's reasoning. One case from the Brazilian Supreme Court will also be used since it has some important takeaways for the jurisprudence development. Another reason for this delimitation is the fact that indigenous people are a very present part of the American continent, with land rights and usage of natural resources being a hot topic and therefore there are many interesting situations from a legal perspective going on.

The thesis delimits to not do a comparative study because there are significant differences in the legal structure and relevant legal framework across the globe. A comparative study could be of interest for a future study, but instead this thesis will dive deeper into indigenous peoples' rights on the American continent. Another reason for not

doing a comparative study is that eg. the ECtHR jurisprudence is more focused on minority rights and there are not many court cases that concern indigenous peoples' rights.

The thesis will also delimit to only look into relevant international frameworks and will not cover the national legislation and legal process on the national level for each chosen case. The focus is to deep dive into the international legislative framework for indigenous people in the American continent.

Another delimitation made in this thesis is that apart from a general discussion about the definition of indigenous people, there will be no focus on discussing the different definitions of indigenous people in legislation. Also, tribal people will be included in the term "indigenous people" such as in the case of *Saramaka People v. Suriname*, where the court stated that jurisprudence regarding indigenous peoples' rights to property applies to tribal communities as well.[16]

Lastly, the thesis does not cover all legal issues in the chosen court cases due to the extensiveness of such cases, rather the focus is on the aspects that are of relevance for the research question and topic. Not all case background details will be presented since it would be too extensive, instead, the focus is on presenting the relevant facts needed for the chosen research angle and giving an overview of the facts in the case to enable the reader to understand the key takeaways from each case.

### 1.4.2 Outline

Chapter one includes an introduction to the topic and also aims to motivate why the chosen topic and research questions are of relevance to look into. The chapter also covers a description of the method, doctrine of sources in international law, and materials used and ends with a description of delimitations and an outline of the thesis.

The second chapter will focus more closely on describing the relationship between indigenous people and human rights to give a more nuanced picture of historical development and issues faced. The chapter includes a discussion regarding the definition of indigenous peoples, indigenous peoples in America and the green transition. The third chapter focuses on describing how the legal framework presented in chapter four, can be put into practice to access justice such as the IACtHR, their legal systems and what issues indigenous peoples face to access justice.

[16] *Case of the Saramaka People v. Suriname*, Judgment including objection, merits, reparations and costs. Judgment of 28 November 2007. Series C no 172, para 86 p.26.

Chapter four covers the legal framework of relevance and starts with giving a general overview of indigenous people and the work made by the UN, and then continues to describe relevant international frameworks, including the American Convention on Human Rights ("ACHR"), UNDRIP, ADRIP, ILO convention no 169, customary law, the Escazsú Agreement and UN Guiding Principles on Business and Human Rights.

The fifth chapter includes case law from the IACtHR and presents relevant court cases that have played a role in the development of jurisprudence. Due to the complexity of the cases, each case starts with a background section to help the reader understand the problem and then follows with the judgment and ends with some discussion and key takeaways from the case.

The sixth and seventh chapters aim to analyse and make conclusions of the presented material, together with answering the research questions and concluding the findings. It will also include a forward-looking view of the topic and what areas could be of interest to do further research within.

# 2 Human rights for indigenous peoples

To understand indigenous peoples' rights to access and remedies in the light of land and natural resources, the question must first be asked who is considered to be an indigenous person. The chapter also gives some background to understand the uniqueness of indigenous peoples, their special connection to their territories and their position in the green transition. The main purpose of the chapter is to give some background that is needed to understand other parts of the thesis.

## 2.1 Definition of indigenous peoples

Indigenous people are practitioners and inheritors of unique cultures and have retained distinct cultural, social, economic and political characteristics that are distinct from the rest of the society. They have a unique way of relating to people and the environment, yet despite the difference between indigenous populations, they share common problems that relate to protecting their rights as indigenous people. Throughout history, indigenous people have sought recognition of their identities, territories, natural resources, traditional lands and way of life. Yet their rights have often been violated and today indigenous people are among the

most vulnerable and disadvantaged groups of people in the world.[17] To understand the marginalisation, disadvantages and issues indigenous people face, it is important to first define who indigenous people are.

There are many definitions of who are indigenous people, however, one of the most cited descriptions that also this thesis will use to define indigenous people was outlined in the UN Special Rapporteur José R. Martínez Cobo's Study on the Problem of Discrimination against Indigenous Populations from 1972. Martínez stated that in general, indigenous populations are not organised as national communities, rather they are constituted in tribal or semi-tribal groups and are often rural population groups.[18] Martínez defined indigenous populations as the following;

> *"Indigenous populations are composed of the existing descendants of the peoples who inhabited the present territory of a country wholly or partially at the time when persons of different culture or ethnic origin arrived there from other parts of the world, overcame them and, by conquest, settlement or other means, reduced them to a non-dominant or colonial condition; who today live more in conformity with their particular social, economic and cultural customs and traditions than with the institutions of the country of which they now form part, under a State structure which incorporates mainly the national, social and cultural characteristics of other segments of the population which are predominant."*[19]

The historical continuity that Martínez mentions expands to include occupation of ancestral lands, common ancestry with the original occupants of these lands, language, culture, residence in certain regions of the world or other relevant factors. An indigenous person is a person who belongs to these indigenous populations and is both recognised and accepted by the population as a member and self-identifies as indigenous. This preserves the communities' sovereign right to, without external interference, decide who belongs with them. *Tribal people* will therefore fall under the usage of the term *indigenous peoples* in this thesis. It has been expressed during debates at meetings for Working Groups of Indigenous Populations and by government delegations that there is no need for a formal and universal definition of

[17] DESA, 'Indigenous People', n.d., available at <https://social.desa.un.org/issues/indigenous-peoples> accessed 10 May 2024.

[18] ECOSOC, 'Study of the problem of discrimination against indigenous populations - Preliminary report submitted by the Special Rapporteur, Mr. José R. Martínez Cobo', (Economic and Social Council), (29 June 1972) E/CN.4/Sub.2/L.566, para 33 p.10.

[19] ECOSOC, 'Study of the problem of discrimination against indigenous populations - Preliminary report submitted by the Special Rapporteur, Mr. José R. Martínez Cobo', (Economic and Social Council), (29 June 1972) E/CN.4/Sub.2/L.566, para 34 p.10.

indigenous people. The self-identification serves as the central part of who is an indigenous person.[20] The UN Declaration on the Rights of Indigenous People does for example not include a definition of indigenous people.

## 2.2 Indigenous peoples in America

Indigenous peoples are spread across the world, from the Arctic to the South Pacific. The American continent has a strong presence of indigenous people and indigenous peoples include the Lakotas in the US, the Quilombodos in Brazil, the Aymaras in Bolivia and the Mayas in Guatemala to mention a few.[21] Around one-fifth of all indigenous groups live on the American continent, with an estimated population of over 60 million people and Brazil is the country with the most groups of indigenous peoples, followed by Colombia and Peru. Millions of these indigenous people live in territories with forest cover and suffer from high multidimensional poverty.[22] Also, indigenous people in Central and South America, are facing growing conflicts over indigenous lands and are often faced with government inaction. They can experience decade-long processes of claiming their ancestral land, leading to activists trying to reclaim ancestral lands on their own.[23]

## 2.3 Green transition and the right to lands, territories and natural resources for indigenous peoples

Indigenous peoples' way of living and their cultures are inherently rooted in their homelands and today many communities have maintained core features of the society of their ancestors even after facing hardships such as colonisation and climate changes. Natural resource extraction and conservation have become synonymous with denial and destruction of access to lands, territories and natural resources, elimination of their traditional ways of life and livelihood and displacement of indigenous peoples and their animals.[24]

[20] DESA, 'State of the world's indigenous peoples', (Department of Economic and Social Affairs), 2009 ST/ESA/328, p.5.

[21] UN, 'Who are indigenous peoples?', (UN Permanent Forum on Indigenous Issues, n.d.), <https://www.un.org/esa/socdev/unpfii/documents/5session_factsheet1.pdf> accessed 13 May 2024.

[22] FAO, 'Who are the indigenous and tribal peoples of Latin America and the Caribbean?' (Food and Agriculture Organization of the United Nations, n.d.), <https://openknowledge.fao.org/server/api/core/bitstreams/27b4e6b5-30b2-4e47-aaab-0505afa387d7/content/src/html/who-are-the-indigenous-and-tribal-peoples-of-latin-america-and-the-caribbean.html> accessed 13 May 2024.

[23] Alexander Villegas & Frances Robles, 'Conflicts over indigenous land grow more violent in Central America', The New York Times (9 March 2020), available at <https://www.nytimes.com/2020/03/09/world/americas/central-america-indigenous-conflicts.html> accessed 13 May 2024.

[24] DESA, 'State of the World's Indigenous Peoples - Rights to Lands, Territories and Resources', vol 5, (United Nations Department of Economic and Social Affairs, 1 January 2021),

Indigenous people have an important role in protecting the world's remaining tropical forests and preservation of biodiversity. This is linked to land rights and also fills an important role in sustaining indigenous people's collective social identity and livelihood. Land rights for indigenous peoples are protected under international law, however, the realisation of such rights is dependent on policies, laws and implementation capacity of the countries where indigenous peoples live. This means that the implementation and legal recognition of land rights can vary among countries. In countries where indigenous land is recognised by law, indigenous communities are still not always aware of their rights and also tend to struggle with the administrative process to secure these rights. Another common struggle is that boundaries between state land, indigenous land and forest areas are not always clear, requiring collaboration between parties and continuous work on mapping and registering land and land use rights.[25]

In a report of the Special Rapporteur on the Rights of Indigenous Peoples, José Francisco Calí Tzay, about green financing and indigenous rights from 2023, stated numerous facts to take into consideration regarding the green transition. The report highlighted the importance of respecting the right to self-determination, lands, territories and natural resources and the right to free, prior and informed consent in green finance decision-making processes that affect indigenous peoples' lands and communities.[26] The report also expressed that States need to establish effective, culturally appropriate, accessible and independent mechanisms that allow indigenous peoples to seek justice and remedy in cases of environmental harm or human rights violations that result from green financing projects.[27] Also, the reports stated that typical human rights risks in the light of green transition are lack of consultation regarding land use and decision-making, environmental degradation, forced eviction and resettlement, limited provided information regarding the governance of natural resources and environmental and social impact assessment not being inadequate.[28]

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<https://social.desa.un.org/sites/default/files/publications/2023-03/State-of-Worlds-Indigenous-Peoples-Vol-V-Final%20%282%29.pdf> accessed 15 May 2024.

[25] Willem Van Der Muur, 'How can Indigenous Peoples' rights to land be secured? Some lessons from the East Asia and Pacific region', (World Bank blogs, 27 May 2022), available at <https://blogs.worldbank.org/en/eastasiapacific/how-can-indigenous-peoples-rights-land-be-secured-some-lessons-east-asia-and> accessed 14 May 2024.

[26] UNGA, 'Report of the Special Rapporteur on the rights of indigenous peoples - Green financing, a just transition to protect the rights of Indigenous Peoples', (Human Rights Council), (21 July 2023) A/HRC/54/31, para 77(b), p.18.

[27] UNGA, 'Report of the Special Rapporteur on the rights of indigenous peoples - Green financing, a just transition to protect the rights of Indigenous Peoples', (Human Rights Council), (21 July 2023) A/HRC/54/31, para 77(f), p.19.

[28] UNGA, 'Report of the Special Rapporteur on the rights of indigenous peoples - Green financing, a just transition to protect the rights of Indigenous Peoples', (Human Rights Council), (21 July 2023) A/HRC/54/31, para 11, p.4.

When the Paris Agreement was adopted in 2015, it represented a landmark moment for climate financing, stating the need for financing flows to meet climate goals.[29] Later on, at the Conference of the Parties to the United Nations Framework Convention on Climate Change in 2021, parties acknowledged the importance of indigenous peoples and their scientific knowledge for mitigating the ongoing global climate change and biodiversity loss. Indigenous people also have an important role in protecting biodiverse environments, mitigating climate change and maintaining healthy forests, which has been widely documented.[30]

Ecosystems that are managed by indigenous peoples also show better sustainable outcomes. This is because indigenous people depend on natural resources for their livelihoods and ways of living and have therefore developed principles of social and environmental sustainability. The environmental outcome in indigenous territories is far better, one example being that deforestation is lower. Indigenous peoples therefore can be considered key protagonists in promoting sustainable development that is stated in the Sustainable Development Goals such as goal 15 regarding restoring and protecting ecosystems. Apart from protecting the environment, indigenous peoples are also vulnerable to climate change since they rely heavily on the climate and natural system with which they have close interactions. Therefore it is of concern that even though the Sustainable Development Goals are relevant for indigenous peoples, there are many ongoing projects related to energy and economic development that are being conducted on indigenous territories and still many indigenous peoples do not have access to basic services such as health, energy and education.[31]

# 3 Indigenous peoples access to justice

Access to justice is an important part of respecting human rights and this chapter aims to present which issues indigenous people face when accessing justice,[32] indigenous peoples

[29] UNGA, 'Report of the Special Rapporteur on the rights of indigenous peoples - Green financing, a just transition to protect the rights of Indigenous Peoples', (Human Rights Council), (21 July 2023) A/HRC/54/31, para 9, p.3.

[30] UNGA, 'Report of the Special Rapporteur on the rights of indigenous peoples - Green financing, a just transition to protect the rights of Indigenous Peoples', (Human Rights Council), (21 July 2023) A/HRC/54/31, para 10, p.4.

[31] IFAD, 'Partnering with indigenous peoples for the SDGs', (October 2019), <https://www.ifad.org/documents/38714170/41390728/policybrief_indigenous_sdg.pdf/e294b690-b26c-994c-550c-076d15190100> accessed 15 May 2024.

[32] The thesis defines remedies as a legal means of which a court orders redress for a wrong or enforces a right. A remedy could be monetary compensation, for direct or indirect losses, performance of contractual obligations, prohibiting certain actions, restoring a party, or a clarification of a right or obligation. The list is not exhaustive.

own legal system and will also present the court that the main chosen case law for this thesis is from and how that court functions (IACtHR). The chapter ends with presenting barriers indigenous peoples face to access justice.

The thesis meaning of access to justice refers to every individual having equal and fair access to the legal system and legal remedies such as legal representation, reparation mechanisms, a fair trial and legal information.[33]

## 3.1 Issues related to indigenous peoples access to justice

A present issue for indigenous people is that their own legal and justice systems remain unrecognised by many local, regional and national authorities. When indigenous justice systems are aligned with international human rights law, indigenous people can more easily access justice and break down the barriers indigenous people face. The UN High Commissioner for Human Rights has urged States to work in partnership with indigenous people to move towards a more integrated justice system that also considers the specific needs that indigenous children and young people, women, human rights defenders and disabled people have.[34]

There is a risk that the ordinary judicial system discriminates against indigenous peoples and that indigenous peoples face more barriers to access justice than non-indigenous people. Such barriers can be language barriers, complex and inadequate legal procedures, poor social and economic conditions, a fear of reprisals and violence and a lack of funding to seek justice. Another related issue can be corporations that do not take responsibility concerning human rights and simply deny or ignore it, making it tough for indigenous peoples to seek redress.[35]

In a report of the Special Rapporteur on the Rights of Indigenous Peoples, the report concluded that international human rights standards recognise indigenous peoples' right to maintain and develop their legal systems and institutions and that overall, States are making significant progress in recognising and enabling indigenous justice systems. However, some

[33] Josh Ounsted, 'Access to Justice' (Raoul Wallenberg Institute, n.d.), available at <https://rwi.lu.se/what-we-do/focus-areas/fair-efficient-justice/> accessed 21 May 2024.

[34] UN High Commissioner for Human Rights - Türk, V, 'Türk calls urgently for Indigenous Peoples to have full access to justice' (United Nations Human Rights - Office of the High Commissioner, 25 October 2023) <https://www.ohchr.org/en/statements-and-speeches/2023/10/turk-calls-urgently-indigenous-peoples-have-full-access-justice> accessed 9 May 2024.

[35] UN High Commissioner for Human Rights - Türk, V, 'Türk calls urgently for Indigenous Peoples to have full access to justice' (United Nations Human Rights - Office of the High Commissioner, 25 October 2023) <https://www.ohchr.org/en/statements-and-speeches/2023/10/turk-calls-urgently-indigenous-peoples-have-full-access-justice> accessed 9 May 2024.

of the main challenges being addressed were 1) for Governments to fully recognise the character and status of all indigenous people, 2) coordinate and integrate indigenous and ordinary judicial systems including making sure that indigenous jurisdiction is not restricted and 3) overcoming prejudicial stereotypes and attitudes about indigenous systems of justice.[36]

The report from the Special Rapporteur also stressed the intersect discrimination indigenous women are facing and that the collective approach to justice can be problematic for individual rights.[37] Indigenous justice systems often offer limited space for female participation and in practice, the ordinary judicial system may be inaccessible for females.[38] The report urged States to involve women in dispute resolutions and judicial decisions and to protect women, children, persons with disabilities, different sexual orientations and others who frequently face discrimination.[39] It also stated the importance of cooperative work between parties to address the special needs and concerns of indigenous people who face a higher risk of discrimination and to work with the barriers in the area of access justice within both the indigenous and ordinary judicial systems.[40]

In a report from the Australian Human Rights Commission, submitted to the Senate Legal and Constitutional Affairs Committee, it stated that indigenous people are overrepresented in all aspects of the criminal justice system both as victims and offenders and also highlighted that indigenous peoples have complex legal needs that arise from social disadvantage, language barriers and cross-cultural differences.[41] The report also highlighted that indigenous women are facing higher barriers than men since a greater part of the available legal services, are directed to indigenous men.[42] Lower levels of education, high levels of disabilities, mental health problems and hearing losses together with social

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[36] UNGA, 'Report of the Special Rapporteur on the rights of indigenous peoples' (Human Rights Council), (2 Augusti 2019) A/HRC/42/37, paras 103-104 p.18.

[37] UNGA, 'Report of the Special Rapporteur on the rights of indigenous peoples' (Human Rights Council), (2 Augusti 2019) A/HRC/42/37, para 70 p.13.

[38] UNGA, 'Report of the Special Rapporteur on the rights of indigenous peoples' (Human Rights Council), (2 Augusti 2019) A/HRC/42/37, para 71 p.13.

[39] UNGA, 'Report of the Special Rapporteur on the rights of indigenous peoples' (Human Rights Council), (2 Augusti 2019) A/HRC/42/37, para 102 p.18.

[40] UNGA, 'Report of the Special Rapporteur on the rights of indigenous peoples' (Human Rights Council), (2 Augusti 2019) A/HRC/42/37, para 121 p.20.

[41] Australian Human Rights Commission, 'Inquiry into Access to Justice', (Australian Human Rights Commission Submission to the Senate Legal and Constitutional Affairs Committee), (20 October 2009), <https://humanrights.gov.au/sites/default/files/content/legal/submissions/2009/20091020_access_justice.pdf> accessed 9 May 2024, para 4 p.3.

[42] Australian Human Rights Commission, 'Inquiry into Access to Justice', (Australian Human Rights Commission Submission to the Senate Legal and Constitutional Affairs Committee), (20 October 2009), <https://humanrights.gov.au/sites/default/files/content/legal/submissions/2009/20091020_access_justice.pdf> accessed 9 May 2024, para 6 p.3.

exclusion and issues of disadvantages also contribute to increase the complexity of the legal needs for indigenous people.[43]

Another issue indigenous people face when accessing justice is the fact that justice has traditionally been understood in individual terms to ensure that individuals can defend their rights using the justice system. Indigenous people have however often acted collectively in coalitions of groups with similar goals to enhance their likelihood of success. This stresses the importance of recognising and strengthening community-based alternative legal systems.[44]

## 3.2 Indigenous peoples legal system

Indigenous people have historically had their own legal system and both the IACtHR and the United Nations Declaration on the Rights of Indigenous Peoples ("UNDRIP") have highlighted the importance of consideration of indigenous peoples' own legal systems.[45] This can be a complicated process for many reasons, one being how causality and which measure is appropriate to take into consideration to resolve disputes, vary widely according to cultural context. Indigenous peoples' belief systems also have a significant role, some communities interpret wrongdoing as a result of either illness or witchcraft and the required remedial action may vary from those actions that are prescribed by the state judicial system. The way indigenous peoples understand the nature of their claims, laws and government is highly dependent on specific contents and histories.[46]

Legal pluralism, the existence of more than one legal order in the same space, has been favoured increasingly in its official recognition and thereby created space for indigenous law. The recognition varies between States, but has in general grown in acceptance in recent years and thereby increased the ability for indigenous peoples to exercise their forms of dispute resolution. Previously, indigenous law was marginalised and in some states even criminalised. New human rights instruments have also influenced a lot of the increase in

[43] Australian Human Rights Commission, 'Inquiry into Access to Justice', (Australian Human Rights Commission Submission to the Senate Legal and Constitutional Affairs Committee), (20 October 2009), <https://humanrights.gov.au/sites/default/files/content/legal/submissions/2009/20091020_access_justice.pdf> accessed 9 May 2024, para 16 p.6.

[44] Brinks, D. M, 'Access to What? Legal Agency and Access to Justice for Indigenous Peoples in Latin America', The Journal of Development Studies, 2019, vol 55 no 3, pp.348-365.

[45] DESA, 'State of the World's Indigenous Peoples - Rights to Lands, Territories and Resources', vol 5, (United Nations Department of Economic and Social Affairs, 1 January 2021), <https://social.desa.un.org/sites/default/files/publications/2023-03/State-of-Worlds-Indigenous-Peoples-Vol-V-Final%20%282%29.pdf> accessed 15 May 2024.

[46] Rachel Sieder, 'The Challenge of Indigenous Legal Systems: Beyond Paradigms of Recognition', Brown Journal of World Affairs. 2012, vol 18 no 2, pp.103-114.

recognition. However, there have also been criticisms regarding the debate being focused on indigenous law upholding international human rights notions rather than the transformation of political systems and guaranteeing collective rights for indigenous peoples'.[47]

Other critics from scholars are concerned that the ongoing globalisation, liberalisation and privatisation that financial institutions push, risks neglecting the customary rights of indigenous people regarding their lands, territories and natural resources. Therefore it is of important to recognise legal pluralism and other norms that protect indigenous peoples, so they get empowered to protect themselves from the vested forces of private business interests. The legislative way is seen as an effective way for formal recognition and acknowledgement of customary claims from indigenous peoples.[48] Scholars also highlight the importance of the international law community to continue the legal recognition of indigenous autonomy by implementing and respecting indigenous legal systems where they conflict with their State counterparts. By doing that, the interaction between indigenous and non-indigenous will improve and the indigenous peoples will continue to practise their own customs and traditions.[49]

## 3.3 The Inter-American Court of Human Rights

The IACtHR has been seen as enlarging the protection of the rights of individuals with its implementations of an effective, systematic and evolutive interpretation of the ACHR, in line with human rights instruments that are part of the *corpus juris* of international human rights law. This has enabled targeted protection of rights, such as the rights of children and indigenous peoples and emphasised the *pro homine principle*, for the personal principle, leading to a human rights protection that prioritises human persons when human rights norms are interpreted in the process. The reference the IACtHR makes to international norms and principles which integrates the *corpus juris* of international human rights law can be seen as paving the way to a new *jus gentium* that is focused on the fulfilment of the needs of protection and the general aspirations for humankind and no longer state focused.[50] The IACtHR analyses complaints of human rights violations of indigenous peoples in a broad

[47] Rachel Sieder, 'The Challenge of Indigenous Legal Systems: Beyond Paradigms of Recognition', Brown Journal of World Affairs. 2012, vol 18 no 2, pp.103-114.

[48] Suchithra Menon C & Deva Prasad M, 'Indian Forest Rights Legislation: Significance of Recognizing the Legal Pluralism for Indigenous Peoples Rights', Statute Law Review, 2020, vol 41 no 1, pp.78-88.

[49] Lindsay Short, 'Traditions versus Power: When Indigenous Customs and State Laws Conflicts', Chicago Journal of International Law, 2014, vol 15 no 1, pp.376-408.

[50] Alejandro Fuentes, 'Systematic Interpretation of the American Convention on Human Rights', Journal of the Belarusian State University. International Relations, 2020, vol 1 no 1, pp. 94-101.

context, taking into account principles of human rights law and evolving rules in the American and international community, including conventions/treaties, customs, and other sources of international law. The IACtHR sees human rights conventions/treaties as living instruments of which interpretation must evolve with time and current conditions.[51]

## 3.4 Barriers to accessing justice

Indigenous peoples face many barriers to accessing justice and remedies. Even though indigenous peoples have had some victories in national and international forums in recent years, the realisation of remedies and reparations for damage caused by activities in or near their lands is an exception rather than the rule. Indigenous peoples lack access to courts and other mechanisms to protect their rights, both under international human rights legislation and through their own justice systems. Some are not even recognised as legal subjects with collective rights to their land. Also, some legislation such as colonial doctrines discriminates against indigenous peoples which risks affecting current legislation. Therefore indigenous peoples are very vulnerable and some indigenous authorities have even been prosecuted for exercising jurisdiction under their customary law.[52]

Indigenous people often face discrimination with one example being that there is a disproportionate number of indigenous people incarcerated and it is common that the process of court cases is delayed, which in practice makes it impossible to realise remedies and reparations. Some land rights disputes have taken over 30 years without being solved. Cultural differences and other justice mechanisms are also a challenge to effective access to justice and remedies. Other barriers can be language barriers and no access to any interpreter, which makes it practically impossible to access justice. Another possible barrier can be the lack of legal assistance, which can be an even larger issue due to the geographical remoteness of the livelihood of many indigenous peoples that by that misses out on executing their rights. Lastly, it can also be an expensive process that requires a lot of resources to seek justice, therefore indigenous people can face economic barriers since their way of living is not as focused on earning as non-indigenous people who for example have monetary salaries as the rule.[53]

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[51] Isabel M. Madriago Cueno, 'ILO Convention 169 in the Inter-American human rights system: consultation and consent', Westlaw UK Journal Articles, 2020, vol 24 no 2/3, pp.257-264.

[52] DESA, 'State of the World's Indigenous Peoples - Rights to Lands, Territories and Resources', vol 5, (United Nations Department of Economic and Social Affairs, 1 January 2021), <https://social.desa.un.org/sites/default/files/publications/2023-03/State-of-Worlds-Indigenous-Peoples-Vol-V-Final%20%282%29.pdf> accessed 15 May 2024.

[53] DESA, 'State of the World's Indigenous Peoples - Rights to Lands, Territories and Resources', vol 5, (United Nations Department of Economic and Social Affairs, 1 January 2021),

Indigenous peoples also face barriers that are not related to that they are indigenous peoples per se, however, the collusion between the private sector and the State creates a barrier to access justice for indigenous peoples. International human rights legislation affirms the state's responsibility to establish and implement processes that both recognise and adjudicate indigenous peoples' rights. However, in practice, few States have established such processes. What makes the situation more complex is the fact that many of the agricultural and extractive businesses that interfere with the indigenous communities are transnational by nature, making jurisdiction an issue.[54] However even if the process regarding core legislative provisions of UNDRIP has led to favourable rulings in both the IACtHR and on a national level, still none of the groundbreaking decisions has been fully implemented.[55]

The lack of harmonisation between international human rights law and international investment law challenges the effective access to justice for indigenous peoples. International investment agreements that aim at large-land acquisitions, and foreign investments in agricultural, energy and extractive projects near indigenous peoples' lands and territories have proliferated due to the increased global consumerism and its correlated demand for resources. International investment law also establishes protection for companies, leading to companies suing States for the potential loss of earnings, creating a chilling effect of protecting indigenous peoples' rights where States defend their actions by leaning on indigenous rights arguments and at the same time pursuing criminal cases against indigenous peoples.[56]

# 4 The legal framework

The legal framework for international law is a complex area that can be regulated by several legal frameworks. Human rights are considered *jus cogens*, meaning it can not be derogated.[57]

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<https://social.desa.un.org/sites/default/files/publications/2023-03/State-of-Worlds-Indigenous-Peoples-Vol-V-Final%20%282%29.pdf> accessed 15 May 2024.

[54] DESA, 'State of the World's Indigenous Peoples - Rights to Lands, Territories and Resources', vol 5, (United Nations Department of Economic and Social Affairs, 1 January 2021), <https://social.desa.un.org/sites/default/files/publications/2023-03/State-of-Worlds-Indigenous-Peoples-Vol-V-Final%20%282%29.pdf> accessed 15 May 2024.

[55] DESA, 'State of the World's Indigenous Peoples - Rights to Lands, Territories and Resources', vol 5, (United Nations Department of Economic and Social Affairs, 1 January 2021), <https://social.desa.un.org/sites/default/files/publications/2023-03/State-of-Worlds-Indigenous-Peoples-Vol-V-Final%20%282%29.pdf> accessed 15 May 2024.

[56] DESA, 'State of the World's Indigenous Peoples - Rights to Lands, Territories and Resources', vol 5, (United Nations Department of Economic and Social Affairs, 1 January 2021), <https://social.desa.un.org/sites/default/files/publications/2023-03/State-of-Worlds-Indigenous-Peoples-Vol-V-Final%20%282%29.pdf> accessed 15 May 2024.

[57] Christine Evans, *The Right to Reparation in International Law for Victims of Armed Conflict*, Cambridge: Cambridge University Press, 2012, p.30.

Human rights and humanitarian law is also *lex specialis*, meaning that it overrides general international law.[58] Also, the normative and legal framework of indigenous peoples' right to access justice and remedies in disputes concerning rights to lands, territories and natural resources encompasses case law from international courts, international legal documents on human rights and humanitarian law. Section four aims to present the United Nations' role for indigenous peoples, some core international legislation for indigenous peoples on the American continent, indigenous customary law and ends with briefly explaining the relatively new environmental-focused treaty "the Escazú Agreement" and UNGP.

## 4.1 Indigenous peoples and the UN

The UN has a central role when it comes to the work concerning indigenous peoples' rights and has historically been important to raise awareness and highlight issues concerning indigenous peoples' rights. The UN General Assembly ("UNGA"), is one of the principal organs of the UN and the main policy-making organ of the UN, of which the UN Human Rights Council ("UNHRC") serves as a subsidiary organ.[59]

There are also currently three bodies within the UN that are mandated to specifically deal with indigenous peoples' issues. First of all, there is the Special Rapporteur on the Rights of Indigenous Peoples, which is part of the thematic special procedures of the UNHRC. The Special Rapporteur presents reports each year that include carried-out activities and discussion of specific themes and issues of relevance.[60] Secondly, there is also an expert mechanism on the rights of indigenous people. The expert mechanism was established by res 6/36 in 2007 and its role is to provide the UNHRC with advice and expertise on the rights of indigenous peoples.[61] The main focus is to help member states achieve the goals of the UN Declaration on the Human Rights of Indigenous Peoples ("UNDRIP") such as clarifying key

[58] Christine Evans, *The Right to Reparation in International Law for Victims of Armed Conflict*, Cambridge: Cambridge University Press, 2012, p.2.

[59] UNGA 'Human Rights Council' Res 60/251 (15 March 2006).

[60] DESA, 'Reports by the Special Rapporteur on the Rights of Indigenous Peoples' (United Nations Department of Economic and Social Affairs, n.d.) <https://www.un.org/development/desa/indigenouspeoples/reports-by-the-special-rapporteur-on-the-rights-of-indigenous-peoples.html> accessed 10 March 2024.

[61] UNHRC 'Expert mechanism on the rights of indigenous peoples' Res 6/36 (14 December 2007).

principles, suggesting measures States can adopt at the level of laws and policies and examining good practice and challenges.[62]

There is also a forum within the UN called the UN Permanent Forum on Indigenous Issues ("UNPFII"), which was established by res E/2000/22 in 2000 and has mandates to discuss indigenous issues related to economic and social development, education, health, culture, the environment and human rights. The forum serves as an advisory body to the Economic and Social Council ("ECOSOC"), one of the principal organs of the UN, and raises awareness about indigenous issues within the UN system and functions as a coordinator of information exchange between parties.[63]

## 4.2 The international legal framework

### 4.2.1 American Convention on Human Rights

In 1969, the Inter-American Specialised Conference on Human Rights was held in Costa Rica, in which member States of the Organisation of the American States after a twenty-year-long process, adopted the American Convention on Human Rights ("ACHR"). The ACHR later entered into force in 1978, when the document was ratified by the first countries. Today, twenty-five American nations have ratified the AHCR. It is binding for States that have ratified or adhered to the Convention. To safeguard the rights of people in the American continent, the Inter-American Commission on Human Rights was established in 1959 and began functioning in 1960, and the Inter-American Court on Human Rights ("IACtHR"), which was established when the ACHR entered into force and had its first hearing in 1979.[64]

The ACHR is a convention for states within the American hemisphere in which states reaffirm their intention to consolidate a system of social justice and personal liberty that is based on respect for the essential rights of an individual. Signing States also need to recognise that it justifies international protection that reinforces or complements the protection that is provided by the domestic law of American states.[65]

[62] UN, 'Expert Mechanism on the Rights of Indigenous Peoples' (Office of the High Commissioner, n.d.) <https://www.ohchr.org/en/hrc-subsidiaries/expert-mechanism-on-indigenous-peoples> accessed 10 March 2024.

[63] ECOSOC 'Establishment of a Permanent Forum on Indigenous Issues' Res 2000/22 (28 July 2000).

[64] IACtHR, 'History', n.d., available at <https://www.corteidh.or.cr/historia.cfm?lang=en> accessed 6 May 2024.

[65] American Convention on Human Rights, (adopted 22 November 1969, entered into force 18 July 1978), 1144 UNTS 123.

The IACtHR has adopted an extensive approach regarding the interpretation of the ACHR both regarding the definition of the content of human rights and the scope of the Court's competencies. The approach by the IACtHR relies on teleological arguments, focusing on the purpose and functionality of something, and comparable arguments to define the content of the rights such as those stated in the ACHR.[66]

#### 4.2.1.1 Article 1(1) - Obligation to respect rights

Article 1(1) of the ACHR recognises the obligation of States to respect rights and is used in conjunction with other articles. States undertake to respect the rights and freedoms in the ACHR and that people who are subject to a State's jurisdiction are ensured to full and free exercise of those rights and freedoms without discrimination.[67]

#### 4.2.1.2 Article 2 - Domestic legal effects

The right to domestic legal effects is stated in Article 2 of the ACHR and is just like Article 1, used in conjunction with other articles of the ACHR. The Article is connected to Article 1 since it states that to exercise the rights and freedoms that are referred to in Article 1, which is all other Articles of the ACHR, States must adopt such legislative or other measures necessary to give the effect to those rights and freedoms if this is not already ensured by legislative or other provisions.

#### 4.2.1.3 Articles 3 and 4 - Right to juridical personality and life

The right to juridical personality, which is stated in Article 3 of the ACHR, is a right for every person to be recognised as a person before the law.[68] The right to life, stated in Article 4 of the ACHR, is an article that recognises that every person has a right to have their life respected and this shall be protected by law.[69] Article 4 focuses on the right to life in the light of death penalties, but section 6 of the article also includes the right to apply for amnesty,

[66] Pablo González Domínguez, 'The "Constitutional" Interpretation of the American Convention on Human Rights by the Inter-American Court of Human Rights', Zeitschrift fur Offentliches Recht (ZoR): Journal of Public Law, 2023, vol 73 no 3, pp.453, 460-461.

[67] American Convention on Human Rights, (adopted 22 November 1969, entered into force 18 July 1978), 1144 UNTS 123, Article 1(1).

[68] American Convention on Human Rights, (adopted 22 November 1969, entered into force 18 July 1978), 1144 UNTS 123, Article 3.

[69] American Convention on Human Rights, (adopted 22 November 1969, entered into force 18 July 1978), 1144 UNTS 123, Article 4.

pardon or commutation of sentence, meaning that states must implement fair and transparent procedures to grant mercy.[70] Articles 3 and 4 are non-derogable.[71]

#### 4.2.1.4 Article 5 - Right to humane treatment

The right to humane treatment is stated in Article 5 of the ACHR and states that every person has a right to have[72] its physical, moral and mental integrity respected and the article also includes the right regarding not being tortured and not being punished if not being the criminal. The article provides an autonomous right to personal integrity and is non-derogable according to Article 27 and the IACtHT has reiterated this.[73]

#### 4.2.1.5 Article 8 - Right to a fair trial

Article 8 of the ACHR, states a right to a fair trial and that every person who is accused of a criminal offence has a right to be presumed innocent until guilt is proven. During the proceedings every person is entitled to 1) a translator without a charge if the person does not understand the language of the court, 2) prior notification with details of the charges against him, 3) adequate time and means for preparation of defence, 4) a right to defend himself personally or assisted by a legal counsel of his choosing and to communicate freely and privately with the legal counsel. Each person is also entitled to 5) assistance of a counsel provided by the State if the accused decides to not defend himself personally or engage an own counsel, 6) as a defence, examine witnesses that are present in the court and as a witness obtain the appearance of experts and other relevant people, 7) not be compelled to be a witness against himself or plead guilty and lastly 8) appeal the judgment to a higher court. The Article also states that a confession of guilt is only valid if it is made without coercion when a person is acquitted by a non-appealable judgment it shall not be subjected to a new trial for the same cause and lastly, the criminal proceedings shall be public expect when the interests of justice need to be protected.[74]

The article's purpose is to ensure that state authorities who determine an individual's rights will use a procedure that provides necessary means to defend legitimate interests and to

[70] Thomas M. Antkowiak & Alejandra Gonza, The American Convention on Human Rights: Essential Rights, Oxford Scholarly Authorities on International Law, 2017, p.77.
[71] Thomas M. Antkowiak & Alejandra Gonza, The American Convention on Human Rights: Essential Rights, Oxford Scholarly Authorities on International Law, 2017, p.106.
[72] American Convention on Human Rights, (adopted 22 November 1969, entered into force 18 July 1978), 1144 UNTS 123, Article 5(1),(2),(3),(6).
[73] Thomas M. Antkowiak & Alejandra Gonza, The American Convention on Human Rights: Essential Rights, Oxford Scholarly Authorities on International Law, 2017, p.106.
[74] American Convention on Human Rights, (adopted 22 November 1969, entered into force 18 July 1978), 1144 UNTS 123, Article 8.

obtain duly reasoned rulings so the individual is protected by the law and also safeguarded from arbitrariness.[75] The extensive article states a right to a hearing within a reasonable time and due guarantees by an independent, competent and impartial tribunal that has been established by law.[76] Since there are many similarities among Human Rights Treaties, it is natural that when the case law is well-developed by counterparts such as the European Court of Human Rights ("ECtHR"), it is often cited.[77]

#### 4.2.1.6 Article 21 - Right to property

Article 21 of the ACHR states that everyone has a right to use and enjoy its property and no one shall be deprived of his property unless in cases that are established by law or certain social interest or public utility. Other forms of exploitation shall be prohibited by law.[78] The IACtHR has developed a broad notion of property, including tangible and intangible property. In the light of Article 29(b) of the ACHR, the IACtHR has in several cases referred to the article since it establishes that no provisions shall be interpreted as limiting the exercising and enjoyment of a right or freedom that is recognised by laws or conventions that a State is party of.[79]

#### 4.2.1.7 Article 22 - Right to freedom of movement and residency

The right to freedom of movement and residency is stated in Article 22 of the ACHR and includes the right for every person who lawfully recedes a territory to reside in it and move about in it. The article also includes restrictions for limiting this right such as restrictions must then be according to law and only to the extent necessary.[80]

#### 4.2.1.8 Article 25 - Right to judicial protection

The IACtHR has previously stated that Article 25 of the ACHR is one of the fundamental pillars of the rule of law.[81] The right to judicial protection is a right to simple, prompt or other

[75] Thomas M. Antkowiak & Alejandra Gonza, The American Convention on Human Rights: Essential Rights, Oxford Scholarly Authorities on International Law, 2017, p.174.
[76] American Convention on Human Rights, (adopted 22 November 1969, entered into force 18 July 1978), 1144 UNTS 123, Article 8.
[77] Thomas M. Antkowiak & Alejandra Gonza, The American Convention on Human Rights: Essential Rights, Oxford Scholarly Authorities on International Law, 2017, p.174.
[78] American Convention on Human Rights, (adopted 22 November 1969, entered into force 18 July 1978), 1144 UNTS 123, Article 21.
[79] Thomas M. Antkowiak & Alejandra Gonza, The American Convention on Human Rights: Essential Rights, Oxford Scholarly Authorities on International Law, 2017, p.267.
[80] American Convention on Human Rights, (adopted 22 November 1969, entered into force 18 July 1978), 1144 UNTS 123, Article 22.
[81] Thomas M. Antkowiak & Alejandra Gonza, The American Convention on Human Rights: Essential Rights, Oxford Scholarly Authorities on International Law, 2017, p.216.

effective resources. It also includes a right to a competent tribunal or court against acts that violate a person's fundamental rights that are recognized by the ACHR, by the constitution or by laws of the state concerned. It also includes violations committed by persons acting in the course of their official duties. The article also states that States need to ensure that persons claiming remedy have their rights determined by the competent authority provided by the State's legal system, that it develops possibilities for judicial remedies and ensures it is a competent authority that enforces such remedies when granted.[82]

The simple and prompt remedies do however not have clear boundaries or precise meanings and the Court will look at national law when assessing the "without delay" principle. When it comes to effective remedies, whether the remedy is adequate is also of importance and here the Court finds it important for the remedy to be suitable to address the infringement of a legal right.[83] The state responsibility also does not end when a competent authority issues a judgment or decision, it must also guarantee that the decision is executed.[84]

It is also important to distinguish the difference between Article 8 (right to fair trial) and Article 25 (right to judicial protection). The IACtHR has explained that providing effective judicial remedies to victims of human rights violations is covered in Article 25 and Article 8 covers that these remedies must be by the rules of due process law. It has been subject to dispute that the IACtHR has combined Articles 8 and 25 since several judgments now hold Articles 8 and 25 as "the right to access justice". The Court has developed a broad due process and its original scope has expanded when combining Articles 8 and 25. There are critics that this might be problematic since it hinders the understanding and development of each provision. The Court has further highlighted through its case law that the means and not the results are of importance.[85]

#### 4.2.1.9 Article 63 - Right to Remedies

[82] American Convention on Human Rights, (adopted 22 November 1969, entered into force 18 July 1978), 1144 UNTS 123, Article 25.

[83] Thomas M. Antkowiak & Alejandra Gonza, *The American Convention on Human Rights: Essential Rights*, Oxford Scholarly Authorities on International Law, 2017, p.216.

[84] Thomas M. Antkowiak & Alejandra Gonza, *The American Convention on Human Rights: Essential Rights*, Oxford Scholarly Authorities on International Law, 2017, p.223.

[85] Thomas M. Antkowiak & Alejandra Gonza, *The American Convention on Human Rights: Essential Rights*, Oxford Scholarly Authorities on International Law, 2017, p.224.

When there has been a violation of the ACHR, Article 63 of the Convention states a right for the injured party to fair compensation, to enjoy the right or freedom that has been violated and the consequence that constituted the breach to be remedied.[86]

### 4.2.2 UNDRIP

The United Nations Declaration on the Rights of Indigenous Peoples ("UNDRIP") is a declaration that was adopted in 2007 by over 140 States, that states rights for indigenous peoples. UNDRIP is however not legally binding and therefore there is a need for states to enforce national legislation for UNDRIP to be realised.[87]

There are several important articles in UNDRIP. The right to self-determination is recognised in Articles 3 and 4. Article 3 states that indigenous people have the right to self-determination. By this right, indigenous peoples can freely determine their political status and freely pursue their economic, social and cultural status.[88] Article 4 states that in exercising the right to self-determination, indigenous people have a right to self-government or autonomy when it comes to matters that are related to their local and internal affairs, including ways to finance the autonomous functions.[89]

The right for indigenous people to be part of the decision-making process is stated in Articles 5, 18 and 27. Article 5 states a right to maintain and strengthen their customs while participating fully in the political, social, economic and cultural life of a State.[90] Article 18 states a right to participate in the decision-making process in matters that affect indigenous peoples rights by their chosen representatives and also to maintain and develop their own decision-making institution.[91] Finally, Article 27 states that in conjunction with indigenous peoples, all States shall establish and implement a fair, impartial, independent, open and transparent process that also recognises indigenous customs, traditions, laws and land tenure

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[86] American Convention on Human Rights, (adopted 22 November 1969, entered into force 18 July 1978), 1144 UNTS 123, Article 63.

[87] DESA, 'State of the World's Indigenous Peoples - Rights to Lands, Territories and Resources', vol 5, (United Nations Department of Economic and Social Affairs, 1 January 2021), <https://social.desa.un.org/sites/default/files/publications/2023-03/State-of-Worlds-Indigenous-Peoples-Vol-V-Final%20%282%29.pdf> accessed 15 May 2024.

[88] UNGA, United Nations Declaration on the Rights of Indigenous People (UNDRIP), (13 September 2007), A/RES/61/295, Article 3.

[89] UNGA, United Nations Declaration on the Rights of Indigenous People (UNDRIP), (13 September 2007), A/RES/61/295, Article 4.

[90] UNGA, United Nations Declaration on the Rights of Indigenous People (UNDRIP), (13 September 2007), A/RES/61/295, Article 5.

[91] UNGA, United Nations Declaration on the Rights of Indigenous People (UNDRIP), (13 September 2007), A/RES/61/295, Article 18.

systems regarding rights to their lands, resources and territories and that indigenous peoples shall be part of this process.[92]

Articles 25, 26 and 27 of UNDRIP cover the collective right to own and control lands and resources. Apart from Article 27 which is described in the above paragraph, Article 25 states that indigenous peoples have a right to strengthen and maintain their special relationship with lands, waters, territories, coastal seas and other resources to uphold responsibilities for the next generations.[93] Article 26 states the right to lands, territories and resources of which the indigenous peoples traditionally have occupied, owned or in other ways used or acquired and that this right also includes the right to own, use, control and develop lands, territories and resources. Finally, Article 26 expresses that States shall give legal recognition and protection for these lands, territories and resources with respect to customs, traditions and land tenure systems of the indigenous peoples.[94]

Another important area is the right to free, prior and informed consent that is recognised in Articles 10, 11, 19, 28, 29 and 32. Article 10 recognises a right to not be forcibly removed from their lands and territories and relocation shall not take place without their free, prior and informed consent, with an agreement of a fair and just compensation and with an option of return if possible.[95] Article 11(2) continues by articulating that States shall provide redress through effective mechanisms that may involve restitution and that this shall be developed in conjunction with indigenous peoples with respect to their way of life.[96] The right of consultation and cooperation with States to obtain indigenous peoples' free, prior and informed consent before any legislative or administrative measure that may affect them is adopted or implemented is stated in Article 19.[97] Article 28 then continues with a right to address redress for lands, territories and natural resources that have been confiscated, taken, used, damaged or occupied without their free, prior and informed consent. The redress can include restitution or fair and equitable compensation. The compensation shall be in equal

[92] UNGA, United Nations Declaration on the Rights of Indigenous People (UNDRIP), (13 September 2007), A/RES/61/295, Article 27.
[93] UNGA, United Nations Declaration on the Rights of Indigenous People (UNDRIP), (13 September 2007), A/RES/61/295, Article 25.
[94] UNGA, United Nations Declaration on the Rights of Indigenous People (UNDRIP), (13 September 2007), A/RES/61/295, Article 26.
[95] UNGA, United Nations Declaration on the Rights of Indigenous People (UNDRIP), (13 September 2007), A/RES/61/295, Article 10.
[96] UNGA, United Nations Declaration on the Rights of Indigenous People (UNDRIP), (13 September 2007), A/RES/61/295, Article 11(2).
[97] UNGA, United Nations Declaration on the Rights of Indigenous People (UNDRIP), (13 September 2007), A/RES/61/295, Article 19.

size, quality and legal status, monetary or other appropriate redress.[98] The right to conservation and protection of the environment and productive capacity of the land, territories and resources is stated in Article 29. Also, States shall take effective measures so programmes for maintaining, monitoring and restoring the health of indigenous peoples that are affected by hazardous materials and other disposals in the lands and territories, are implemented.[99] Lastly, Article 32 recognises the right to determine and develop strategies and priorities for the development of indigenous peoples' lands, territories and resources. States shall consult and cooperate to obtain their free and informed consent before the approval of projects that affect the lands, territories and resources, especially when it comes to the development, utilisation or exploitation of minerals, water and other resources. The Article also states that States need to provide effective mechanisms for fair and just redress and the need for measures to mitigate adverse economic, environmental, social, spiritual and cultural impacts.[100]

Connected with access to justice, Article 34 of UNDRIP recognises the right to develop, maintain and promote their own institutional structures, procedures, practices, judicial systems and customs in accordance with international human rights standards.[101] The right to technical and financial assistance to enjoy the rights in UNDRIP is stated in Article 39.[102] Article 40 states the right to access to and prompt decisions through fair and just procedures for conflicts and disputes with States or other parties and a right to effective remedies for all infringements of their collective and individual rights. Indigenous customs, traditions, legal systems and rules shall be considered together with international human rights.[103]

During the negotiations of UNDRIP, the right to self-determination and the right to natural resources in indigenous peoples' lands and territories were the two most politically charged areas. The international *corpus jurus* for indigenous lands, territories and resources is still evolving and young but UNDRIP serves an important role in clarifying the basic

[98] UNGA, United Nations Declaration on the Rights of Indigenous People (UNDRIP), (13 September 2007), A/RES/61/295, Article 28.

[99] UNGA, United Nations Declaration on the Rights of Indigenous People (UNDRIP), (13 September 2007), A/RES/61/295, Article 29.

[100] UNGA, United Nations Declaration on the Rights of Indigenous People (UNDRIP), (13 September 2007), A/RES/61/295, Article 32.

[101] UNGA, United Nations Declaration on the Rights of Indigenous People (UNDRIP), (13 September 2007), A/RES/61/295, Article 34.

[102] UNGA, United Nations Declaration on the Rights of Indigenous People (UNDRIP), (13 September 2007), A/RES/61/295, Article 39.

[103] UNGA, United Nations Declaration on the Rights of Indigenous People (UNDRIP), (13 September 2007), A/RES/61/295, Article 40.

framework for those rights. However, there is still a gap between the content and scope of rights for indigenous peoples and the implementation on a grass-root level.[104] Nations that decide to implement UNDRIP into their national legislation can provide an opportunity to remove barriers to using indigenous legal orders within the courts, provide respect to indigenous law and governance in conflicts that concern indigenous lands, territories and natural resources and address weaknesses in the presumption that the judiciary holds expertise in indigenous law. UNDRIP also guides how to navigate indigenous consultation and opposition to large-scale industrial projects.[105] UNDRIP has however been criticised for not being more than a consolation prize, not giving indigenous peoples access to international forums for redress and like most UN declarations is understood to be "soft law" and nothing more since it is not legally binding for states.[106]

### 4.2.3 ADRIP

The American Declaration on the Rights of Indigenous Peoples ("ADRIP") is a declaration that was adopted on June 15, 2016, by the Organisation of American States ("OAS") which is a regional intergovernmental organisation with 35 member countries of the Americas. ADRIP offers protection for indigenous peoples on the American continent with one purpose being to serve as an important instrument for the IACtHR to provide content to other instruments such as the ACHR and its predecessor the American Declaration of the Rights and Duties of Man that is still applicable for states that are not bound to the ACHR.[107] Even though it is not legally binding, ADRIP can be used as a moral and political tool to help States guide their laws, policies and practices in the interest of indigenous peoples. However, it can be seen as potentially being part of customary law and by that bind states.[108]

ADRIP is comprehensive and Article XXX 4(c) states that States shall take special and effective measures to guarantee that indigenous peoples and children live free from

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[104] DESA, 'State of the World's Indigenous Peoples - Rights to Lands, Territories and Resources', vol 5, (United Nations Department of Economic and Social Affairs, 1 January 2021), <https://social.desa.un.org/sites/default/files/publications/2023-03/State-of-Worlds-Indigenous-Peoples-Vol-V-Final%20%282%29.pdf> accessed 15 May 2024.

[105] Darcy Lindberg, 'UNDRIP and the Renewed Application of Indigenous Laws in the Common Law', U.B.C. Law Review, 2022, vol 55 no 1, pp.75-79.

[106] Kerry Wilkins, 'So You Want to Implement UNDRIP…', U.B.C. Law Review, 2021, vol 53 no 4, pp.1237-1238.

[107] Indian Law Resource Center, 'The American Declaration on the Rights of Indigenous Peoples', n.d., available at <https://indianlaw.org/adrip/home> accessed 19 May 2024.

[108] Indian Law Resource Center, 'The American Declaration on the Rights of Indigenous Peoples - Background Materials & Strategies for Implementation', n.d., available at <https://indianlaw.org/sites/default/files/ADRIP%20Booklet%20(web%20version).pdf> accessed 19 May 2024, p.1.

violence and shall guarantee the right of access to justice, protection and effective reparation for harm caused.[109] Article XXVI 2 concerns that States shall adopt appropriate measures and policies to recognise, respect and protect the lands, territories, cultures, and environment as well as their individual and collective integrity.[110] The right to free, prior and informed consent regarding projects that affect their land, territories and other resources is stated in Article XXIX 4.[111] Article XIII 2 concerns that States shall provide redress which may include restitution and should be in conjunction with indigenous peoples and with their way of life.[112]

### 4.2.4 ILO Convention no 169

The International Labour Organisation ("ILO") was founded in 1919 as part of the Treaty of Versailles ended World War I and became a specialised agency of the United Nations in 1946. ILO is an organisation that is devoted to promoting internationally recognised labour and human rights with its founding mission of labour peace being essential to achieve prosperity. ILO works with creating decent work and economic conditions and has a tripartite structure that gives voice to employers, workers and governments.[113]

In 1957, ILO adopted Convention no 107 which aimed to protect and integrate indigenous and other tribal and semi-tribal populations. Some of these populations were not integrated into the national community and were hindered from benefiting fully from rights and advantages that were enjoyed by other parts of the populations.[114] The Convention was however antiquated, so in 1989, a new convention was in place that revised ILO Convention no 107. ILO Convention no 169 ("ILO 169") is a convention from 1989 that once ratified, is legally binding. Over 20 countries have ratified ILO 169 so far with the majority being Latin American countries.[115]

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[109] OAS, American Declaration on the Rights of Indigenous Peoples (ADRIP), (15 June 2016), AG/RES.2888 (XLVI-O/16), Article XXX 4(c).

[110] OAS, American Declaration on the Rights of Indigenous Peoples (ADRIP), (15 June 2016), AG/RES.2888 (XLVI-O/16), Article XXVI 2.

[111] OAS, American Declaration on the Rights of Indigenous Peoples (ADRIP), (15 June 2016), AG/RES.2888 (XLVI-O/16), Article XXIX 4.

[112] OAS, American Declaration on the Rights of Indigenous Peoples (ADRIP), (15 June 2016), AG/RES.2888 (XLVI-O/16), Article XIII 2.

[113] UN, 'ILO: International Labour Organization', n.d., available at <https://www.un.org/youthenvoy/2013/08/ilo-international-labour-organization/> accessed 18 May 2024.

[114] International Labour Organisation no 107 (adopted 5 June 1957, entered into force 2 June 1959).

[115] International Labour Organisation no 169 (adopted 7 June 1989, entered into force 5 September 1991).

ILO 169 includes some important articles for indigenous peoples such as Article 32 which states that governments shall take appropriate measures to include indigenous and tribal peoples in activities in the social, cultural, economic, spiritual and environmental fields.[116] Article 2(2)(c) is also of importance, stating that governments shall assist in eliminating socio-economic gaps that may exist between indigenous and other members of a national community that is compatible with the peoples' way of life.[117] Article 3(1) states that indigenous and tribal peoples shall enjoy the full measure of fundamental freedom and human rights without any discrimination and hindrance, without males and females not being discriminated against.[118] Articles 13 to 19 include rights to land, such as Article 14(3) that to resolve land claims, states shall establish adequate procedures within the national legal system. Article 15(1) states that natural resources that belong to their lands shall be specially safeguarded and that this right includes the right to participate in the management, use and conservation of the natural resources.[119] Article 15(2) continues with when it comes to mineral and other subsurface resources, governments need to establish procedures for the people to be consulted and wherever possible, participate in the benefit of such activities.[120] Article 8(1) highlights that customs and customary laws shall be due regard.[121]

ILO 169 has been used by the IACtHR since it is one of the few treaties that deals with the rights of indigenous peoples. Due to the broad and flexible approach of the IACtHR, ILO 169 is commonly referred to in judgements of the IACtHR that consider ILO 169 as a relevant instrument for the protection of indigenous peoples' rights. By this, its impact has not been limited to States that have ratified the Convention, rather it has crossed borders and been considered as being the minimum standard.[122] ILO 169 serves an important role since it is a legally binding document that addresses indigenous peoples' right to free, prior and informed consent, their participation in the decision-making process and collective rights.[123]

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[116] International Labour Organisation no 169 (adopted 7 June 1989, entered into force 5 September 1991), Article 32.

[117] International Labour Organisation no 169 (adopted 7 June 1989, entered into force 5 September 1991), Article 2(2)(c).

[118] International Labour Organisation no 169 (adopted 7 June 1989, entered into force 5 September 1991), Article 3(1).

[119] International Labour Organisation no 169 (adopted 7 June 1989, entered into force 5 September 1991), Article 15(1).

[120] International Labour Organisation no 169 (adopted 7 June 1989, entered into force 5 September 1991), Article 15(1).

[121] International Labour Organisation no 169 (adopted 7 June 1989, entered into force 5 September 1991), Article 8(1).

[122] Isabel M. Madriago Cueno, 'ILO Convention 169 in the Inter-American human rights system: consultation and consent', Westlaw UK Journal Articles, 2020, vol 24 no 2/3, pp.257-264.

[123] Chris Swartz, 'After 30 Years, Only 23 Countries Have Ratified Indigenous and Tribal Peoples Convention ILO 169', (Cultural Survival, 5 June 2019), available at

ILO 169 has however also been criticised, some critiques being the lack of ratification from Asian and African States. The reasons for the lack of ratification are not clear, but the concept of indigenous peoples and pure denial of the presence of indigenous peoples in some States is one explanation. There is also a lack of implementation models in those countries that have ratified ILO 169.[124]

### 4.2.5 Customary law

Customary law for indigenous people is often rooted in local traditions and customs and answers different needs for indigenous communities such as solutions to conflicts, the process of dealing with offenders and maintaining social order and harmony. Those countries who have implemented indigenous customary law into their formal legal systems, have found justice being handled more effectively.[125] However, there have been some critics, stating that indigenous customary law does not provide sufficient guarantees to protect individual human rights.[126]

Customary law has a significant importance for indigenous people and there is a strong demand from the indigenous people regarding the recognition of cultures and customary legal systems when administering justice. Rejection and non-recognition of indigenous law can be seen as a pattern of denial of the indigenous identity, society and culture. Many states also face difficulties due to the monist concept of national law, hindering the recognition of plural legal traditions and thereby subordinating customary legal systems to the state's official legal norm. This can lead to discrimination in the national judicial system when indigenous peoples' legal concepts are ignored and can create insecurities in the official legal system.[127] The Special Rapporteur recommended indigenous law to have the status and hierarchy of positive law within the framework of the right to self-determination

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<https://www.culturalsurvival.org/news/after-30-years-only-23-countries-have-ratified-indigenous-and-tribal-peoples-convention-ilo> accessed 18 May 2024.

[124] Lara Dominguez, 'A Practitioner's Perspective on the Rights of Indigenous Peoples Since the Adoption of ILO Convention No. 169', (*Minority Rights Group*, 1 July 2019), available at <https://minorityrights.org/a-practitioners-perspective-on-the-rights-of-indigenous-peoples-since-the-adoption-of-ilo-convention-no-169/> accessed 18 May 2024.

[125] UN, 'Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, Rodolfo Stavenhagen' (Economic and Social Council), (26 January 2004) E/CN.4/2004/80, para 67 p.18.

[126] UN, 'Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, Rodolfo Stavenhagen' (Economic and Social Council), (26 January 2004) E/CN.4/2004/80, para 68 p.18.

[127] UN, 'Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, Rodolfo Stavenhagen' (Economic and Social Council), (26 January 2004) E/CN.4/2004/80, para 54 p.16.

and in consultation with indigenous peoples, opening its judicial systems to indigenous legal concepts and customs.[128] Regarding the principle of non-discrimination being violated when recognising indigenous legal institutions, the report from the Special Rapporteur concluded that international law recognises the need for positive measures to protect the rights of minorities and policies that aim at correct conditions that prevent full enjoyment of their rights.[129]

### 4.2.6 Escazú Agreement

A relatively new treaty is the Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean (the "Ezcazú Agreement"), which was adopted in Escazú, Costa Rica on 4 March 2018 and entered into force on 22 April 2021. It is signed by 24 and ratified by 16 out of the 33 countries it is open for. The agreement is a regional agreement reached by and for Latin America and the Caribbean and is a ground-breaking legal instrument for the environment that also serves as a human rights treaty. It also recognises core democratic principles and includes those that traditionally have been excluded, underrepresented or marginalised. The treaty has a strong environmental focus and serves as a tool to achieve the 2030 Agenda for Sustainable Development.[130]

The treaty includes "access rights", that include access to justice in environmental matters, a right of public participation in environmental decision-making and a right to access environmental information.[131] It focuses on biodiversity conservation, the use of natural resources, land degradation and climate change.[132] Article 8 of the treaty explicitly mentions that groups in vulnerable situations such as indigenous peoples, shall receive assistance in the

[128] UN, 'Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, Rodolfo Stavenhagen' (Economic and Social Council), (26 January 2004) E/CN.4/2004/80, para 69 p.19.

[129] UN, 'Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, Rodolfo Stavenhagen' (Economic and Social Council), (26 January 2004) E/CN.4/2004/80, para 71 p.19.

[130] ECLAC, 'Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin American and the Caribbean', (adopted in Escazú, Costa Rica on 4 March 2018, entered into force on 22 April 2021), LC/PUB.2018/8/Rev.1.

[131] ECLAC, 'Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin American and the Caribbean', (adopted in Escazú, Costa Rica on 4 March 2018, entered into force on 22 April 2021), LC/PUB.2018/8/Rev.1, article 2(a).

[132] ECLAC, 'Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin American and the Caribbean', (adopted in Escazú, Costa Rica on 4 March 2018, entered into force on 22 April 2021), LC/PUB.2018/8/Rev.1.

preparation of their requests and obtain a response.[133] Article 8 also states that all Parties of the Agreement shall guarantee that its international obligations and domestic legislation that relates to indigenous peoples are observed.[134] The International Court of Justice ("ICJ") is the competent court to judge.[135] However, so far there have not yet been any court cases from the ICJ that refer to the treaty.

### 4.2.7 UN Guiding Principles on Business and Human Rights

The UN Guiding Principles on Business and Human Rights ("UNGP") were endorsed by the UN Human Rights Council in 2011 and was the first globally agreed on standard on business and human rights.[136] UNGP is not legally binding, although the aim was to create an authoritative and normative framework with guiding principles for States and business enterprises, both transnational and others.[137] UNGP states that judicial mechanisms are the core of ensuring access to remedy, underlining that it is a core duty for all states to ensure access to justice through the domestic judicial system. UNGP has however been criticised for the lack of recognition of indigenous peoples as collective right holders under international law and also the lack of judicial routes of redress for indigenous peoples are a barrier for indigenous people to access justice. Another weakness of UNGP is the lack of guidance regarding the access to justice in the home states of transnational corporations, making it tough in practice to access justice.[138]

# 5 Case law

The chapter will present four cases from the IACtHR and one from the Brazilian Supreme Court. The cases are important cases for judicial development of accessing justice in land rights and natural resources disputes and each case starts with a background section to give the reader an overview of the case, then followed by the Court's reasoning and lastly, a

[133] ECLAC, 'Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin American and the Caribbean', (adopted in Escazú, Costa Rica on 4 March 2018, entered into force on 22 April 2021), LC/PUB.2018/8/Rev.1, para 4 p.17 and article 8(5).

[134] ECLAC, 'Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin American and the Caribbean', (adopted in Escazú, Costa Rica on 4 March 2018, entered into force on 22 April 2021), LC/PUB.2018/8/Rev.1, article 8(2).

[135] ECLAC, 'Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin American and the Caribbean', (adopted in Escazú, Costa Rica on 4 March 2018, entered into force on 22 April 2021), LC/PUB.2018/8/Rev.1, article 19(2)(a).

[136] IWGIA, 'Interpreting the UN Guiding Principles for Indigenous Peoples - Report 16', (International Work Group for Indigenous Affairs), (June 2014), p.8.

[137] UNHRC, United Nations Guiding Principles on Business and Human Rights (UNGP), (16 June 2011), A/HRC/17/31.

[138] IWGIA, 'Interpreting the UN Guiding Principles for Indigenous Peoples - Report 16', (International Work Group for Indigenous Affairs), (June 2014), pp.8, 34.

section called key takeaways that is an analysis of the present case. Due to the complexity of the cases from the IACtHR, some descriptions are quite extensive, the purpose being to help the reader understand the facts needed to later understand the key points from each case.

## 5.1 Case of the Mayagna (Suma) Awas Tingni community v. Nicaragua (2001) - IACtHR

The case concerned a land dispute where the State had granted permission for logging exploitation and the State had not ensured an effective remedy when the Awas Tingni Community protested regarding their property rights.

### 5.1.1 Background

The case concerned the Awas Tingni Community, which is an indigenous community located on the Atlantic Coast of Nicaragua, where the Community subsisted based on hunting, fishing, fruit gathering and agriculture. There were no real property title deeds to the lands the Community claimed, so when the State granted concession to a corporation to carry out road construction work and logging exploitation in the forest in the region the Community was located in, the Community submitted a letter to the Minister, where they requested no further steps to be taken to grant concession to the corporation without an agreement with the Community. The Community then alleged that the State did not ensure an effective remedy in response to their protests regarding their property rights.[139]

Due to this, the Community filed an application to the IACtHR where they claimed that the State of Nicaragua had not complied with its obligations under the American Convention of Human Rights. The Community claimed that the State had not demarcated the communal lands belonging to the Community, nor adopted effective measures to ensure the property rights of the Community to their ancestral lands, territories and natural resources and lastly, they claimed a breach due to the granting of concessions on community land without the Communities' consent.[140]

[139] UN, 'The Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua', (United Nations Environment Program, n.d.), available at <https://leap.unep.org/en/countries/ni/national-case-law/case-mayagna-sumo-awas-tingni-community-v-nicaragua> accessed 21 May 2024.

[140] UN, 'The Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua', (United Nations Environment Program, n.d.), available at <https://leap.unep.org/en/countries/ni/national-case-law/case-mayagna-sumo-awas-tingni-community-v-nicaragua> accessed 21 May 2024.

The Court was to decide whether Nicaragua had violated Articles 21 (right to property) and 25 (right to judicial protection) in combination with Articles 1(1) (obligation to respect rights) and 2 (domestic legal effects).[141]

### 5.1.2 Judgment

The Court ruled in favour of the Community when it concluded that in connection with articles 1(1) and 2, the State had violated Article 25 of the ACHR,[142] which states the right to judicial protection such as access to a competent court or tribunal for protection against violations of fundamental rights.[143] This was because Nicaragua had not adopted adequate domestic legal measures to allow titling, delimitation and demarcation of community lands and also did not process the remedy filed by members of the Community within a reasonable time.[144] The Court stressed the importance that the State adopted necessary legislative, administrative or other measures in its domestic law to create an effective mechanism for delimitation and titling of the property of the members of the Community, that is in accordance with values, customary law, customs and more of the Community.[145]

The Court also concluded that in connection with articles 1(1) and 2, the State had violated Article 21 of the ACHR[146] that states the right to property.[147] The Court stressed the importance of indigenous peoples' customary law must be taken into account[148] and that the Community had a property right to the lands they inhabit and that the limits of the territory of which property exists have not been effectively delimited and demarcated by the State, which creates uncertainty for the Community.[149]

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[141] *Case of the Mayagna (Suma) Awas Tingni Community v. Nicaragua*, Judgment including merits, reparations and costs. Judgment of 31 August 2001. Series no 79, para 2 p.2.

[142] *Case of the Mayagna (Suma) Awas Tingni Community v. Nicaragua*, Judgment including merits, reparations and costs. Judgment of 31 August 2001. Series no 79, para 139 p.69.

[143] ACHR article 25

[144] *Case of the Mayagna (Suma) Awas Tingni Community v. Nicaragua*, Judgment including merits, reparations and costs. Judgment of 31 August 2001. Series no 79, para 137 p.69.

[145] *Case of the Mayagna (Suma) Awas Tingni Community v. Nicaragua*, Judgment including merits, reparations and costs. Judgment of 31 August 2001. Series no 79, para 138 p.69.

[146] *Case of the Mayagna (Suma) Awas Tingni Community v. Nicaragua*, Judgment including merits, reparations and costs. Judgment of 31 August 2001. Series no 79, para 155 p.76.

[147] American Convention on Human Rights, (adopted 22 November 1969, entered into force 18 July 1978), 1144 UNTS 123, Article 21.

[148] *Case of the Mayagna (Suma) Awas Tingni Community v. Nicaragua*, Judgment including merits, reparations and costs. Judgment of 31 August 2001. Series no 79, para 151 p.75.

[149] *Case of the Mayagna (Suma) Awas Tingni Community v. Nicaragua*, Judgment including merits, reparations and costs. Judgment of 31 August 2001. Series no 79, para 153 p.75.

When it comes to the reparation mechanism in Article 63(1) of the ACHR, the Court stated that the State needed to carry out the delimitation, demarcation and titling of the corresponding lands within a maximum of 15 months, with full participation of the Community and values, customary law, customs and more being taken into account.[150] No material damages were proved and the judgment itself was a form of reparation according to the Court.[151] Regarding immaterial damage, the Court considered that the State needed to invest 50,000 dollars in works of collective interest of the Awas Tingni Community.[152] For general expenses, the Court considered it equitable to 30,000 dollars through the Inter-American Commission.

### 5.1.3 Key takeaways

The case is of importance since it is the first case where the IACtHR has issued a judgment in favour of the rights of indigenous peoples to their ancestral land. This means that when national justice mechanisms are not enough to allow access to justice, international mechanisms can fill that gap. The Court stressed the importance of domestic legislative, administrative or other measures to create an effective mechanism for delimitation and titling of the property that is in accordance with values, customary law, customs and more of the Community. The Court focused on the importance of customary law, creating space for the indigenous traditions and way of living. What is also worth noting is the reparation mechanisms which the Court stated, that focused on the participation of the Community, on future investments that will be beneficial for the Community and the overall focus on including indigenous people. The inclusion focus can be seen as one of the most important steps to meet the challenges indigenous peoples face to access justice in an effective way. However, the process is long for an indigenous community to take a case to the IACtHR and that is one of the main challenges in effectively accessing justice. What can also be seen as problematic is that the judgment mainly is just a suggestion since there are no straight consequences and enforcement power of the Court, but this can instead be seen as damage to rule of law commitments and international reputations if a State does not comply with the judgment of the Court.

[150] *Case of the Mayagna (Suma) Awas Tingni Community v. Nicaragua*, Judgment including merits, reparations and costs. Judgment of 31 August 2001. Series no 79, para 164 p.80.

[151] *Case of the Mayagna (Suma) Awas Tingni Community v. Nicaragua*, Judgment including merits, reparations and costs. Judgment of 31 August 2001. Series no 79, paras 165-166 p.80.

[152] *Case of the Mayagna (Suma) Awas Tingni Community v. Nicaragua*, Judgment including merits, reparations and costs. Judgment of 31 August 2001. Series no 79, para 167 pp.80-81.

## 5.2 Case of the Yakye Axa indigenous community v. Paraguay (2005) - IACtHR

The case about the Yakye Axa indigenous community concerned allegations that Paraguay has not ensured ancestral property rights to the Yakye Axa indigenous community and its members since no satisfactory solution has been achieved regarding a land claim that had been processed since 1993. The situation made it impossible for the Yakye Axa people to possess and own their territory and kept the Yakye Axa people in a vulnerable situation.[153]

### 5.2.1 Background

The Yakye Axa indigenous community is an indigenous community of around 320 people that traditionally lived in the Paraguayan Chaco area. The community is part of the Southern Enxet Langua people.[154] The economy of the indigenous community is primarily based on fishing, hunting, and gathering, together with farming and raising cattle.[155] At the end of the 19th century, large parts of the Paraguayan Chaco were sold through the London Stock Exchange to British entrepreneurs and the Anglican Church began to establish missions in the area.[156] In 1979, the Anglican Church began a development program for the indigenous communities and purchased some land that the members of the Yakye Axa indigenous community moved to in 1986 due to bad living conditions.[157] The natural environment and resources differed from those of the place of origin, the resettlement did not improve living conditions for the community members and the lack of water and food caused several deaths.[158] The new place was also the main settlement for the indigenous communities of Makxlawaya and the Yakye Axa indigenous community was marginalised and therefore decided to take steps to claim the lands the Yakye Axa indigenous community considered their traditional habitat.[159] The Yakye Axa indigenous community were not able to overcome

[153] *Case of the Yakye Axa Indigenous Community v. Paraguay*, Judgment including merits, reparations and costs. Judgment of 17 June 2005. Series C no 125, para 2 p.2.
[154] *Case of the Yakye Axa Indigenous Community v. Paraguay*, Judgment including merits, reparations and costs. Judgment of 17 June 2005. Series C no 125, paras 50.1, 50.7 pp.24-26.
[155] *Case of the Yakye Axa Indigenous Community v. Paraguay*, Judgment including merits, reparations and costs. Judgment of 17 June 2005. Series C no 125, para 50.3 p.25.
[156] *Case of the Yakye Axa Indigenous Community v. Paraguay*, Judgment including merits, reparations and costs. Judgment of 17 June 2005. Series C no 125, para 50.10 p.27.
[157] *Case of the Yakye Axa Indigenous Community v. Paraguay*, Judgment including merits, reparations and costs. Judgment of 17 June 2005. Series C no 125, paras 50.12-13 p.28.
[158] *Case of the Yakye Axa Indigenous Community v. Paraguay*, Judgment including merits, reparations and costs. Judgment of 17 June 2005. Series C no 125, paras 50.14-15 pp.28-29.
[159] *Case of the Yakye Axa Indigenous Community v. Paraguay*, Judgment including merits, reparations and costs. Judgment of 17 June 2005. Series C no 125, paras 50.15-16 p.29.

the problems associated with extreme poverty and therefore decided to return to a place close to their ancestral territory, where conditions got worse due to poor living conditions.[160]

At this time, there was an administrative process to address land tenure problems in Paraguay.[161] In 1993, the leaders of the Yakye Axa indigenous community submitted a note to the Instituto de Bienestar Rural ("IBR"), an institution responsible for the integration of the population into the social and economic development and rural welfare, which they wished the Yakye Axa indigenous community to return to their traditional territory.[162] The President of the IBR asked the Instituto Paraguayo del Indígena ("INDI"), the institute for indigenous people in Paraguay, to provide the background of the legal status and other information about the Yakye Axa indigenous community.[163] The INDI did not respond to this request even after several reiterated requests in 1995 and 1996.[164] The leaders of the Yakye Axa indigenous community also requested the IBR for a visual inspection of the claimed territories that were repeated several times without any inspection taking place.[165]

In 1997, a technical-anthropological report about the Yakye Axa indigenous community was submitted by the Center of Anthropology Studies at the University of Católica and was later challenged by the firms that owned the estate that the Yakye Axa indigenous community claimed, saying they were also not interested in negotiating any sale of property.[166] In 1998, the IBR decided that the land was a traditional habitat to the Yakye Axa indigenous community.[167] This was forwarded to the INDI[168], which wanted to analyse the matter in a broader framework and later sent a note to the land owners, asking them to sell

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[160] *Case of the Yakye Axa Indigenous Community v. Paraguay*, Judgment including merits, reparations and costs. Judgment of 17 June 2005. Series C no 125, paras 4, 5 pp.1-2.

[161] *Case of the Yakye Axa Indigenous Community v. Paraguay*, Judgment including merits, reparations and costs. Judgment of 17 June 2005. Series C no 125, para 50.23 p.30.

[162] *Case of the Yakye Axa Indigenous Community v. Paraguay*, Judgment including merits, reparations and costs. Judgment of 17 June 2005. Series C no 125, paras 50.19, 50.24 pp.30-31.

[163] *Case of the Yakye Axa Indigenous Community v. Paraguay*, Judgment including merits, reparations and costs. Judgment of 17 June 2005. Series C no 125, paras 50.17, 50.25 pp.29, 31.

[164] *Case of the Yakye Axa Indigenous Community v. Paraguay*, Judgment including merits, reparations and costs. Judgment of 17 June 2005. Series C no 125, para 50.25 p.31.

[165] *Case of the Yakye Axa Indigenous Community v. Paraguay*, Judgment including merits, reparations and costs. Judgment of 17 June 2005. Series C no 125, para 50.26 p.31.

[166] *Case of the Yakye Axa Indigenous Community v. Paraguay*, Judgment including merits, reparations and costs. Judgment of 17 June 2005. Series C no 125, para 50.35 pp.33-34

[167] *Case of the Yakye Axa Indigenous Community v. Paraguay*, Judgment including merits, reparations and costs. Judgment of 17 June 2005. Series C no 125, para 50.37 p.34.

[168] *Case of the Yakye Axa Indigenous Community v. Paraguay*, Judgment including merits, reparations and costs. Judgment of 17 June 2005. Series C no 125, para 50.39 p.35.

land to the Enxet Lengua people.[169] The landowners were not interested in the sale of land.[170] After going back and forth between the IBR and the INDI, the INDI decided to ask the Legislative by requesting expropriation of some land to the Yakye Axa indigenous community.[171] A request to the President of Congress, for drafting a bill to expropriate the land claimed, was made by the leaders of the Yakye Axa indigenous community in 2000.[172] The Senate later withdrew the expropriation bill,[173] but adopted another bill in 2003 that granted some land to the Yakye Axa indigenous community that was not the originally claimed land.[174] The leaders of the Yakye Axa indigenous community rejected this offer since there had been no prior consultation or agreement with the Yakye Axa indigenous community.[175]

In 1999, there was also a complaint filed by one of the land owners against unnamed members of the Yakye Axa indigenous community, regarding crimes of invasions of others' property, theft and grave coercion. The Community members were not allowed to appoint a defence attorney and could not exercise their right to defence.[176]

After failing to try to reclaim their traditional lands, the case was later filed to the Inter-American Court of Human Rights ("the Court") in 2003, with the allegation that Paraguay had not ensured the ancestral property rights to the Yakye Axa indigenous community since the land claim has been processed since 1993 without a satisfactory solution being attained. This had put the Yakye Axa People in a vulnerable situation that had threatened the survival of the Community and its members and has made it impossible to own and possess their territory. The Court was to decide whether Paraguay had breached Articles 4 (right to life), 8 (right to fair trial), 21 (right to property) and 25 (right to judicial protection)

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[169] *Case of the Yakye Axa Indigenous Community v. Paraguay*, Judgment including merits, reparations and costs. Judgment of 17 June 2005. Series C no 125, paras 50.40, 50.43 pp.35-36.

[170] *Case of the Yakye Axa Indigenous Community v. Paraguay*, Judgment including merits, reparations and costs. Judgment of 17 June 2005. Series C no 125, para 50.44 p.36.

[171] *Case of the Yakye Axa Indigenous Community v. Paraguay*, Judgment including merits, reparations and costs. Judgment of 17 June 2005. Series C no 125, para 50.53 p.38.

[172] *Case of the Yakye Axa Indigenous Community v. Paraguay*, Judgment including merits, reparations and costs. Judgment of 17 June 2005. Series C no 125, para 50.54 p.38.

[173] *Case of the Yakye Axa Indigenous Community v. Paraguay*, Judgment including merits, reparations and costs. Judgment of 17 June 2005. Series C no 125, para 50.57 p.39.

[174] *Case of the Yakye Axa Indigenous Community v. Paraguay*, Judgment including merits, reparations and costs. Judgment of 17 June 2005. Series C no 125, para 50.60 p.40.

[175] *Case of the Yakye Axa Indigenous Community v. Paraguay*, Judgment including merits, reparations and costs. Judgment of 17 June 2005. Series C no 125, para 50.61 p.40.

[176] *Case of the Yakye Axa Indigenous Community v. Paraguay*, Judgment including merits, reparations and costs. Judgment of 17 June 2005. Series C no 125, para 106 p.66.

of the ACHR, in combination with Articles 1(1) (obligation to respect rights) and 2 (domestic legal effects).[177]

### 5.2.2 Judgment

The IACtHR deemed that Paraguay abridged Articles 8(1), 8(2)(d), 8(2)(e), 8(2)(f) and 25 in combination with Articles 1(1) and 2 of the ACHR, regarding the rights to a fair trial and judicial protection.[178] The State has an obligation to provide an effective remedy to the Yakye Axa indigenous community for their territorial claim and to ensure that they are heard within due guarantees under reasonable terms.[179] The Court deemed that the legal process must be respected in administrative proceedings where an individual's rights may be affected by the decision.[180] The State also needs to take into account indigenous peoples specificities, their special vulnerability, their customary law, values, their economic and social characteristics and customs to grant effective protection.[181] The administrative proceedings in the case were ineffective in addressing the land claim by the Yakye Axa indigenous community.[182] The Court also stated that Paraguay had not taken appropriate legal steps that were necessary to ensure that the procedures were effective to offer a definite solution to the claims and that Article 1(1) places States under an obligation that procedures are accessible and simple and can provide a timely response to the requests.[183] Due to the legal procedure for the land claim being ineffective and disregarding the principle of reasonable time, the State violated Articles 8 and 25 in combination with Articles 1(1) and 2 of the ACHR.[184] The lack of defence counsel for the criminal proceedings constituted a violation of the right to a fair trial in Article 8 of the ACHR.[185]

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[177] *Case of the Yakye Axa Indigenous Community v. Paraguay*, Judgment including merits, reparations and costs. Judgment of 17 June 2005. Series C no 125, para 2 p.2.

[178] *Case of the Yakye Axa Indigenous Community v. Paraguay*, Judgment including merits, reparations and costs. Judgment of 17 June 2005. Series C no 125, para 119 p.68.

[179] *Case of the Yakye Axa Indigenous Community v. Paraguay*, Judgment including merits, reparations and costs. Judgment of 17 June 2005. Series C no 125, para 52(a) p.52.

[180] *Case of the Yakye Axa Indigenous Community v. Paraguay*, Judgment including merits, reparations and costs. Judgment of 17 June 2005. Series C no 125, para 62 p.58.

[181] *Case of the Yakye Axa Indigenous Community v. Paraguay*, Judgment including merits, reparations and costs. Judgment of 17 June 2005. Series C no 125, para 63 p.58.

[182] *Case of the Yakye Axa Indigenous Community v. Paraguay*, Judgment including merits, reparations and costs. Judgment of 17 June 2005. Series C no 125, para 98 pp.64-65.

[183] *Case of the Yakye Axa Indigenous Community v. Paraguay*, Judgment including merits, reparations and costs. Judgment of 17 June 2005. Series C no 125, paras 102-103 p.65.

[184] *Case of the Yakye Axa Indigenous Community v. Paraguay*, Judgment including merits, reparations and costs. Judgment of 17 June 2005. Series C no 125, para 104 pp.65-66.

[185] *Case of the Yakye Axa Indigenous Community v. Paraguay*, Judgment including merits, reparations and costs. Judgment of 17 June 2005. Series C no 125, para 117 p.68.

The Court stated that regarding the right to property in Article 21 of the ACHR, the Court resorted to ILO 169 to interpret the provision in the ACHR in accordance with the evolution of the inter-american system and international human rights law.[186] The Court highlighted that the *corpus juris* in international law comprises varied content of international instruments such as treaties, conventions, resolutions, declarations etc.[187] The close relationship indigenous peoples have with their traditional territories and natural resources must therefore be safeguarded by Article 21 of the ACHR according to the Court.[188] To guarantee the right to communal property, it is necessary to take into account the close link the land has with indigenous customs, traditions, rituals, etc.[189] Both private property of individuals and communal property are protected by Article 21 of the ACHR,[190] when there are contradictions, the Court stated some guidelines to restrict such rights, including such restrictions 1) must be established by law, 2) must be necessary, 3) must be proportional and 4) its purpose must be to attain a legitimate goal in a democratic society.[191] Also, selecting and delivering alternative lands or payment as compensation is not solely a discretionary task for the State and there must be consensus with the indigenous peoples involved.[192] Even though Paraguay had recognised the right to communal property in its own legal order, necessary domestic legal steps had to ensure the effective use and enjoyment of the indigenous traditional land had not been taken and therefore the Court found that Paraguay had violated Article 21 of the ACHR in conjunction with Articles 1(1) and 2 of the ACHR.[193]

Lastly, the Court was to decide whether there had been a violation of Article 4(1) of the ACHR. The Court did not find[194] enough evidence for the State to have violated Article 4(1) in the case of the death of community members due to lack of food and medical care. However, the Court did find a violation of Article 4(1) due to the State not taking enough

[186] *Case of the Yakye Axa Indigenous Community v. Paraguay*, Judgment including merits, reparations and costs. Judgment of 17 June 2005. Series C no 125, para 127 p.74.

[187] *Case of the Yakye Axa Indigenous Community v. Paraguay*, Judgment including merits, reparations and costs. Judgment of 17 June 2005. Series C no 125, para 128 p.74.

[188] *Case of the Yakye Axa Indigenous Community v. Paraguay*, Judgment including merits, reparations and costs. Judgment of 17 June 2005. Series C no 125, para 137 p.76.

[189] *Case of the Yakye Axa Indigenous Community v. Paraguay*, Judgment including merits, reparations and costs. Judgment of 17 June 2005. Series C no 125, para 154 p.79.

[190] *Case of the Yakye Axa Indigenous Community v. Paraguay*, Judgment including merits, reparations and costs. Judgment of 17 June 2005. Series C no 125, para 143 p.77.

[191] *Case of the Yakye Axa Indigenous Community v. Paraguay*, Judgment including merits, reparations and costs. Judgment of 17 June 2005. Series C no 125, para 144 p.77.

[192] *Case of the Yakye Axa Indigenous Community v. Paraguay*, Judgment including merits, reparations and costs. Judgment of 17 June 2005. Series C no 125, para 151 p.79.

[193] *Case of the Yakye Axa Indigenous Community v. Paraguay*, Judgment including merits, reparations and costs. Judgment of 17 June 2005. Series C no 125, paras 155-156 pp.79-80.

[194] *Case of the Yakye Axa Indigenous Community v. Paraguay*, Judgment including merits, reparations and costs. Judgment of 17 June 2005. Series C no 125, para 178 p.88.

measures regarding conditions that affected the Yakye Axa members to have a decent life.[195] The Court highlighted the importance of taking special consideration of elderly people and children.[196]

When it comes to reparation mechanisms, apart from getting their land back, the Court set 45,000 dollars to be paid to the community by the State with the pecuniary damage including loss of income for the victims, expenses incurred due to the facts and pecuniary consequences that have a causal link with the case.[197] In its assessment of the non-pecuniary damages, the Court considered the fact that the right to communal property had not been made effective and the grave living conditions the community members had faced during the process.[198] The special significance of the land was also noted and the Court deemed the State to create a community development fund and programs that will be given to the victims and include the supply of water and sanitary infrastructure. The State additionally needed to allocate 950,000 dollars to development programs for education, housing, health etc. for the community members.[199]

### 5.2.3 Key takeaways

The Court focused on the need for legal procedures for the indigenous peoples to be available and accessible, simple, enable a timely response to requests made and that people must have a real opportunity to recover their lands. The Court stated that the legal process must be respected in administrative proceedings and all other proceedings that may affect rights, which shows that the Court is taking an extensive approach that will have a positive effect in reality for indigenous peoples effective access to justice in the future. Another important key takeaway from the case is how much the Court focuses on the importance of granting effective protection that takes special consideration of indigenous peoples and their unique way of living and functioning. If this gets implemented in real life, indigenous peoples in the future will feel less discriminated against and have more tools to easily access justice in the future. The Court also sets extensive focus on the reparations with a broad range of

[195] *Case of the Yakye Axa Indigenous Community v. Paraguay*, Judgment including merits, reparations and costs. Judgment of 17 June 2005. Series C no 125, para 176 p.87.
[196] *Case of the Yakye Axa Indigenous Community v. Paraguay*, Judgment including merits, reparations and costs. Judgment of 17 June 2005. Series C no 125, paras 172, 175 pp.86-87.
[197] *Case of the Yakye Axa Indigenous Community v. Paraguay*, Judgment including merits, reparations and costs. Judgment of 17 June 2005. Series C no 125, paras 193-194 p.91.
[198] *Case of the Yakye Axa Indigenous Community v. Paraguay*, Judgment including merits, reparations and costs. Judgment of 17 June 2005. Series C no 125, para 202 p.94.
[199] *Case of the Yakye Axa Indigenous Community v. Paraguay*, Judgment including merits, reparations and costs. Judgment of 17 June 2005. Series C no 125, para 205 p.94.

mechanisms such as monetary compensation for different types of damage, but also the preventive approach is with a community development fund and different development programs that will help increase the living standards for the Community members.

## 5.3 Case of the Saramaka people v. Suriname (2007) - IACtHR

The case about the Saramaka people concerned a mining exploitation and logging dispute and allegations that Suriname had not adopted effective measures to recognise the Saramaka peoples' rights to use a territory they had traditionally occupied and used. Suriname had allegedly failed to adopt domestic legal provisions to ensure rights such as the right to judicial protection.[200]

### 5.3.1 Background

The Saramakas are a group of around 50,000 indigenous people with descendants of self-liberated African slaves, living in Suriname in northeastern South America. Suriname has a high proportion of rainforest and their ancestors fought for nearly a century before signing a peace treaty with the Dutch colonisers in 1762, which granted them their territory and freedom from slavery. In 1958, the Government of Suriname approved the Afobaka hydro dam project, the construction of a hydro dam by an aluminium company, to supply power to an aluminium smelter. The construction of the dam was finished in 1964 and large areas got flooded and thousands of Saramakas were displaced from their traditional lands. In the 1970s, gold deposits were discovered within the territory of the Saramakas and after signing a mining agreement, exploration and exploitation by an international mining company began. The communities received no compensation from the exploitation and there was no free prior informed consent by the Saramakas. In 1993, the Government of Suriname granted Chinese corporations logging concessions in the Saramaka territory without consulting with the Saramaka People. In 1996, Saramaka people organised themselves as the Association of Saramaka Authorities ("VSG"), to defend their territory and filed a petition to the IACtHR in 2000 to address land rights and human rights violations by the Government of Suriname.[201]

The representatives of the Saramaka people alleged facts such as the lack of consent in the construction of the Afobaka dam, the amount of area flooded and the number of

[200] *Case of the Saramaka People v. Suriname*, Judgment including objection, merits, reparations and costs. Judgment of 28 November 2007. Series C no 172, para 2 p.2.

[201] VSG, 'Timeline', n.d., available at <https://saamaka-oto.org/timeline/> accessed 30 April 2024.

Saramaka people that have been displaced from the dam area, what effect the construction has had on the community, the environmental degradation and the destruction of Saramaka sacred sites.[202] The Court was then to decide whether Suriname had breached Articles 3 (judicial personality), 21 (right to property) and 25 (right to judicial protection) of the ACHR, in combination with Articles 1(1) (obligation to respect rights) and 2 (domestic legal effects).[203]

### 5.3.2 Judgment

The Court addressed eight issues to conclude if there have been any breaches of the ACHR. The first issue concerned the members of the Saramaka people as a tribal community that is subject to special measures that ensure the full exercise of their rights. This is of relevance since international human rights law imposes that states need to adopt special measures to guarantee recognition of tribal peoples' rights. The Saramaka people are not indigenous to the Suriname region but have inhabited the region since they were brought to Suriname during the colonisation period and have characteristics that are similar to indigenous people.[204] The Court concluded that the Saramaka people made up a tribal community, whose cultural, social and economic characteristics differed from the rest of the community.[205] The Court highlighted that the Saramaka people are considered a tribal community and that jurisprudence regarding indigenous peoples' rights to property applies to tribal communities as well.[206]

The second issue concerned Saramaka peoples' right to use communal property in accordance with Articles 1(1), 2 and 21 of the ACHR. The Court stated that States need special relationships with their territory that tribal and indigenous people have that guarantee their cultural, social and economic survival and the property right in Article 21, in conjunction with Articles 1(1) and 2 of the ACHR, places a positive obligation for states to adopt special measures that guarantee equal and full exercise of their rights to territories they

[202] *Case of the Saramaka People v. Suriname*, Judgment including objection, merits, reparations and costs. Judgment of 28 November 2007. Series C no 172, para 12 p.4.
[203] *Case of the Saramaka People v. Suriname*, Judgment including objection, merits, reparations and costs. Judgment of 28 November 2007. Series C no 172, paras 3-4 p.2.
[204] *Case of the Saramaka People v. Suriname*, Judgment including objection, merits, reparations and costs. Judgment of 28 November 2007. Series C no 172, para 79 p.23.
[205] *Case of the Saramaka People v. Suriname*, Judgment including objection, merits, reparations and costs. Judgment of 28 November 2007. Series C no 172, para 84 p.25.
[206] *Case of the Saramaka People v. Suriname*, Judgment including objection, merits, reparations and costs. Judgment of 28 November 2007. Series C no 172, para 86 p.26.

have traditionally occupied and used.[207] In the present case, the Court concluded that the aforementioned criteria should be applied.[208]

The Court also looked into the rights of the Saramaka people derived from their system of communal property, where it concluded that the State's legal framework merely granted the Saramaka people the privilege to use land, it did not guarantee the right to effectively control their territory without outside interference and that the State's legislation only granted a privilege or permission to use and occupy the lands at the discretion to the State. By this, the State had not complied with its duty to give domestic legal effects to the Saramaka's property rights in accordance with Article 21 in relation to Articles 1(1) and 2 of the ACHR.[209]

The Court's jurisprudence stated that members of tribal or indigenous communities have the right to own the natural resources within their territory they have traditionally used just as the right to own land that they have traditionally used and occupied. Therefore, the special measures required must guarantee that indigenous and tribal people can continue living their traditional way of life, with their distinct social structure, cultural identity, customs, economic system, beliefs and traditions being protected, guaranteed and respected by States.[210] The Court highlighted that the connectedness between the territory and natural resources that is necessary for their cultural and physical survival, is precisely what needs to be protected under Article 21 of the ACHR. The natural resources at indigenous och tribal people's territories that are protected under Article 21 of the ACHR, are the natural resources that have traditionally been used and necessary for their continuation of such a way of life.[211]

The Court then continued to determine which natural resources are protected under Article 21 of the ACHR.[212] Restrictions for the Saramaka peoples' right to enjoy and use traditionally owned natural resources and land are only okay when the restrictions do not

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[207] *Case of the Saramaka People v. Suriname*, Judgment including objection, merits, reparations and costs. Judgment of 28 November 2007. Series C no 172, para 91 p.27.

[208] *Case of the Saramaka People v. Suriname*, Judgment including objection, merits, reparations and costs. Judgment of 28 November 2007. Series C no 172, para 96 p.28.

[209] *Case of the Saramaka People v. Suriname*, Judgment including objection, merits, reparations and costs. Judgment of 28 November 2007. Series C no 172, paras 115-116 pp.34-35.

[210] *Case of the Saramaka People v. Suriname*, Judgment including objection, merits, reparations and costs. Judgment of 28 November 2007. Series C no 172, para 121 p.36.

[211] *Case of the Saramaka People v. Suriname*, Judgment including objection, merits, reparations and costs. Judgment of 28 November 2007. Series C no 172, para 122 p.36.

[212] *Case of the Saramaka People v. Suriname*, Judgment including objection, merits, reparations and costs. Judgment of 28 November 2007. Series C no 172, para 123 p.36.

deny their survival as tribal people.[213] States must therefore ensure the effective participation of the Saramaka people in conformity with their traditions and customs, regarding investment, development and exploration or extraction plans. The State also needs to guarantee there will be some benefit with such a plan for the Saramaka People and lastly, that no concessions are issued within the territory before a technical and independent environmental and social impact assessment has been conducted with the State's supervision. This is intended to help guarantee, protect and preserve the people's special relationship with its territory.[214] However, when it comes to the scope of guarantees of consultation and benefit sharing, the Court stated that the level of consultations required varies depending on the nature and content of the right and the free, prior and informed consent of the Saramakas is additionally required.[215] Benefit sharing must be a reasonable equitable compensation that results from the exploitation of natural resources necessary for the indigenous or tribal people or traditionally owned lands.[216]

Another issue that the Court looked into was the guarantees established under international law in relation to the concession that the State already has granted. Since the Saramaka People traditionally had harvested etc. forest products, the Court stated that the State should not have granted logging concessions within the Saramaka territory unless the safeguards of benefit-sharing, effective participation and environmental and social impact were complied with.[217] When it comes to gold-mining concessions, the Saramaka people have traditionally not used gold as part of their cultural identity or economic system. However, since the gold mining activity within the Saramaka territory affects other natural resources that are necessary for the Saramaka people such as waterways, there is a duty for the State to consult with the Saramaka people in conformity to their customs and traditions, benefit sharing and assess the social and environmental impact with the project.[218]

Overall, the Saramaka people have a right to use and enjoy natural resources within their traditionally owned territory that are necessary for their survival and restrictions of that

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[213] *Case of the Saramaka People v. Suriname*, Judgment including objection, merits, reparations and costs. Judgment of 28 November 2007. Series C no 172, para 128 p.38.

[214] *Case of the Saramaka People v. Suriname*, Judgment including objection, merits, reparations and costs. Judgment of 28 November 2007. Series C no 172, para 129 p.38.

[215] *Case of the Saramaka People v. Suriname*, Judgment including objection, merits, reparations and costs. Judgment of 28 November 2007. Series C no 172, para 137 p.41.

[216] *Case of the Saramaka People v. Suriname*, Judgment including objection, merits, reparations and costs. Judgment of 28 November 2007. Series C no 172, para 140 p.42.

[217] *Case of the Saramaka People v. Suriname*, Judgment including objection, merits, reparations and costs. Judgment of 28 November 2007. Series C no 172, para 146 p.43.

[218] *Case of the Saramaka People v. Suriname*, Judgment including objection, merits, reparations and costs. Judgment of 28 November 2007. Series C no 172, para 155 p.46.

by granting extraction and exploitation concessions can only be done if the State ensures the benefit and effective participation of the Saramaka people together with environmental and social impact assessments. There also needs to be adequate safeguards and mechanisms implemented to ensure that activities do not significantly affect traditional land and natural resources. In the present case, the State did not comply with this and therefore Article 21 in conjunction with Article 1 of the ACHR was breached.[219]

Another important area is the right to a judicial personality. The Court stated that the State needs to recognise the Saramaka people's judicial capacity to exercise their rights collectively. This may be achieved by implementing legislative or other measures that both recognise and take into account the Saramaka peoples' view of themselves as a collectivity that is capable of exercising and enjoying the right to property. In consultation and with full respect for the Saramaka peoples' traditions and customs, the State needs to establish judicial and administrative conditions to ensure the recognition of their judicial personality.[220] Since the State failed with this, it violated the recognition of their judicial personality according to Article 3 of the ACHR, in relation to Articles 21 (the right to property) and 25 (right to judicial protection), together with the general obligations in Articles 1(1) (obligation to respect rights) and 2 (domestic legal effects).[221]

Lastly, the Court looked into the availability of adequate and effective legal remedies in Suriname to protect the Saramaka people against acts that violate their right to property. The Court considered the judicial resources available under Suriname's Civil Code, its Mining Decree from 1986 and its Forest Management Act of 1992 and concluded that neither legislation met the requirements under Article 25 of the ACHR, in conjunction with Articles 21 and 1(1) since it does not provide adequate and effective legal resources to protect indigenous peoples against violations of their right to property.[222] The need to hold a registered right or title to be able to qualify as a rightful "claimant" or "third party" and therefore allow appeal to the judiciary according to the Mining Decree of 1986, makes it impossible for the Saramaka people since they do not hold title to their traditional territory.[223]

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[219] *Case of the Saramaka People v. Suriname*, Judgment including objection, merits, reparations and costs. Judgment of 28 November 2007. Series C no 172, para 158 p.47.

[220] *Case of the Saramaka People v. Suriname*, Judgment including objection, merits, reparations and costs. Judgment of 28 November 2007. Series C no 172, para 174 p.51.

[221] *Case of the Saramaka People v. Suriname*, Judgment including objection, merits, reparations and costs. Judgment of 28 November 2007. Series C no 172, para 175 p.51.

[222] *Case of the Saramaka People v. Suriname*, Judgment including objection, merits, reparations and costs. Judgment of 28 November 2007. Series C no 172, para 185 p.54.

[223] *Case of the Saramaka People v. Suriname*, Judgment including objection, merits, reparations and costs. Judgment of 28 November 2007. Series C no 172, para 183 p.53.

The Court also concluded that it was problematic that the Civil Code judicial resources are only available for individuals claiming an individual right, while the Saramaka people are a collective entity that also is not recognised by the State. Since the Saramaka people's legal right to communal property is not recognised by the State, it is not adequate with a judicial resource that requires a demonstration of a violation of such right.[224]

Regarding reparations, the State needed to allocate 225,000 dollars to a development fund, other monetary compensation for the damage caused, recurring the State to allocate 600,000 dollars to a community development fund for immaterial damage and 75,000 dollars for material damage.[225] The State also needed to grant the Saramaka people the title over their territory, grant legal recognition to their collective judicial capacity, adopt legislative or other measures necessary to ensure the Saramaka people were effectively consulted, remove or amend legal provisions that hinder the protection of the right to property and review logging concessions already granted.[226]

### 5.3.3 Key takeaways

There are several important takeaways from the case, one being that indigenous peoples and tribal people follow its previous jurisprudence regarding the indigenous peoples and tribal peoples share similar characteristics and have the same property rights. This is positive since it does not limit the definition of indigenous people, which is in line with the thoughts of Special Rapporteur Martínez view of indigenous peoples, stating that it is up to the people themselves to identify as indigenous people. This way of viewing indigenous and tribal people will help the people more effectively access justice since it will be hard for States to use the argument of people not belonging to the indigenous community to avoid any disputes.

The case also covers both mining and logging disputes and shows that there is a broad spectrum of natural resources that are included in the legislative protection. The Court's argumentation of natural resources that have not necessarily been part of indigenous peoples' economic or cultural system, but affect other natural resources that have, also being included in the protection such as the gold in this case, is also worth noting. This expands indigenous

[224] *Case of the Saramaka People v. Suriname*, Judgment including objection, merits, reparations and costs. Judgment of 28 November 2007. Series C no 172, para 179 p.52.

[225] *Case of the Saramaka People v. Suriname*, Judgment including objection, merits, reparations and costs. Judgment of 28 November 2007. Series C no 172, paras 199, 201, 207-208 pp.58, 60.

[226] *Case of the Saramaka People v. Suriname*, Judgment including objection, merits, reparations and costs. Judgment of 28 November 2007. Series C no 172, para 194 p.56.

peoples' rights to their natural resources and makes it more clear which natural resources can be part of a judicial process.

The Court focuses a lot on the right to land and resources in their argumentation and what is also central in the case just like in the other presented cases in this thesis, is the importance of effective participation by indigenous peoples in such disputes. The Court also focuses on the benefit for the tribal peoples and the need for environmental and social impact assessments. This focus highlights the importance of both including indigenous peoples in matters of land and natural resources rights and also letting them benefit from it and letting their needs be taken into account. By doing this, the special nature of indigenous communities and their connection with their lands get a larger role and respect, which is needed for indigenous peoples to access justice. The special need for protection that guarantees their way of living and traditional way of life with unique distinctions is crucial and if there is no respect for this special relationship and indigenous peoples are not part of the process or benefit from it, it can be seen as a discrimination of indigenous peoples.

The access to adequate and effective legal remedies is also discussed and here the Court argues that it is impossible to access such remedies for the Saramaka people since they do not hold title to their traditional territory. Another issue was the national legislation only recognising individual rights and since the Saramakas were a collective entity that was not recognised by the State, it was not adequate with a judicial resource that required a demonstration of a violation of such right. What this implies is that the national legislation can put a strain on access to effective justice and remedies. The indigenous peoples are in the hands of the State and this is not beneficial for the exercising of indigenous peoples rights. Another issue is that the State might try to create loopholes by legislating so it gets hard for indigenous people to recognise their rights and they get stuck in the administrative process of exercising these rights. It creates an obstacle for indigenous people and therefore it is important to recognise their judicial personality and for States to fulfil their positive obligation to adopt special measures that can guarantee the equal and full exercise of indigenous peoples' rights to the territories they have traditionally occupied or used.

Lastly, the Court put a lot of effort into its reasoning concerning reparations. It demanded the State to pay monetary compensation, grant legal recognition to their collective judicial capacity, adopt legislative or other measures necessary to ensure the Saramakas be effectively consulted, remove or amend legal provisions that hinder the protection of the right to property and review logging concessions already granted. This shows that apart from

monetary compensation, there is a strong focus on the reparation mechanism that will benefit the people in real life. The forward-looking approach also shows that the Court does not only focus on the present case, rather the approach is to avoid similar situations in the future by improving health, rights, education level etc. and to include the indigenous people in the process of a higher extent to help them raise their voice. This can be seen as a purpose-focused approach, which goes in line with the general approach by the IACtHR when it comes to their judgment.

## 5.4 Case of the Kichwa indigenous people of Sarayaku v. Ecuador (2012) - IACtHR

The case of the Kichwa indigenous people concerns the granting by Ecuador of a permit enabling oil exploration and exploitation activities in the territory of the Kichwa indigenous people of Sarayaku, to a private oil company in the 1990s without previously consulting or obtaining the Sarayaku people's consent. The oil company then began the exploration, used high-power explosives at places within the indigenous territory and created a risk for the Sarayaku population. The indigenous community was prevented from seeking subsistence and limited their right to freedom of movement and cultural expression. Also, the case related to the failure to observe judicial guarantees and the alleged lack of judicial protection.[227]

### 5.4.1 Background

The Kichwa indigenous people of Sarayaku are a group of people that live in the tropical forest area of the Amazonian region of Ecuador and are part of the Kichwa nationality. The population consists of around 1,200 inhabitants and the territory is one of the most biologically diverse in the world.[228] It takes two to three days by boat, or eight days by land to reach the territory[229] and they subsist on family-based fishing, farming, hunting and gathering that follows their ancestral traditions and customs.[230] Sarayaku was recognized as the Kichwa Original People of Sarayaku in 2004 and they have a traditional community where decisions

[227] *Case of the Kichwa Indigenous People v. Ecuador*, Judgment including, merits and reparations. Judgment of 27 June 2012. Series C no 245, para 2 p.4.

[228] *Case of the Kichwa Indigenous People v. Ecuador*, Judgment including, merits and reparations. Judgment of 27 June 2012. Series C no 245, paras 51-52 p.16.

[229] *Case of the Kichwa Indigenous People v. Ecuador*, Judgment including, merits and reparations. Judgment of 27 June 2012. Series C no 245, para 53 p.17.

[230] *Case of the Kichwa Indigenous People v. Ecuador*, Judgment including, merits and reparations. Judgment of 27 June 2012. Series C no 245, para 54 p.17.

on important issues of special significance for the people are taken.[231] Nature elements of the Sarayaku territory have spirits and are interconnected and make places sacred according to the worldview of the Sarayaku People.[232]

In the 1960s, Ecuador started to increase oil exploration activities with a focus on the Amazonian region of the country and at that time, the State made steps to secure complete control over oil resources in Ecuador from a nationalist perspective. At that point, cultural, environmental and ethnic values were not an issue for the debate and the oil exploitation has resulted in a large-scale environmental cost due to the high pollution.[233] Ecuador experienced rapid economic growth and a strong modernization of the infrastructure of its main cities due to the income from oil exploitation[234] in 2005, oil revenues represented nearly 40% of the national budget and sales of crude oil accounted for a quarter of Ecuador's GDP.[235]

The territories of the Sarayaku people were awarded by the State in 1992.[236] On numerous occasions, the oil company tried to negotiate to access the Sarayaku people's territory and to obtain their consent for oil exploration. This took place by direct contact with the community members and thereby circumventing the indigenous organisational levels, offering benefits to the Sarayaku people[237] and also offering money and jobs that the Sarayaku people turned down, but the neighbouring communities agreed to.[238] In 2002, the Sarayaku Association communicated to the Ministry of Energy and Mines, that they were opposing the entry of the oil companies into its ancestral territory.[239] Later on during 2003 and 2004, several incidents were reported of presumed harassment and threats against the Sarayaku people and lawyers and in 2003, 120 members of the Sarayaku people were

[231] *Case of the Kichwa Indigenous People v. Ecuador*, Judgment including, merits and reparations. Judgment of 27 June 2012. Series C no 245, para 55 p.17.
[232] *Case of the Kichwa Indigenous People v. Ecuador*, Judgment including, merits and reparations. Judgment of 27 June 2012. Series C no 245, para 57 p.17.
[233] *Case of the Kichwa Indigenous People v. Ecuador*, Judgment including, merits and reparations. Judgment of 27 June 2012. Series C no 245, para 59 p.18.
[234] *Case of the Kichwa Indigenous People v. Ecuador*, Judgment including, merits and reparations. Judgment of 27 June 2012. Series C no 245, para 58 p.17.
[235] *Case of the Kichwa Indigenous People v. Ecuador*, Judgment including, merits and reparations. Judgment of 27 June 2012. Series C no 245, para 60 p.18.
[236] *Case of the Kichwa Indigenous People v. Ecuador*, Judgment including, merits and reparations. Judgment of 27 June 2012. Series C no 245, para 61 p.18.
[237] *Case of the Kichwa Indigenous People v. Ecuador*, Judgment including, merits and reparations. Judgment of 27 June 2012. Series C no 245, para 73 p.21.
[238] *Case of the Kichwa Indigenous People v. Ecuador*, Judgment including, merits and reparations. Judgment of 27 June 2012. Series C no 245, para 74 p.21.
[239] *Case of the Kichwa Indigenous People v. Ecuador*, Judgment including, merits and reparations. Judgment of 27 June 2012. Series C no 245, para 80 p.23.

allegedly attacked by the People of Canelos, a group that had agreed to sign with the oil company.[240]

The Court was then to decide whether there had been a violation by Ecuador of the ACHR a) Article 21 (right to property) in conjunction with Articles 13, 23 and 1(1), b) Articles 4 (right to life), 8 (right to a fair trial) and 25 (right to judicial protection) in conjunction with Article 1(1), c) Article 22 (right to freedom of movement and residency) in conjunction with Article 1(1), d) Article 5 (right to humane treatment) in conjunction with Article 1(1) and e) Article 2 (domestic legal effects).[241]

### 5.4.2 Judgment

The Court found that the State had failed its obligation to adopt domestic legal measures in accordance with Article 2 of the ACHR since the State did not refer to any mechanisms that suggest that the absence of regulation on the right to prior consultation did not constitute an obstacle in the case.[242]

The Court highlighted that since indigenous peoples exercise some rights recognised by the ACHR on a collective basis, legal considerations should be understood from a collective point of view.[243] By failing to consult the Sarayaku people on the execution of the project that directly impacted their territory, the State failed its obligation to adopt all necessary measures to guarantee the participation of the Sarayaku people in their way of living. The Court found the State had violated Article 21 of the ACHR in conjunction with the right to cultural identity, in conjunction with Articles 1(1) and 2 of the ACHR.[244]

The State's non-compliance with its obligations to guarantee the right to communal property by allowing explosives to be placed on the indigenous territory created a permanent risk and threat of life for the indigenous members.[245] The State had therefore put the indigenous peoples at grave risk for their life and physical integrity which is recognised in

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[240] *Case of the Kichwa Indigenous People v. Ecuador*, Judgment including, merits and reparations. Judgment of 27 June 2012. Series C no 245, paras 107-108 p.28.

[241] *Case of the Kichwa Indigenous People v. Ecuador*, Judgment including, merits and reparations. Judgment of 27 June 2012. Series C no 245, para 3 p.5.

[242] *Case of the Kichwa Indigenous People v. Ecuador*, Judgment including, merits and reparations. Judgment of 27 June 2012. Series C no 245, paras 226-227 p.65.

[243] *Case of the Kichwa Indigenous People v. Ecuador*, Judgment including, merits and reparations. Judgment of 27 June 2012. Series C no 245, para 231 p.66.

[244] *Case of the Kichwa Indigenous People v. Ecuador*, Judgment including, merits and reparations. Judgment of 27 June 2012. Series C no 245, para 232 p.66.

[245] *Case of the Kichwa Indigenous People v. Ecuador*, Judgment including, merits and reparations. Judgment of 27 June 2012. Series C no 245, para 248 p.71.

Articles 4(1) and 5(1) of the ACHR.[246] The Court also observed that no investigation was opened in five of the six complaints that were filed and that there was evidence of procedural inactivity therefore the Court found that the investigations were not effective measures to guarantee the rights to personal integrity.[247] Due to the flaws in the investigation of the reported facts, the Court found that the State authorities had not acted with due diligence or within their obligation to guarantee the right to personal integrity. Therefore, the Court found that the State had not fulfilled their obligations stated in Article 5 of the ACHR.[248]

The Court stated that the right for judicial protection that is stated in Article 25 of the ACHR, includes the available remedies to be effective to not breach the Article. The responsibilities stated in Article 25 were divided into two, the first being the responsibility for States to establish legislation to ensure the application of effective remedies and to guarantee the due process of law for competent authorities. Secondly, the responsibility also included the guarantee of an effective mechanism to execute decisions or judgments that are issued by the authorities.[249] The Court found that Ecuador did not guarantee an effective remedy to redress the juridical situation that had been violated, did not ensure an appropriate competent authority ruled on the rights of those individuals who filed for remedy and the decision was not executed through effective judicial protections. Therefore the State has violated Articles 8(1), 25(1), (25)(2)(a) and (25)(2)(c) of the ACHR in relation with Article 1(1).[250] The Court decided to not examine any breaches of Article 22 since it is examined together with other articles.[251]

Based on the provision of Article 63(1) of the ACHR, the Court concluded several things concerning reparation mechanisms in the present case. Concerning restitution, the Court stipulated that the State is obliged to neutralise, deactivate and completely remove the surface pentolite.[252] The State also needed to compensate a sum of 90,000 dollars for pecuniary damage, 1,250,000 dollars for non-pecuniary damage and 58,000 dollars for other

[246] *Case of the Kichwa Indigenous People v. Ecuador*, Judgment including, merits and reparations. Judgment of 27 June 2012. Series C no 245, para 249 p.71.

[247] *Case of the Kichwa Indigenous People v. Ecuador*, Judgment including, merits and reparations. Judgment of 27 June 2012. Series C no 245, para 270 p.75.

[248] *Case of the Kichwa Indigenous People v. Ecuador*, Judgment including, merits and reparations. Judgment of 27 June 2012. Series C no 245, para 271 p.75.

[249] *Case of the Kichwa Indigenous People v. Ecuador*, Judgment including, merits and reparations. Judgment of 27 June 2012. Series C no 245, para 263 p.74.

[250] *Case of the Kichwa Indigenous People v. Ecuador*, Judgment including, merits and reparations. Judgment of 27 June 2012. Series C no 245, para 278 p.77.

[251] *Case of the Kichwa Indigenous People v. Ecuador*, Judgment including, merits and reparations. Judgment of 27 June 2012. Series C no 245, para 229 p.65.

[252] *Case of the Kichwa Indigenous People v. Ecuador*, Judgment including, merits and reparations. Judgment of 27 June 2012. Series C no 245, para 293 p.80.

expenses. The Court has time limits for when the payments need to be done and it highlights that it is important that the money goes to whatever the indigenous community decides it to go to, but suggests it goes to implementation of different health, educational, food security etc. initiatives[253]

### 5.4.3 Key takeaways

The case is of importance since the Court held that Ecuador had breached the rights to consultation, cultural identity and communal property when Ecuador granted permission for oil exploration to a primate oil company without consulting with the Kichwa Indigenous Peoples. The Court put a lot of its effort into the effectiveness of judicial mechanisms and the general argumentation that can be understood is that it does not matter if mechanisms are in place to protect rights if the mechanisms are not efficient, functional in reality and serve its purpose. This goes in line with the IACtHR general approach of focusing on purpose and functionality and that the rights must be understood in the light of the current settings in the world and those interests that it serves to protect.

The Court also concluded that Ecuador did not provide an effective remedy to address the juridical situation that had been violated. The Court sets up high standards for the State to comply with the ACHR, which is positive for the future judicial development of effective access to justice. The Court also covers that the execution of filing for remedies needs to be executed through effective judicial protections. This is positive since it shows that the Court has a focus on the whole judicial process, from consultation to access to remedies, which is something that not all legislative framework focuses on. Therefore it is of great importance that the Court can set the standard for the future that it is not only the consultation part that is important for indigenous peoples to access justice, but rather the access to judicial process and remedies.

What is also worth noting is that the Court, as usual, refers intensively to previous Court cases, UNDRIP, ILO 269 etc. which shows that even though other legislative frameworks are not as concrete and binding for States as the ACHR directly, when IACtHR argues in their judgements, other legislations are frequently referred to and by that binding for States since it is used in the light of interpret the ACHR. This can also be seen as a way of showing the importance of customary law as a source apart from the conventions and treaties when it comes to the rights of indigenous peoples, which in many reports have been

[253] *Case of the Kichwa Indigenous People v. Ecuador*, Judgment including, merits and reparations. Judgment of 27 June 2012. Series C no 245, para 317, 323, 331 pp.86, 88-89.

highlighted as an important step for indigenous peoples to access justice. The Court also stipulated several reparation mechanisms, which shows its intention to make a real difference with the judgments.

## 5.5 Case of the Xokleng peoples v. Brazil (2023) - Brazil's Supreme Court

The case concerned a land rights dispute in Brazil where the Xokleng people got evicted from their lands. The case concerned the time limit argument that would have required indigenous peoples to prove that they legally contested or occupied the claimed territory before the Brazilian Constitution came into force in 1988 to have a right to their lands.

### 5.5.1 Background

There are almost 2 million indigenous peoples in Brazil and they constitute an important part of the country. They have fought for their rights since the Portuguese colonisation era 500 years ago and many of the legal fights have concerned the protection, recognition and autonomy of their lands, which have been a central struggle for the indigenous peoples in Brazil. Due to indigenous peoples' close connection to the Amazon forest and its preservation, the recognition of indigenous peoples' rights in Brazil affects the whole world. An important landmark case concerning land rights that is not from the IACtHR, but from the Brazilian Supreme Court is the case of the Xokleng Peoples, an indigenous community of 2,300 people living in the highlands of Santa Catarina in Brazil. The case began in 2009 when the state of Santa Catarina evicted the Xokleng peoples from lands where they currently resided alongside two other indigenous groups. Since the IACtHR exercises a purpose-focused approach and extensively refers to other court decisions, legislation, declarations, reports etc., it is of relevance to mention the Xokleng case since it is seen as a landmarking case that will have a great effect in the future on indigenous peoples' right to their lands, territories and resources. It was declared that the case would have general repercussion status, meaning that the decision would serve as a precedent to similar cases.[254]

[254] Kiya-Amos Flom, 'Triumph and Turmoil: The Xokleng Case and the Future of Indigenous Land Rights in Brazil', (Columbia Journal of Transnational Law, 17 October 2023), available at <https://www.jtl.columbia.edu/bulletin-blog/triumph-and-turmoil-the-xokleng-case-and-the-future-of-indigenous-land-rights-in-brazil> accessed 19 May 2024.

### 5.5.2 Judgment

The Xokleng cases' central question was whether the Santa Catarina state's time limit argument that would block the right to land for indigenous peoples that did not live on it in 1988, was legit or not. This would have required indigenous peoples to prove that they legally contested or occupied the claimed territory before the Brazilian Constitution came into force in 1988, which would have been problematic since many indigenous peoples were forcibly removed or were nomadic. The Brazilian Supreme Court rejected the time limit argument with 9 out of 11 in favour. The case sets new standards for similar cases and will also have a negative effect on anti-indigenous legislation.[255]

### 5.5.3 Key takeaways

The case is of importance for several reasons, first of all, the case is seen as a landmark case and will serve as a precedent to similar cases. Since the ruling was in favour of indigenous peoples and highlights their connection and rights to their ancestral lands, it will strengthen the rights of other indigenous communities in Brazil and be helpful in the work against the anti-indigenous legislation. On a more holistic level and depending on its recognition, it can potentially serve as customary law and the IACtHR will likely take into account the judgement in future cases concerning land rights. The denial of the time limit argument will strengthen indigenous access to justice since it will ease the process of accessing indigenous land in the future. The right to land can also be seen as a remedy since the Xokleng people now can access their lands again. However in reality the case lasted for many years and was a winding road for the indigenous peoples involved. Even if the case hopefully will be of benefit to similar cases in the future, it is clear that it is not effective access to justice and remedies when the judicial process lasts for 14 years as in this case. What is also concerning is that there is so much anti-indigenous legislation and interest going on in the society, that risks overwhelming the indigenous community in the future with the administrative burden to exercise their right in reality.

[255] Kiya-Amos Flom, 'Triumph and Turmoil: The Xokleng Case and the Future of Indigenous Land Rights in Brazil', (Columbia Journal of Transnational Law, 17 October 2023), available at <https://www.jtl.columbia.edu/bulletin-blog/triumph-and-turmoil-the-xokleng-case-and-the-future-of-indigenous-land-rights-in-brazil> accessed 19 May 2024.

# 6 Analysis

There are many challenges to ensuring effective access to justice and remedies for indigenous peoples on the American continent in the light of their rights to lands, territories and natural resources. The American continent has been at the forefront of the development of the rights of indigenous peoples and the IACtHR has been a central part of that. To answer the research questions in section 1.2, the analysis will start by answering the three sub-research questions and then answering the main research question. A deeper analysis of each court case can be found in each "key takeaway" section in Chapter 5.

***How do indigenous people on the American continent experience access to justice connected to their rights to lands, territories and natural resources?***

In general, indigenous people on the American continent can possibly experience more extensive protection of their rights and access justice and remedies, than indigenous peoples in other parts of the world due to the extensive legislative framework, case law and willingness to protect and develop the rights of indigenous peoples on the American continent. However no matter where in the world, indigenous peoples may face obstacles due to the collective approach when a lot of legislation is formulated as individual rights. This is discussed in the *Saramaka case* and the formulation of rights in legislation may increase the power imbalance between States and indigenous peoples. This since it might create wider gaps for indigenous peoples to effectively exercise their rights by an increased administrative burden that such obstacles create. The respect and recognition of indigenous peoples' judicial personality is therefore crucial for the future since it is something that is a common hindrance for indigenous people to access justice.

However, the collective approach can also be problematic in other ways and hinder exercising individual rights which is of importance, especially from an equal perspective and to protect people in the indigenous communities that are of less power in general such as women, children or people with other sexual orientation to mention a few. This is an area that does not have very much guidance and is not expressed in most of the legislation for indigenous peoples on the American continent.

Being marginalised even before a dispute, indigenous peoples have faced many barriers to accessing fair and effective justice. Examples of this such as language barriers, collusion between the private sector and the state, lack of harmonisation between

international human rights law and international investment law, discrimination, some legislation such as colonial doctrines discriminate against indigenous peoples which risks affecting current legislation, geographical remoteness, cultural differences and lack of economic resources. Their dependence on their lands, territories and natural resources makes indigenous peoples very vulnerable if a dispute takes place and in general, they have faced many hurdles that non-indigenous peoples probably will not face.

***What protection to ensure effective access to justice is afforded to indigenous people on the American continent by the legal framework?***

The American Convention on Human Rights is the most central legislation since it is legally binding for states that have ratified the Convention, it offers extensive protection of rights, the inclusion of articles that concern access to justice and remedies and its application by the IACtHR. The ACHR includes important rights for indigenous peoples such as Article 3 (the right to judicial personality), Article 8 (the right to a fair trial) and Article 25 (the right to judicial protection). This is crucial since there are no other legislations regarding indigenous rights that give that protection. Also, ILO 169, which is binding for states just as the ACHR, is of importance since it is frequently cited by the IACtHR. ILO 169 addresses indigenous peoples' right to free, prior and informed consent, their participation in the decision-making process and collective rights, which help access justice to a higher extent. However, the Convention itself may have little purpose since so few states have ratified it.

Both UNDRIP, ADRIP and UNGA have a positive influence on access to justice since it is possible to argue that it constitutes customary law to at least some extent. This is positive since customary law is a central part of indigenous peoples' rights. However, there are no judicial procedural mechanisms in those frameworks or state obligations since they are not legally binding, meaning that in reality, it will probably not help out very much for indigenous peoples to access justice more effectively. UNGA has been viewed as a guidance framework for corporations, but since corporations have no real responsibility to UNGP, corporations can easily get away. There is still a heavy reliance on national legislation or investment law for corporations to take responsibility for their actions that may have harmed indigenous communities. Lastly, the relatively new Escazú Agreement that focuses on access to justice in environmental matters, the right of public participation in environmental decision-making and the right to access environmental information will be interesting to follow since there are no court cases yet to this date that refers to the treaty, but it has great

potential for also being part of customary law and increase the access to justice for indigenous peoples in the future.

The downside of international legislation is the lack of mechanisms if a state breaches legislation and that the treaties/conventions that have such mechanisms first must be ratified by the state, which may not always be in the interest of the state especially for states that tend to not respect the rights in the legislative frameworks. It creates a catch-22. Overall, the legal framework is extensive, but the main issue that remains is the access to judicial procedures and for this to function in the future, there is a need for reprisals for states that do not follow through with example a judgment from the IACtHR. Otherwise, it risks continuing long-lasting legal procedures that in reality only have a symbolic value.

***How has the case law of the Inter-American Court of Human Rights progressed the rights of indigenous people to access justice in the light of rights to lands, territories and natural resources?***

As discussed under the respective case in section 5, the case law of the IACtHR has progressed the rights of indigenous peoples to access justice in the light of the right to lands, territories and natural resources in a positive way. The purpose and practical focused approach by the IACtHR in their reasoning is positive in the sense that it will benefit indigenous peoples in the affected communities in the future, that will both experience better living standards, as well as more effective access to justice. However, the main issue here is that nothing will happen if the States do not follow through with the judgment by the Court. Hopefully, a situation like that makes the state look like it's breaching the rule of law concept or other states can put political and economic pressure on the state to follow through. What is also interesting is the focus on reparation mechanisms that are not only monetary. The Court focuses on communities as a whole and in most cases suggests different types of development programs that would be life-changing for an indigenous community if implemented by the State. For example, the increased educational level of the population would mean that people more easily can access the ordinary judicial system in the future and thereby more effectively access justice.

Each case contributes to the case law development, however in general, all cases put a lot of weight on the participation and inclusion of indigenous peoples in disputes and the importance of respecting their way of living, customs and close connection with their lands. However, even if the IACtHR's judgment is in favour of the indigenous peoples, the IACtHR

does not focus on the part of which the community opinion is the last saying, rather it is the inclusion of them in the process that is the main focus. The Brazil case was in line with the view of the IACtHR and will hopefully influence the IACtHR in the future. Ironically, all cases have been long-lasting processes, which is not an efficient way of accessing justice. In the future, more disputes can hopefully be resolved on a national level in a shorter time frame, which is also important for effective access to justice.

***What are the challenges to ensuring effective access to justice for indigenous people on the American continent in the light of rights to lands, territories and natural resources and how can these challenges be resolved?***

One challenge is that even though many States formally have recognised indigenous land rights and rights to natural resources in legislation, there remains a wide gap between formal recognition and actual implementation. There are several ways to deal with this issue. One way is for the general public to put more pressure on states to implement and make sure that the rights get respected in reality and not only on paper. However, this can be controversial in countries where there is high political tension and reprisals for people who express their opposing opinion to the power, which is not uncommon since the indigenous peoples are experiencing just the same headwind. Another way to deal with such problems is for the states themselves to realise that there is a need for greater implementation and that they hold the power to do so. This is not uncommon for states that have decided to evolve in a way where they want to support and strengthen indigenous peoples' rights such as in Canada. Some countries may only need practical tools and guidance to realise the implementation more efficiently.

Another challenge that should not be underestimated is the fact that money talks. The question of effective access to justice can not only be seen as an evolving right that everyone is on board with since many interests are different from those that would benefit indigenous peoples the most. The green transition can possibly be of benefit for indigenous peoples that can earn money on the natural resources they possess on their lands, however, the transition also creates an increased demand for certain sources of natural resources such as various minerals. Indigenous communities risk being more marginalised in such situations when large corporations with money and lawyers want to get hold of natural resources on indigenous territories. This risks making it harder to access justice for indigenous peoples who do not have the finances and knowledge the large corporations have. It is important for states to understand the increased risk for indigenous peoples not being able to effectively access

justice in the future and that indigenous peoples serve an important part of the green transition and in the work towards achieving the Sustainable Development Goals and Agenda 2030 with their unique knowledge about their lands, territories and resources. States therefore need to welcome and include indigenous peoples in such projects, already from the discussion stages and to make a real change, not only consult with indigenous peoples, but rather also respect their opinion as a final saying if, for example, an indigenous community oppose a potential mining extraction project on their lands. At the same time, states need to increase indigenous peoples' standards and use their knowledge about the preservation of the environment to fight climate change and sustainability goals.

Another challenge is that within the indigenous communities, some people risk getting it even harder to access justice since it is often men who are part of negotiations and decide where the indigenous community stands in the matter. Women might fall even further behind in the decision-making process and inequalities to access justice within the indigenous communities may increase with the green transition. To deal with such potential issues, it is important to evolve more legal mechanisms that protect women and other marginalised people within the indigenous communities and that indigenous communities get extra financial and judicial support to enable effective access to justice.

The existence and recognition of dual legal systems, one being the official one and one being the indigenous one, can help indigenous peoples access justice more effectively in the future. Including the indigenous peoples' judicial procedures that they are already familiar with, can close the gap to access the state official judicial system and also help to make sure indigenous special ways of living and their customs get respected. However, it can also be problematic if there are conflicts in the judicial systems such as different ways of solving disputes, how to judge evidence and different administrative proceedings. Another issue with several legal systems is when it comes to disputes with large transnational corporations, where the home of jurisdiction is not clear, which risks creating a loophole for the indigenous peoples to effectively access justice when they already face difficulties when it comes to this. To solve this issue, it is important that states take responsibility and put extra effort into implementing mechanisms in their national judicial systems that take these risks into account. The legal architecture risks making it ineffective for indigenous peoples to access justice.

To sum it up, unfortunately, indigenous peoples on the American continent face many challenges to effective access to justice in the light of rights to lands, territories and natural resources. They face more barriers than non-indigenous peoples, get marginalised,

discriminated and used by states and corporations and get stuck in time-consuming and complicated legal procedures. They also face problems with not getting their judicial personality and legal system recognised and respected and the reparation mechanisms might not be enough in relation to the effects of the breaches of rights that they have experienced. However, work has been done to deal with these challenges and only the future can tell if this is enough to solve the challenges, fingers crossed that so is the case and more work will hopefully be done on both national and international levels. If there is a will, there is a way.

# 7 Conclusion

Indigenous peoples are people with special traditions and ways of living, close connections to their lands, natural resources and territories and serve an important role in the ongoing climate change and green transition due to their unique knowledge of nature. This is especially present on the American continent which inhabits many indigenous communities that live on lands with great natural resources. Together with the existence of extensive jurisprudence and legislation, these were the main reasons to look into the rights of indigenous peoples on the American continent. However indigenous peoples have experienced a lot of injustice in the past. They have been marginalised, discriminated against and excluded from the ordinary judicial systems and because of that, their access to justice has not been efficient. Justice is not only the mere access to Courts but rather the full judicial process to get their rights respected and fulfilled, including having a juridical personality, a fair trial, judicial protection and also accessing reparations when rights are violated.

The thesis has looked into this area and has found an extensive jurisprudence by the IACtHR that is purpose and functionality-focused in their arguments and has a perspective that lasts longer than the actual case, including a preventive approach as well in their judgements. The legislative framework is extensive and there are mechanisms for states that do not comply with the legislation. However, the majority of them do not serve as legally binding for states. All cases presented in this thesis are conflicts that have lasted for many years and even though the Courts have concluded violations against rights, it is not an effective way to access justice when the time frame is so long. The struggle to include indigenous peoples in various ways such as in the consultation process, accepting their parallel judicial systems, respecting their close connection with their lands, territories and natural resources, unique knowledge and ways of living are just to mention a few obstacles indigenous peoples face to access justice more effectively. Overall, the situation is better than

it was in the past and there are more focus and resources targeted to help indigenous peoples access justice more effectively, but there is still a great need for states to take increased responsibility and for mechanisms to continue evolve to make the situation better in the future to effectively access justice.

The thesis has focused on the rights of indigenous peoples in the American continent, however since indigenous peoples are present all over the world, it would be of interest to do similar studies for other geographic areas such as looking into the jurisprudence of the African Court on Human Rights and the European Court of Human Rights, to further understand the efficiency in accessing justice and what differences can be seen depending. Another area that would be interesting to look into is the protection mechanisms for people at extra risk of getting marginalised within the indigenous communities, such as women, young people and LGBT people. This would be interesting since the current focus in the legislation and by the Courts is the indigenous communities as a whole and not the individuals within the communities. What is also needed is to further understand the national protection of rights and access to justice and why it is so problematic for many indigenous communities to seek justice within their national judicial system.

A lot of work has been done in the last decades in favour of indigenous peoples which is very promising, however, there is still a great need for states to also adjust their national legislation, follow through with the judgments of the IACtHR, including and respect the indigenous peoples and respect their own judicial functions, traditions and special ways of living. The future ahead will be a challenge for the indigenous communities with the increased demand and interest for lands and natural resources that belong to the indigenous peoples and unfortunately, more conflicts will likely arise in the future. Therefore the pressure is on and the United Nations will continue to serve an important role in protecting indigenous peoples' rights hopefully more states will take responsibility in the future and show the way to a more equal world where everyone's rights get respected not only on paper.

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