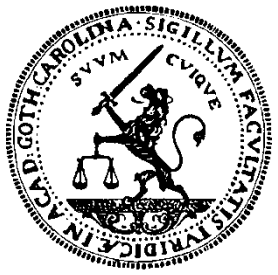

FACULTY OF LAW
Lund University

Jack Musgrave

Indigenous Peoples and Internal Displacement: A Legal No Man's Land?

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CONTENTS

Summary

"*Cultural identity is closely linked to their ancestral lands. If they are deprived of them, by means of forced displacement, it seriously affects their cultural identity, and finally, their very right to life lato sensu...*" (Sawhoyamaxa Indigenous Community v. Paraguay)

In the last five decades a movement calling for the protection of indigenous peoples' rights has precipitated in a wave of international human rights law that attempts to mitigate against the disintegration of indigenous peoples' culture caused by external agitators. Occurrences of outside agitators on indigenous communities has resulted in an increase in internal displacement. During internal displacement indigenous peoples find themselves in a double-bind of vulnerability. Firstly, vulnerable to human rights abuses as a direct result of internal displacement, and secondly, they are marginalised, excluded from consultation and assistance, and denied cultural expression due to long-standing structural discrimination. As such, internal displacement can lead to cultural disintegration, most prominently in situations of forced eviction and protracted displacement. The safety net of legal protection for indigenous people during internal displacement is stunted within international human rights law. The Guiding Principles on Internal Displacement (GPID or Guiding Principles) represents the foremost attempt at international law to uphold human rights during internal displacement, but in many respects, is the master of its own undoing. As such, the first part of this thesis will determine the scope of these Guiding Principles as they intersect with indigenous peoples' rights, and then examine these against the Declaration on the Rights of Indigenous Peoples (UNDRIP) and the International Labour Organization Convention Concerning Indigenous and Tribal Peoples in Independent Countries 1989 (ILO Convention no. 169). This analysis will traverse the legal landscape for the human rights norms that seeks to protect indigenous peoples during internal displacement, and ultimately will identify the extent to which a legal 'no man's land' exists.

The second part of this thesis will put into focus the developments of indigenous peoples' rights flourishing within the regional jurisdiction of the Organization of American States (OAS), referencing case law and advisory opinions which assert justiciable rights for indigenous peoples. Using reasoning by analogy, the jurisprudence of the Inter-American Court of Human Rights (IACtHR) will lay claim to *sui generis* rights for indigenous peoples in all instances of internal displacement, not limited to the most common occurrence of forced eviction but to include internal displacement induced by conflict, generalised violence, disasters and climate change. The legal basis for this rests upon indigenous peoples' cultural and spiritual connection to their ancestral land, placing them in a unique 'genus' as rights holders. To strengthen this claim, it will be argued that ILO Convention no. 169 and UNDRIP operate in the same legal space, which is integrative, compatible and harmonious with the jurisprudential developments of the IACtHR. In light of the findings of this thesis, a case study on conflict in Colombia will be presented, which endorses a 'realist' and *pro homine* methodology to offer one mode of application for the rights of indigenous peoples during internal displacement.

Keywords: Indigenous peoples, human rights, internal displacement, Guiding Principles on Internal Displacement, UNDRIP, ILO Convention no. 169, Colombia

Resumen

"La identidad cultural está estrechamente relacionada con sus tierras ancestrales. Si son despojados de ellas, por medio del desplazamiento forzoso, afecta gravemente su identidad cultural y finalmente, su derecho mismo a la vida lato sensu…"

En las últimas cinco décadas un movimiento llamando a la protección de los derechos de los nativos ha precipitado una ola de instrumentos de derechos humanos internacionales que intentan mitigar contra la desintegración de la cultura de los nativos ocasionada por agitadores externos. Las ocurrencias de agitadores externos en comunidades indígenas han resultado en un incremento en el desplazamiento interno. Durante el desplazamiento interno los indígenas se hallan en doble vínculo de vulnerabilidad. Primero, vulnerables a los abusos de los derechos humanos como resultado directo del desplazamiento interno, y, en segundo lugar, están marginalizados, excluidos de consulta y asistencia, y negados la expresión cultural debido a la discriminación estructural arraigada. Como tal, el desplazamiento interno puede conducir a la desintegración cultural, mayormente predominante en situaciones de evicción forzada y desplazamiento antiguo. La red de seguridad de protección legal para la gente nativa durante el desplazamiento interno es retrasada dentro de la ley de derechos humanos internacionales. Los Principios directivos en Desplazamiento Interno (GPIDO o Principios Rectores) representan el intento principal en la ley internacional para defender los derechos humanos durante el desplazamiento interno, pero en muchos aspectos, es el maestro de su propia ruina. Como tal, la primera parte de esta tesis determinará el alcance de estos Principios Rectores a medida que se entrelazan con los derechos de los indígenas y luego se examinan estos contra la declaración de los Derechos de los Pueblos Indígenas (UNDRIP) y la Convención de la Organización de Labor Internacional con respecto a los Pueblos Nativos y Tribus en Países Independientes 1989 (ILO Convención no. 169). Este análisis recorrerá el escenario legal para las normas de los derechos humanos que buscan proteger a los pueblos indígenas durante el desplazamiento interno, y finalmente identificará la extensión a la que existe la "tierra de nadie" legal.

La segunda parte de esta tesis se enfocará en los desarrollos de los derechos de indígenas floreciendo dentro de la jurisdicción regional de la Organización de los Estados Americanos (OEA), referenciando la ley de l caso y las opiniones consultivas que afirman los derechos justiciables para los nativos. Usando el razonamiento por analogía, la jurisprudencia de la Corte Interamericana de Derechos Humanos (IACtHR) presentará reclamación a los derechos *sui generis* para los indígenas en todas las instancias del desplazamiento interno, no limitado a la ocurrencia más común de despojo forzado sino para incluir el desplazamiento interno inducido por el conflicto, violencia generalizada, desastres, y cambio climático. La base legal para esto yace sobre la cultural de los pueblos indígenas y la conexión espiritual a su tierra ancestral, colocándolos en un "género" único como titulares de los derechos. Para fortalecer esta reclamación, se argumentará que la Convención ILO no. 169 y UNDRIP operarán en el mismo espacio legal, que es integrante, compatible y armonioso con los desarrollos jurisprudenciales del IACtHR. A la luz de los hallazgos de esta tesis, un estudio caso sobre el conflicto en Colombia será presentado, que trata una metodología "realista" y *pro homine* para ofrecer un modo de aplicación para los derechos de los indígenas durante el desplazamiento interno.

Palabras Claves: Pueblos Indígenas, derechos humanos, desplazamiento interno, Principios Rectores sobre el Desplazamiento Interno, UNDRIP, Convención ILO no. 169, Colombia.

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Abbreviations

ACHR	The American Convention on Human Rights 1969
ADRDM	The American Declaration on the Rights and Duties of Man (‘Bogota Declaration’)
ADRIP	The American Declaration on the Rights of Indigenous People
CAT	Convention Against Torture
CCC	Corte Constitucional de Colombia (Colombian Constitutional Court)
CEDAW	Committee on the Elimination of Discrimination Against Women
CERD	Committee on the Elimination of Racial Discrimination
CRC	Convention on the Rights of a Child
CESCR	Committee on Economic, Social and Cultural Rights
EMRIP	Expert Mechanism on the Rights of Indigenous Peoples
FARC	Fuerzas Armadas Revolucionarias de Colombia
GPID	Guiding Principles on Internal Displacement
HRC	Human Rights Council
HRBA	Human Rights Based Approach
IACHR	Inter-American Commission on Human Rights
IACtHR	Inter-American Court of Human Rights
IDMC	Internal Displacement Monitoring Centre
ICJ	International Court of Justice
ILO	International Labour Organization
LGBTQI	Lesbian, Gay, Bi-sexual, Transgender and Queer Individual
OAS	Organization of American States
OCHA	UN Office of the Coordination of Humanitarian Affairs
RAAN	North Atlantic Autonomous Region of Nicaragua
UN	United Nations
UNCHR	United Nations Commission on Human Rights
UNDP	United Nations Development Programme
UDHR	Universal Declaration of Human Rights
UNDRIP	The United Nations Declaration on the Rights of Indigenous People
UNHCR	United Nations High Commissioner for Refugees
UNPFII	United Nations Permanent Forum on Indigenous Issues
VCLT	Vienna Convention on the Law of Treaties

1. Introduction

1.1 Background

In the modern era there is an acute and increasing problem of internally displacement. Internally displaced persons (IDPs) have been forced to flee their homes for a myriad of reasons, such as, conflict, generalised violence, forced eviction, climate change or disasters within the borders of their own countries, and outside the protection of the 1951 Refugee Convention.[1] In 1982, the ratio of refugees to IDPs was 10:1, and as at the end of 2017 there are almost twice as many IDPs to refugees.[2] At the end of 2018 more than 40 million people were internally displaced and 17 million new IDPs as a result of climate change and disasters, within an overall catchment of 70 million people being forcibly displaced globally.[3] The most vulnerable among these are children, women, ethnic minorities, indigenous peoples, LGBTQI people, the disabled and the elderly.

There are around 370 million people who identify as indigenous globally, 70% of which live in Asia.[4] The challenges facing indigenous peoples are multifaceted and pressing, for instance, there is an urgent call to address endemic poverty within indigenous communities, who make up one third of the globes extremely rural poor.[5] Compounding this, indigenous peoples are at an increased risk of '*...structural discrimination, globalization, land dispossession, displacement, militarism, vulnerability to natural disasters and climate change.*'[6] While this may be the reality in one sense, the agency of indigenous peoples' way of life ought to be acknowledged and respected. Indigenous peoples' have themselves been the greatest agents for resistance against displacement due to land grabbing, deforestation, pollution, expansion of agribusiness, mining, oils and gas exploration, dams and

[1] For the Refugee Convention to be operative, an individual would need to cross an international border.
[2] UNHCR, '*Figures at a Glance*', Sourced 10 February 2019, (available at https://www.unhcr.org/figures-at-a-glance.html).
[3] Internal Displacement Monitoring Centre (IDMC), (available at http://www.internal-displacement.org/database on 14 February 2019).
[4] International Fund for Agricultural Development (IFAD) (available at https://www.ifad.org/en/indigenous-peoples).
[5] Collings, N. '*Environment*' in '*State of the World's Indigenous Peoples*', Department of Social and Economic Affairs, Division for Social Policy and Development. Secretariat for the Permanent Forum on Indigenous Issues, New York: United Nations. 83–128, (available at www.un.org/esa/socdev/unpfii/documents/SOWIP/en/SOWIP_web.pdf). See McGregor, D. 'Living well with the earth: Indigenous Rights and the Environment' in '*Handbook of Indigenous Peoples*' Routledge International Handbooks, 1st ed. (2016).pp.170.
[6] UNDP 'Indigenous Peoples', (available at https://www.undp.org/content/undp/en/home/2030-agenda-for-sustainable-development/peace/governance/indigenous-peoples.html).

infrastructure. Within international development and western academia there persists a false narrative that indigenous peoples are vulnerable, poor and on the brink of extinction[7] or that indigenous peoples' lives are at the peril of mining companies and large corporations, with States unwilling or unable to prevent rights being trodden upon. This lays-out the ideal underdog/ David and Goliath plotline for international NGOs, media and advocates to paint indigenous peoples into a victimhood narrative without providing indigenous peoples true agency or voice, nor does it provide traction for advocating other issues relevant to indigenous communities. At best this narrative is unhelpful and at worst it is detrimental to indigenous peoples' survival. Underscoring the above quotation are complex forces that form indigenous peoples' experiences, and so 'indigenous peoples' are not to be framed as a monolith or generalised in this thesis, for this is bereft of substance and nuance. As such, this sentiment encapsulates the motivation for this thesis. Therefore, this requires conducting a holistic survey of international, regional and domestic law concerning indigenous peoples' rights, to carve-out the complexity of the indigenous peoples' experiences, rights and implementation of these rights.

There has long been a thematic discussion concerning indigenous peoples' eviction from their ancestral land, territories and resources, but limited academic attention has been given to indigenous peoples within the context of internal displacement, especially displacement precipitated by disasters, conflict and climate change. This thesis will attempt, among other aims, to explore this thematic discussion and dispel the inclination to differentiate between causes of displacement, as this is counterproductive to the protection of IDPs. The UNHCR says that, '*Nowadays it is meaningless to trace a strict line between voluntary and enforced displacement of persons, because the motives for migration are complex and imply a combination of political, economic and social factors*.'[8] Additionally, the displacement of indigenous peoples, in any form can lead to loss of cultural heritage (in both tangible and intangible ways) and this is in part due to being displaced but also due to the 'ethno-normative' constructs of displacement.[9] So in this sense, placing particular emphasis on

[7] Anaya, S. J. '*Indigenous Peoples in International Law'*, Second Edition, Oxford University Press (2004).pp.56.
[8] Advisory Opinion 18, IACtHR, Oral Statement of the UNHRC.
[9] European Parliament resolution of 3 July 2018 on *'violation of the rights of indigenous peoples in the world, including land grabbing'* (2017/2206(INI)) P8_TA-PROV(2018)0279.
Callirogs, J. C. '*Neoliberal Discourses and Ethnonormative Regime in Post-recognition Peru: Redefining Hierarchies and Identities*', Cultural Studies 32(3), (2018). '*The ambiguities of the ethnonormative regime in Peru may serve as a diversion from structural issues in a context of neoliberalism and may re-elaborate racial hierarchies, racism and the narratives of mestizaje it allegedly opposes*.'

indigenous peoples' experiences during internal displacement and examine the law that protects them in these situations is crucial to uncovering the root causes of indigenous peoples' vulnerability.

This thesis will trace the Guiding Principles on Internal Displacement, ILO Convention no. 169, the United Nations Declaration on the Rights of Indigenous Peoples and the Pinheiro Principles for the scope of international legal protection that is applicable for indigenous peoples during internal displacement. International law is a fragmented and surfeit space where normative gaps persist, and at present there lacks a comprehensive binding international legal protection for the internally displaced. Pushing against the welfare of IDPs is the principle of non-interference of outside actors to matters within the purview of the domestic jurisdiction of States, reflected in the doctrine of state sovereignty.[10] Unless States consent, they are not under any express legal obligation to provide humanitarian assistance outside the Geneva and Hague Conventions, and perhaps one exception is the responsibility to protect doctrine. In essence, IDPs must rely on their State to provide aid, which may be unwilling or unable to assist. This becomes especially non-sensical when considering that a refugee and an IDP may be within the same State but be entitled to different rights under international law.[11]

Until the late 20th century, indigenous peoples have largely been excluded from the expansion of international human rights law and regarded as mere objects of discussion within international law.[12] However, the tide is changing, and indigenous peoples are becoming agents of their own destiny, an 'active force' in political and social terms.[13] They wish to project a vision of their worldview that is bereft of a victim or vulnerability narrative.[14] There has been considerable movement within international human rights law to further the rights of indigenous peoples, especially when their cultural survival is at risk. It is evident that the disruption of indigenous peoples' connection to their environment is a threat to their very

[10] Anaya, S.J. *supra* note 7.pp.217. Article 2(7) United Nations Charter.
[11] In the abstract, a person entitled to refugee status crosses an international border into a neighbouring country and within this country there are internally displaced persons. Assuming the State is a party to the 1951 Refugee Convention, the hosting State is legally bound to provide assistance to refugee but is not the IDP.
[12] Gomez Isa, F. '*The Role of Soft Law in the Progressive Development of Indigenous Peoples' Rights*', in Lagoutte, S., Gammeltoft-Hansen, T. and Cerone, J. (eds) '*Tracing the Roles of Soft Law in Human Rights*', Oxford University Press (2016).pp.185. Anaya, S.J. *supra* note 7.pp.56.
[13] Callirogs, J. C. '*Neoliberal Discourses and Ethnonormative Regime in Post-recognition Peru: Redefining Hierarchies and Identities*', Cultural Studies 32(3), (2018).pp.479.
[14] Anaya, S.J. *supra* note 7.pp.56.

existence, not to mention their spiritual well-being.[15] Thus, in recognition and appreciation of the psycho-cultural impact of displacement on indigenous peoples and the cultural dislocation this can cause, we look upwards toward international human rights law to provide a safety net for indigenous peoples and a benchmark for State compliance. For this, ILO Convention no. 169, the UNDRIP and ACHR will be examined.

Running parallel with the indigenous peoples' movement is the progressive jurisprudence of the IACtHR, which incorporates indigenous understandings of the world developed using ILO Convention no. 169, the UNDRIP and the ACHR. This thesis will discuss leading cases, using jurisprudential construction and legal reasoning by analogy to apply these precedents to indigenous peoples during internal displacement in order to bridge normative gaps in international law.

In the later part of this thesis, a case study on the situation of indigenous people during displacement caused by conflict will be presented to elucidate the findings of chapters 2 and 3. Colombia has experienced extreme conflict displacement, with 6 million people displaced in a single moment in time.[16] Within this conflict, Colombia's indigenous peoples have been disproportionately affected, severing their cultural and spiritual connection to land and threatening their very survival.

1.2 Thesis Aim

Broadly speaking, the aim of this thesis is to explore, through the layers of domestic, regional, and international human rights law, the law the governs displacement and the rights of indigenous peoples within States Party to the ACHR. A strict reading of these instruments may not illicit protection of indigenous peoples during internal displacement, but this thesis will provide for differential modes of interpretation. This will require a methodology that employs a realist, contextual and *pro homine* interpretation of the legal instruments examined. Ebbing through this will be a discussion of the jurisprudential construction of indigenous peoples' rights as articulated by the IACtHR, transplanted into situations of internal displacement. Ultimately, the information amassed form this enquiry will show clearly the scope of protection for indigenous peoples and recommend durable solutions.

[15] Stavropoulou, M. '*Indigenous Peoples Displaced from Their Environment: Is there adequate protection?*' 5 Colorado Journal of International Environmental law and Policy, Vol.5, Issue 1 (1994).pp.106.
[16] IDMC, '*Colombia*', (Available at www.internal-displacement.org/countries/colombia)

1.3 Research Questions

The research questions are as follows:

1. To what extent do the Guiding Principles on Internal Displacement (GPID), the Declaration on the Rights of Indigenous Peoples (UNDRIP) and ILO Convention no. 169 protect indigenous peoples during internal displacement within the jurisdiction of States Party to the Inter-American Convention on Human Rights?
2. How has the case law of the Inter-American Court of Human Rights progressed the rights of indigenous peoples during internal displacement?
3. Is there a legal no man's land when it comes to consultation or consent rights for indigenous peoples during internal displacement?

1.4 Limitations and Terminology

The examination of the GPID will be limited to their applicability to the rights of indigenous peoples. While accepting the definition of 'internally displaced persons' in the GPID was not intended to be an authoritative or formalised definition at international law, it will be used as the basis for defining 'internally displaced person' for this thesis.[17]

There is a terminological distinction between 'internal displacement' and 'displaced' or 'displacement', as a 'displaced' person or 'displacement' could also fall into the category of 'refugee' pursuant to the 1951 Refugee Convention. Many of the findings of this thesis will be equally as applicable to indigenous refugees, but this is not within the ambit of this thesis.

The term 'natural' disaster is a misplaced phrase, insinuating a disaster as representing an act of God, thereby divorcing liability of the State to protect its citizens.[18] Under international law, the State is responsible to ensure the protection of its citizens during internal displacement.

While this thesis will mention land-grabbing, economic land dislocation, forced eviction due to large-scale development projects or extractive industries, this thesis will primarily be focused on 'internal displacement' of indigenous peoples as defined in the GPID which encompasses wider catalysts for displacement. It is acknowledged that indigenous peoples may be 'displaced' due to the abovementioned reasons within the scope of the definition of the GPID, however, the focus of this thesis is to shed light on situations of conflict, disaster and climate change displacement. The reason being is that, academic discourse has largely been

[17]GPID '*Introduction: Scope and Purpose*' §2
[18] Klein, N. '*Shock Doctrine: The Rise of Disaster Capitalism*' (2007) New York: Metropolitan Books.

focused on displacement caused by land-grabbing, economic land dislocation, and forced eviction due to large-scale development projects or extractive industries.

The American Declaration on the Rights of Indigenous Peoples (ADRIP) will be excluded from discussion, as it does not fit neatly into the scope of this thesis, nor does it directly address displacement. Plus, most of ADRIP overlaps with the UNDRIP.

The African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa (Kampala Convention) and Great Lakes Region: Protocol on the Protection and Assistance to Internally Displaced Persons (Great Lakes Protocol) will not be considered in pursuit of answering the research questions, as this thesis is concerned focused on States Party to the ACHR. There will be a brief mention of both of these instruments within Chapter 2 concerning the implementation of the GPID.

'Indigenous peoples' as a term shall be defined in line with the UNDRIP (refer to the discussion on definitions in chapter 2.2.1.1 and 2.3.1.1). Multiple references will be made throughout this thesis concerning indigenous peoples in a global sense and shall only be limited to a geographical space where specified.

A discussion about the definition of 'Tribal People' in ILO Convention no. 169 is not necessary in answering the research questions but instances will arise where it is not material to differentiate between 'tribal peoples' and 'indigenous peoples'.

Rules 129 and 132 of Customary International Humanitarian Law concerning displacement will not be considered within the ambit of this thesis. There is no direct connect between the creation of these rules and the rights of indigenous peoples.

This thesis will not examine the Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security. Aspects of the guidelines touch on both indigenous peoples and displacement, however, it is too remote to be considered applicable in answering the research questions.

1.5 Methodology

This thesis will adopt an end-to-end appraisal of the law related to indigenous peoples and internal displacement beginning with international law (GPID, UNDRIP, ILO Convention No. 169 and Pinheiro Principles), working down to a regional (ACHR) and finally domestic level (Colombia).

Where appropriate, there will be analysis of the law incorporating indigenous perspectives that recognises collective rights, indigenous knowledge, cultural perspectives and traditional practices.[19]

A 'realist', 'contextual' and '*pro homine*' approach to the rights of indigenous peoples will be explored, as advocated by S J Anaya. At various points, there is a need to bridge principles, norms and articles within international law to the rights of indigenous peoples during internal displacement. Within chapters 3 and 4, the law concerning indigenous peoples will be applied by analogy and constructed to fit within contexts of internal displacement.

This thesis will incorporate principles of a Human Rights Based Approach (HRBA) to advocate for durable solutions to problems identified concerning indigenous peoples during internal displacement.

1.6 Structure

Chapter 2 describes the existing international legal instruments that govern indigenous peoples during internal displacement. This will traverse three major instruments, namely: the GPID, UNDRIP, ILO Convention no. 169 and make a brief mention of the Pinheiro Principles. The aim of this will be to not only consolidate the law into one place, but to provide some analysis of the potential of the law's application, shortfall and impact. From this, a position will be taken for the realisation of indigenous peoples' rights during internal displacement.

Chapter 3 conducts an in-depth analysis of the rights of indigenous peoples within the Organization of American States (OAS). To get to the heart of the matter, this chapter will focus on the jurisprudence and advisory opinions of the IACtHR and the role of ILO Convention no. 169 in the region. Flowing forth from this analysis is not only the scope of legal protection, but also the means by which to interpret human rights as they relate to indigenous peoples during internal displacement. Extracted from this discussion will be an attempt to apply the legal principles by analogy and through a 'realist', contextual and *pro homine* lens to all situations of displacement, beyond the instances provided in the case law.

Chapter 4 conducts a case study of indigenous peoples' experience during conflict induced internal displacement in Colombia. There will be a broad discussion of the civil war and peace process, bringing in present day issues. This will be followed by the application of the

[19] Drawn from the preamble of the UNDRIP

cumulative findings from the previous chapters to conflict displacement of indigenous peoples in Colombia.

Chapter 5 will conclude the parameters of the existence of a legal no-man's land. An analytical discussion will ensue, drawing comparisons between jurisdictions and differential legal protection.

2. International Legal Instruments

This chapter will provide a snapshot of the international legal instruments that touch upon indigenous peoples during internal displacement. The following legal instruments will be analysed, namely: The Guiding Principles on Internal Displacement, the Declaration on the Rights of Indigenous Peoples and ILO Convention no. 169. This will require placing three separate and distinct instruments in proximity to one another with a view to compare and contrast the extent of the law's reach. To round off the chapter the Pinheiro Principles will be discussed.

2.1 The Guiding Principles on Internal Displacement

2.1.1 Background

The 20th century saw an exponential increase of internally displaced persons, precipitated by generalised violence, civil wars, internal armed conflict and land-grabbing. While these is not a new phenomenon, in the era of globalised human rights and in light of mass atrocities in Rwanda and the former Yugoslavia, the problem of internal displacement was pushed to the forefront of international politics. There are countless examples of millions of IDPs unable to cross an international boarder and seek asylum, assistance or protection pursuant to the 1951 Refugee Convention, leaving them largely unprotected by governments that were unwilling or unable to uphold their human rights. While there is no international convention protection IDPs, the Guiding Principles on Internal Displacement ('GPID' 'Guiding Principles') represent a benchmark for a global commitment for the protection and promotion of human rights in the context of internal displacement.

The Guiding Principles were developed outside of the traditional inter-government treaty process, which requires State negotiations, voting, ratification and ascension.[20] There was little enthusiasm and significant consternation among States for a binding instrument and the prolonged process of treaty process would not serve to address the pressing issue of global internal displacement.[21] In addition, the legal experts working on drafting the Guiding Principles believed there was a sufficient corpus of international law which could be tailored

[20] Anaya, S.J. *supra* note 7.
[21] Cohen, R. '*Hardening Soft Law: Implementation of Guiding Principles on Internal Displacement*', ASIL Proceedings 2008, Brookings-Bern Project pp.189.

to address internal displacement. Thus began a consultation process overseen by legal experts instructed by the UN Commission on Human Rights.[22] This process drew some initial criticism and reluctance from some States, who feared the result of the Guiding Principles without full State oversight.[23] For instance, tensions arose over the perceived potential encroachment upon state sovereignty, as many States felt pushed out of the drafting process.[24]

The Guiding Principles are intended to provide government and non-government actors with an anchor to aid in providing durable solutions to internally displaced persons in need of protection. At the centre of the Guiding Principles is a reaffirmation and restatement of international humanitarian law and international human rights law, in the challenging context of internal displacement. One such restatement is an internally displaced person right to be free from torture, thus incorporating the Convention Against Torture - a *jus cogens* norm.[25]

Francis Deng, when drafting the Guiding Principles, purposefully used existing hard law within human rights and humanitarian law to create a backbone for the Guiding Principle and enure State compliance.[26] His task was to bring together a team of legal experts to compile existing international legal norms, reformulating these within the context of displacement to '*...consolidate the norms, focus attention, and, by doing so, serve an educational role*'.[27] Included within this examination was inter-government agencies and NGOs. The experts report, entitled '*Internally Displaced Persons: Compilation and Analysis of Legal Norms*'[28] concluded that significant legal grey areas and gaps existed warranting the development of a framework.[29] Deng was then mandated with the task of choosing what form this framework should take, whether legal or non-legal, which subsequently became a set of non-binding 'soft law' guidelines based on existing law.[30] Soft law lacks '*...the legitimacy and strong*

[22] Human Rights Commission Res. 1992/73, approved by the Economic and Social Council on 20 July 1992.
[23]Cohen, R. *supra* note 21.
[24]*Ibid.*
[25] Principle 12 (2) GPID.
[26] Cohen, R., Deng, F. M. '*Developing the Normative Framework for IDPs*', International Journal of Refugee Law 30 (2) 310, (2018).
[27] Kälin, W. '*Consolidating the Normative Framework for IDPs*', International Journal of Refugee Law, Volume 30, Issue 2, June 2018.pp.314.
[28] Compilation and Analysis of Legal Norms: Report of the Representative of the Secretary-General, Mr. Francis Deng, submitted pursuant to the Commission on Human Rights Resolution 1995/57, U.N ESCOR, 51st Sess., Provisional Agenda Item 9(d), U.N Doc E/CN.4/1996/52/Add.2 (1995).
[29] Schmidt, P. '*The Process and Prospects for the U.N Guiding Principles on Internal Displacement to Become Customary International Law: A Preliminary Assessment'*, Geo. J. Int'l L. 483 (2004).pp.483.
[30] *Ibid.*pp.484.

surveillance and enforcement mechanisms offered by hard law' and promotes compromised standards but it can be a precursor towards hard law or customary law.[31]

The legal experts, when drafting the '*Compilation and Analysis of Legal Norms*', identified eight clear gaps and seventeen areas of insufficient coverage for internally displaced persons.[32] Admittedly, eight instances where '*...insufficient coverage results from gaps in legal protection which occur where no explicit norms exist to address identifiable needs of the displaced.*'[33] Furthermore, seventeen areas where '*...insufficient coverage results where a general norm exists but a corollary, more specific right has not been articulated that would ensure implementation of the general norm.*'[34] The former scenario of eight clear gaps was unable to be addressed by the Guiding Principles, as to do so would require the team of legal experts to create new law without a specific existing international norm to hook into. The latter scenario of insufficient coverage was able to be addressed by carving out a principle based on already existing and generally articulated international legal norms. As such, the need to fill these gaps or further strengthen international law related to internal displacement was hamstrung by the legal expert's commitment not to act beyond their mandate or to overstate existing law.[35] The temptation would have been to interpret international law widely to maximise the bounds of protection for IDPs. At this early stage of the process, the contemplation of comprehensive and wide-ranging legal protection within a treaty was *fait accompli*, no States were willing to invest in a treaty process. Instead, the legal experts had limited agency over the interpretation of international law during internal displacement, curtailing any meaningful progressive development of law. Deng's hypothesis was to '*deduce specific norms from more general principles that are part of existing international law*'[36], but this is wholly reductive and is a *suggestive* interpretation of international law. Furthermore, the workability of the methodology of compiling international law drafted and ascended to for one purpose and then transplanted in another context is a complex task. As such, legal

[31]Kirton J.J. and Trebilcock, J.M. '*Introduction: Hard Choices and Soft Law in Sustainable Global Governance*', in Kirton, J.J. and Trebilcock J.M. (eds), Hard Choices, Soft Law: Voluntary Standards in Global Trade, Environment and Social Governance (Burlington: Ashgate Publishing, 2004).pp.6. Also, Schmidt, P. *supra* note 29.
[32] Schmidt, P. *supra* note 29.pp.483.
[33]Kälin, W. '*How Hard is Soft Law? The Guiding Principles on Internal Displacement and the Need for a Normative Framework*', 19 December 2001, Brookings Institute Project on Internal Displacement.pp.5.
[34]*Ibid.*
[35]Cohen, R. *supra* note 21.pp.189.
[36]Kälin, W. *supra* note 33.pp.6.

grey areas and gaps persist to this day, and this is acutely so for protecting indigenous peoples during internal displacement.

2.1.2 Internally Displaced Person defined

The scope and meaning of '*Internally Displaced Person*' is defined as '*persons or groups of persons*' that are '*forced or obligated to flee or leave their homes or places of habitual residence in particular as a result of or in order to avoid the effects of armed conflict, situations of generalized violence, violations of human rights or natural or made-made disasters*.'[37] Inherently, an IDP has not crossed an internationally recognised boarder.[38] This is not a complete definition and is intended to be descriptive rather than prescriptive. The use of the words '*in particular*', indicates the list of causes is not exhaustive.[39] Thus, a multitude of factors could be considered to have caused internal displacement which are not explicitly listed in the definition, such as climate change or forced eviction. The cause need only be a '*...coercive or otherwise involuntary character of movement.*'[40] The above definition of '*Internally Displaced Person*' is not a legal definition that confers a special legal status or a justiciable right actionable against a State.[41]

It is evident that IDPs are at acute risk of harm, such as, physical, sexual or physiological abuse. In addition, they are often deprived of shelter, food, health and education services. For women, children, elderly and minorities displacement renders them in a position where risk factors for human rights abuses are increased. The Guiding Principles are aimed to prevent violations of human rights by using a three-tiered approach, to include protection against arbitrary displacement before it occurs, protection during internal displacement, and protection upon resettlement.[42]

It is worth bearing in mind that humanitarian assistance and responsibility for IDPs rests primarily with national authorities of the State in which the IDPs reside, reflecting the

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[37] Introduction: Scope and Purpose of Guiding Principles on Internal Displacement 2. '*For the purposes of these Principles, internally displaced persons are persons or groups of persons who have been forced or obligated to flee or have to leave their homes or places of habitual residence, in particular as a result of or in order to avoid the effects of armed conflict, situations of generlaized violence, violations of human rights or natural or made-made disasters, and who have not crossed an internationally recognized State border.'*
[38] *Ibid.*
[39] Kälin, W. *supra* note 33.pp.2.
[40] *Ibid*.pp.2.
[41] Kälin, W. s*upra* note 33.pp.3.
[42] Kälin, W. *supra* note 33.pp.1.

principle of state sovereignty and territorial integrity within international law.[43] There is a tension between respect, protection, fulfilment and promotion of human rights law and the recognition the aforementioned international legal norms and this is starkly presented when considering the justiciability and scope of rights an IDP as comparative with a person who has refugee status.

For the purposes of this thesis, there will be a discussion of the Guiding Principles as they intersect and interact with indigenous peoples' rights in the context of the States within the OAS. It should be noted, the GPID preceded the UNDRIP in time, which may contribute to aspects of indigenous peoples' rights being overlooked. However, the draft form of the UNDRIP was considered by Special Representative to the Secretary General on IDPs (Francis Deng), when compiling the existing law for the UN.[44] ILO Convention no. 169 was operative at the time and was taken into account when the drafters cast their nets over international human rights and humanitarian law.[45]

2.1.3 Harding of Soft Law

Essential to the discussion of protection afforded to indigenous peoples during internal displacement rests largely on the premise that States will induct the GPID as part of their domestic law and policy. The drafters of the GPID envisaged the principles attaining a level of acceptance beyond a non-binding 'soft law' instrument, as each of the principles contained within the Guiding Principles reflects, reasserts or reconceptualises international human rights and humanitarian law in the context of internal displacement.

'Soft law' can be defined as instruments of a character that give rise to legal effects but may not reach the threshold of 'real law' or 'hard law'.[46] It is said to operate in a space between law and politics, merely aspirational norms that are accorded some legal status.[47] Furthermore, soft law is premised on the assumption that States may create hard law, based upon a soft law instrument, within their own jurisdiction or facilitate a consensus of norms

[43] Principles 3(1) and 25 GPID.
[44] Commission on Human Rights by the Representative of the Secretary-General in 1996 (E/CN.4/1996/52/Add.2) '*Appendix II: Compilation and Analysis of Legal Norms*' (Part II).pp.269.
[45] Kälin, W. *supra* note 33.pp.14. Also, Compilation and Analysis of Legal Norms: Part II, I.E, II.D-F in Commission on Human Rights by the Representative of the Secretary-General in 1996 (E/CN.4/1996/52/Add.2).
[46] Klabbers, J. '*The Redundancy of Soft Law*', Nordic Journal of International Law 65 (1996).pp.168. While this is not a complete definition, it will suffice for the purposes of this examination.
[47] Schmidt, P. *supra* note 29.pp.514. Handl, G.F. '*A Hard Look at Soft Law'*, Proceedings of the Annual Meeting: American Society of International Law, Vol.82 (1988).pp.37.

among States.[48] Many scholars have contemplated the prospect of the Guiding Principles becoming hard law or potentially part of customary international law.[49] This has not eventuated as, typically, soft law is formulated through State consensus, through declarations, principles or State practice. Kälin concedes the Guiding Principles could be considered in a strict sense to be 'softer than soft law', due to the lack of inter-government consultation during its creation.[50] The goal was to facilitate the hardening of the Guiding Principles by '*promot[ing] the adoption of [the Guiding Principles on Internal Displacement] through national legislation.*'[51] The hypothesis being that the 'acceptance and usage' by a State is more fundamental than the legal form of the Guiding Principles. This is not within the ambit of this thesis to fully postulate whether or not 'acceptance and usage' or 'internalisation' has occurred globally, however, it is contended that 20 years since the creation of the GPID the number of IDPs has increased exponentially eclipsing that of the number of refugees.

2.1.3.1 'Usage and Acceptance' and 'Internalisation' of the GPID

The unwillingness of States to accept and use international human rights law necessitated the creation of the Guiding Principles. The Guiding Principles are not focused on outcomes or norm implementation, and non-compliance has largely been left unchecked. Additionally, some States have been vocal objectors to the Guiding Principles, with China proclaiming the UN has not official adopted them and India asserts individual States would need to accede to them in order for them to be applicable.[52] While it is accepted the GPID have been 'internalised' and 'used' by some States, these breakthroughs have not had the envisaged impact or have had unforeseen consequences, especially concerning indigenous peoples. In advocating for the GPID, some scholars have asserted its usage within the African Union as an example of its reach. A common reference is the Convention for the Protection and Assistance of Internally Displaced Persons in Africa (Kampala Convention) which is legally binding upon States, but this fails to include any reference to indigenous peoples.[53] Additionally, the International Conference on the Great Lakes Region: Protocol on the

[48] *Ibid*.
[49] Schmidt, P. *supra* note 29. Beyani, C. '*The Politics of International Law: Transformation of the Guiding Principles on Internal Displacement from Soft Law into Hard Law'*, The American Society of International Law (2008) 102.
[50] Kälin, W. *supra* note 33.pp.6.
[51] General Assembly Res A/59/2005 §210 (Kofi Annan).
[52] Orchard, P. '*Protection of Internally Displaced Persons: soft law as a norm-generating mechanism*', Review of International Studies (2010) 36.pp.297. Statement by Mr. A Gopinathan, 56th Human Rights Council.
[53] *Ibid*.

Protection and Assistance to Internally Displaced Persons (Great Lakes Protocol)[54] implements the Guiding Principles at a sub-regional level and incorporates them into the domestic law of the Great Lakes States. However, this instrument does not explicitly include indigenous peoples within the 'special protection' or 'development-induced displacement' provisions, and inherits the deficiencies of the GPID.[55] This is disconcerting considering the extreme marginalisation and vulnerability of Africa's indigenous peoples.[56] It is not within the ambit of this thesis to examine in-depth the complexity in attempting to implement the instruments above, however, running counter to the purported achievements of the GPID is the dire situation of internal displacement and non-compliance to the GPID within Africa and Great Lakes Region.[57] As at the end of 2018, Africa has 16.5 million internally displaced people, with three million of this number within the Democratic Republic of Congo.[58] This is not to say that the number of IDPs correlates directly to human rights abuses but its certainty is an indicator of - and gives weight to - the notion that the Guiding Principles have had limited practical impact.[59] Furthermore, the African Commission on Human and Peoples' Rights has not utilised these instruments within the jurisprudence concerning indigenous peoples being displacement.[60] For indigenous peoples during internal displacement that translates to a weakness in the ability to rally States to aid IDPs or give them agency during internal displacement.

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[54] Kälin, W. *supra* note 33.pp.6. The International Conference on the Great Lakes Region is an inter-government organisation is composed of twelve member States, namely: Angola, Burundi, Central African Republic, Republic of Congo, Democratic Republic of Congo, Kenya, Uganda, Rwanda, Republic of South Sudan, Sudan, Tanzania and Zambia. The protocol was adopted and signed on 20 November 2004 (http://www.icglr.org/index.php/en/).

[55] Article 5 Great Lakes Region: Protocol on the Protection and Assistance to Internally Displaced Persons. See subsections 2.1.4-2.1.8 concerning the deficiencies of the GPID.

[56] Haleem, A., Jennings, P.W. and Phele, K.E. '*Africa*' in '*The State of the World's Minorities and Indigenous Peoples 2016: Events of 2016',* Minority Rights Group International, (2016).pp.70-96.

[57] Daley, P. '*Refugees, IDPs and Citizenship Rights: the Perils of Humanitarianism in the African Great Lakes Region*', Third World Quarterly Vol. 34, No.5 (2013).pp.895. Daley states that '*The growth in IDP numbers and their vulnerability may account for the Protocol on the Protection and Assistance to Internally Displaced Person, which was adopted on 30 November 2006 by States of the International Conference on the Great Lakes. Africa-wide recognition came on 6 December 2012, when the African Union's Convention for the Protection and Assistance for Internally Displaced Peoples in Africa, which was adopted in 2009, came into force. The existence of these legislations has not resulted in marked improvement of the situation of IDPs. Therefore, the contention here is that the potential for sustainable solutions for the forcedly displaced is dependent on three main interconnecting factors relating to citizenship and belonging: States' diversity politics, entitlement protection and international humanitarian intervention*.'
Ong'ayo, A.O. '*Displacement and Cross-Border Mobility in the Great Lakes Region: Re-thinking Underlying Factors and Implications for Regional Management of Migration',* African Insight, Vol. 48(1) June 2018.pp.63.

[58] Internal Displacement Monitoring Centre (IDMC) '*10 Million People Displaced Across Sub-Saharan Africa in 2018*', 5 May 2019 (available at http://www.internal-displacement.org/media-centres/10-million-people-internally-displaced-across-sub-saharan-africa-in-2018).

[59] Daley, P. *supra* note 57.

[60] *Centre for Minority Rights Development and Minority Rights Group International on behalf of Endorois Welfare Council vs. Kenya*, African Commission on Human and Peoples' Rights, 2009, 276/03 §1 and 17.

A discussion of the 'acceptance and usage' or 'internalisation' of the Guiding Principles will be examined within the case study in chapter 4 in the context of Colombia, which is often lauded as a State that has fully embraced the GPID. Additionally, in *Moiwana* the IACtHR develops the GPID within their decision concerning the freedom of movement but no weight is given to Guiding Principle 9, nor did any norm setting occur.[61] Unlike a treaty, the GPID does not hook into to the States decision-making apparatuses, and so, there is not a binding pre-existing norm for a rights holder to assert and enable a re-evaluation of IDP policy.[62] In an international system that comprises of decentralised sovereign Nation-States and the UN, there are constraints and opportunities to promote the GPID.[63] The enforceability of human rights norms requires an accountability nexus between rights holders (IDPs) and duty bearers (states), such as a court or monitoring mechanism, to optimise the realisation of rights. This will be further examined further in relation to ILO Convention no. 169 and in chapter 4.

A further constraint to the GPID is the incorporation of ILO Convention No. 169 as a hard law basis for the assertion of the rights of indigenous peoples, within principle 9. One discrete drawback with this legal construction is the Convention has only 23 ratifications, and it follows that to assert a guiding principle to be based on a universally accepted 'international legal norm' is misleading in this case.[64] Thus, the principles that incorporate ILO Convention no. 169 cannot be said to have the same gravitas as Principle 11(2)(b) which prohibits slavery, a *jus cogens* norm. So, in this sense, not all Principles are created equally.

2.1.4 Guiding Principles Applicable to Indigenous Peoples

From the outset of its conceptualisation, the GPID was to provide broad human rights protection to those who find themselves in situations of internal displacement. Indigenous peoples, who find themselves in situations of displacement shall not be discriminated against and have the full enjoyment of their rights and freedoms.[65] The Guiding Principles do not derogate other human rights instruments, and where applicable, the rights contained in ILO

[61] Case of the *Moiwana Community v. Suriname*, Judgement of 15 June 2005 (Preliminary Objections, Merits, Reparations and Costs) §111.
[62] Orchard, P. *supra* note 52.pp.284.
[63] Mishra, O. '*Promoting Study and Research on Internal Displacement: Role of Academic Institutions*', Refugee Survey Quarterly, Vol.19, No.2 (2000) §239.
[64] For more detailed discussion refer to subchapter 2.2.
[65] Principle 1 GPID.

Convention No. 169 and UNDRIP are operative during displacement.[66] Kälin asserts that the Guiding Principles '*reflect and are consistent*' with international law and thereby '*codify and make explicit*' what is inherent within bodies of international law and by extension indigenous peoples' rights.[67] This section is limited to the examination of the Guiding Principles that directly concern and incorporate the rights of indigenous peoples and whether Kälin's words holds water.

2.1.5 Guiding Principle 6

Principle 6 directly relates to indigenous peoples during internal displacement, it states,

'1. Every human being shall have the right to be protected against being arbitrarily displaced from his or her home or place of habitual residence.

2. The prohibition of arbitrary displacement includes displacement: (a) When it is based on policies of apartheid, "ethnic cleansing" or similar practices aimed at/or resulting in altering the ethnic, religious or racial composition of the affected population; (b) In situations of armed conflict, unless the security of the civilians involved or imperative military reasons so demand; (c) In cases of large-scale development projects that are not justified by compelling and overriding public interests; (d) In cases of disasters, unless the safety and health of those affected requires their evacuation; and (e) When it is used as a collective punishment.'

Principle 6 represents an attempt to protect against all types of arbitrary displacement from a person's '*home or place of habitual residence*'. While this provision is broad, the scope of it does not fit neatly with the notion of collective rights or indigenous peoples' worldview. Contrast the wording of the provisions contained within the ILO Convention no. 169, which adopts the usage of the phrasing '*the land which they occupy'* or '*otherwise use',* and the UNDRIPs' usage of *'territories.'* This may seem as a semantic difference upon cursory observation but in actuality it has significant legal consequences. For example, for indigenous peoples, displacement will not necessarily be limited to their '*home or place of habitual residence*' but also to the wider environment, such as, areas of spiritual or cultural practice

[66] Principle 2(2) GPID.
[67] Kälin, W. *supra* note 33.pp.viii.

and ancestral land. The usage of the term '*territories'* used in the UNDRIP encompasses the total environment of the area indigenous peoples live.[68]

Note that principle 6 lists examples of arbitrary displacement but does not provide a definition of 'arbitrary'. This section has been carefully engineered not to step outside the bounds of the international legal definition of arbitrary.[69] Generally, '*arbitrary*' denotes '*...injustice, unpredictability and unreasonableness.*'[70] Kälin, a proponent and advocate of the Guiding Principles, recognises that Principle 6 draws upon many international human rights instruments, but it ultimately '*...fails to provide adequate and comprehensive coverage for all instances of arbitrary displacement since they do not spell out the circumstances under which displacement is permissible.*'[71] Thus, the framing of this principle as a catch-all provision lacks nuance and specificity to cater to indigenous peoples during internal displacement. For instance, a situation of forced eviction by a government could be considered within the international legal definition of '*arbitrary*' but not be captured within the list of situations provided in principle 6. Thus, it is suggested here that principle 6 is indicative of the GPID as a whole, which is not intended to provide an exhaustive or even a compendious body of protection for internally displaced persons, least of all a body of law that recognises rights specific to indigenous peoples.

Nevertheless, principle 6 is an acknowledgement of the rights enshrined within ILO Convention no. 169, particularly Articles 14 and 16 (which will be discussed in greater detail in subchapter 2.3).[72] Article 16 provides a detailed prohibition against removal of indigenous peoples from lands they occupy, with caveated exceptions which call for free and informed consent. Contrast Principle 6(2)(b) of the Guiding Principles which states that large scale developments will be arbitrary, '*which are not justified by compelling and overriding public interests*', requiring no consent. More often than not, indigenous peoples are in the minority leaving the overriding public interest in favour of the majority. It is clear that principle 6 has been extrapolated and generalised out to include non-indigenous IDPs, watering down

[68]Anaya, S.J. *supra* note 7.pp.65.
[69] Kälin, W. '*Guiding Principles on Internal Displacement: Section II: Principles Relating to Protection From Displacement*', 38 Study in Transnational Legal Policy 25 (2008).pp.27.
[70] Nowak, M. '*Article 17*', in Nowak (ed.), ICCPR Commentary, 2nd edition (Kehl/Strassburg/Arlington: NP Engel Publishing, 2005) §2.
[71] Kälin, W. *supra* note 69.pp.27.
[72] While not an express reference to this article, Kälin asserts the guarantee against arbitrary displacement is reflected in Article 16 of ILO Convention no. 169 and Article 10 of the Declaration of the Rights of Indigenous Peoples.

protection. Kälin singles out principle 6 as an example of a norm of international law where the origin of the right specifically applied to indigenous peoples, which subsequently has been extrapolated out to a general norm.[73] For a non-indigenous IDP it could offer protection where there was none previously but creates a lower threshold of protection for indigenous peoples. By way of example, if Canada who is not a party to ILO Convention no. 169, wished to adopt the Guiding Principles as a standard for internal displacement, a lower standard for protection against forced displacement of indigenous peoples could be applied as *lex specialis* of international law. The Canadian government could decide that the Guiding Principles are the specialised rules or rule-system to govern this situation to the exclusion of a general rule within the UNDRIP.[74] This thesis will not be conducting a fragmentation or conflict of laws examination, this example is intended to highlight how the generality of the Guiding Principles could have unintended consequences. See 2.2.1.2 for further discussion.

Kälin asserts that in addition to reflecting sections within ILO Convention no. 169, principle 6 adopts Article 10 of the UNDRIP.[75] Broadly, this provision is a blanket ban on the forcible removal of indigenous peoples from their lands or territories. Relocation is permissible where free, prior and informed consent is agreed after compensation or the option of free return is brokered. This will be discussed further in subsection 2.2, suffice it to say that principle 6 falls considerably below this standard. Ultimately, protection from arbitrary displacement for indigenous peoples as articulated in principle 6 is significantly stunted, especially when considering alternative provisions in ILO Convention no. 169 and UNDRIP.

2.1.6 Guiding Principle 9

The Guiding Principles are intended to be applied in conformity and unity with other human rights standards.[76] While it is a soft law instrument, it carries significant weight in displacement law and policy and principle 9 is an attempt to push indigenous peoples and minorities to the forefront of this discussion. Principle 9 recognises that,

[73]Kälin, W. *supra* note 69.pp.27-28.
[74] Koskenniemi, M. '*Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*', Report of the Study Group of the International Law Commission. 13 April 2006, General Assembly (A/CN.4/L.682).
[75] Kälin, W. *supra* note 69. Article 10 was still in the drafting stage.
[76] Kälin, W *supra* note 66.pp.42.

"*States are under a particular obligation to protect against the displacement of* ***indigenous people****, minorities, peasants, pastoralists and other groups with special dependency on and attachment to their lands*"[77] [Emphasis added]

Principle 9 is a nod to Article 13(1) ILO Convention no. 169 which requires governments to respect the special importance of cultures and spiritual values of indigenous peoples and their relationship with the lands or territories which they occupy or otherwise use, and in particular the collective aspects of this relationship. When comparing the wording of these provisions, it evident that principle 9 lacks nuance and specificity. For instance, '*dependency on and attachment to*' gives little weight to an obligation on a State to respect cultural and spiritual connect to land, especially as the other groups listed in this section do not traditionally have a cultural or spiritual connection to land. The expression of '*dependency on and attachment to'* cannot be construed as synonymous with '*cultural and spiritual connection*'. Nor can this be inferred from the words, as what is expressly stated invalidates what is silent (*expressum facit cessare tacitum).*[78]

Likewise, Principle 9 is interconnected with Article 14 of the ILO Convention no. 169 which requires respect of ownership and property rights over land indigenous peoples traditionally occupy. Deng considered this provision when drafting his section, however, the wording is principle 9 is not reflective of this right.

By way of preliminary conclusion, it is evident that principles 6 and 9, from their origins in hard law to their ultimate articulation within the Guiding Principles have not strengthened the rights of indigenous peoples during internal displacement but has weakened them to a threshold below the standards of ILO Convention no. 169 and the UNDRIP. For more discussion see the chapter on ILO Convention no. 169 at 2.3.

2.1.7 Resettlement and Right of Return: Principles 14, 15(d) and 28

Principles 14, 15(d) and 28 concern resettlement and the right of return. There is '…*no general rule within international law that affirms the right of internally displaced persons to return to their original place of residence or to move to another safe place of their choice*

[77] *Ibid.*
[78] Fellmeth, A.X, Horwitz, M. '*Guide to Latin in International Law*', 1st Edition, Oxford University Press (2011).

within their own country.'[79] Thus, the right to voluntary return or resettlement with safety and dignity espoused in Principle 28 is the creation of new law, disavowing the mantra of the principles being drawn within the bounds of international law and pushes the legitimacy of the legal expert's mandate.[80] Specific rights related to return are present within the law related to indigenous peoples, such as in Article 10 of the UNDRIP and Articles 16(3) and (4) of ILO Convention no. 169. In a similar way to the previously discussed principles, the threshold for protection is lower in the GPID than within the above instruments. Further comparisons of the extent of protection during resettlement and the right of return can be drawn from subsections 2.2.4 and 2.3.4.

The freedom of movement and the right against forcible return or resettlement (principles 14 and 15(d)) attempts to prevent harm befalling an IDP who has fled their home or place of residence. This right is akin to the freedom of movement and the principle of *non-refoulment* at international law.[81] While these rights against forcible return or resettlement are clearly protective, there is not enough emphasis placed on the agency of the IDP to be part of the decision-making process. In contrast, the UNDRIP and ILO Convention no. 169 places considerable emphasis on indigenous peoples' right to consultation, and further acknowledges the spiritual connection between indigenous peoples and their traditional land, especially during relocation.[82]

Indigenous peoples in the context of displacement remains a tangential issue within human rights discourse. The ambit of the GPID in relation to the rights of indigenous peoples reflects this and significant gaps exist thereof. The pronouncement of protection against the displacement of indigenous peoples and attachment to their land is not nuanced and lacks the specificity required to reflect their *sui generis* rights. In essence, this task falls upon the State to protect indigenous peoples and to be accountable in providing durable solutions to indigenous peoples during internal displacement.

[79] Schmidt, P *supra* note 29.pp.489. UNCECSR '*Internally displaced persons: Report of the Representative of the Secretary-General, Mr. Francis Deng, submitted pursuant to the Commission on Human Rights resolution 1995/57*'(UNESC E/CN.4/1996/52/Add.2) Compilation and Analysis of Legal Norms §243.
[80] Kälin, W. *supra* note 66.pp.69.
[81] *Ibid*.pp.38.
[82] Article 10 UNDRIP and Articles 16(1)- (4) of ILO Convention no. 169.

Many IDPs have human rights protection, separate and apart from the GPID.[83] Thus, the political thrust that precipitated the creation of the Guiding Principles could be seen a reaction to the 'lack of compliance and implementation' of existing human rights and humanitarian law.[84] If a State that is not bound by ILO Convention no. 169, there lacks not only compliance and implementation of human rights law but a legal foundation from which to even assert rights. Failure to take a teleological approach to the Guiding Principles, such as advocating a HRBA, renders displaced people without protection.

2.1.8 Conclusion

The Guiding Principles are innovative, pragmatic and an achievement in the legal engineering of soft law. However, much of the success attributed to the GPID is overstated and focuses on the legal ingenuity of the instrument rather than its implementation. It will become apparent that when you drill down into it, the GPID have not advanced the situation of IDPs. States accepting the GPID within domestic and regional law and policy, as in Colombia, has not correlated in outcomes that uplift IDP's rights, particularly indigenous peoples' rights. The lack of oversight and monitoring, coupled with the generality of the provisions, has resulted weakens protection and indifference by States. What remains to be seen is a meaningful commitment by States that translates into durable solutions for IDPs.

While the Guiding Principles reflect an awareness of the differential situation of minorities in situations of internal displacement, it does not provide sufficient scope for the experiences of indigenous peoples. The authoritative tone of the Guiding Principles leads one, especially with a legal mind, to believe they command the adherence of a State. However, in reality, the Guiding Principles are one viewpoint or legal interpretation on existing international legal norms within a context that perhaps was not envisaged by the drafters of the original instrument. This is obvious when looking at the transplantation of ILO Convention no. 169 and the UNDRIP into Principles 6 and 9.

A human rights-based approach to displacement which accords to indigenous peoples' rights is desirable, especially given the developments within the IACtHR and norms divesting from

[83] ICCPR, ICESR and UDHR.
[84] Schmidt, P. *supra* note 29.

the UNDRIP. Giving agency to indigenous peoples during internal displacement should be guiding consideration when developing policy and law in this area.

2.2 The United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP)

2.2.1 Background

In 2007, the UNDRIP was adopted by the General Assembly of the United Nations after a labour intensive two-decade-long negotiation process between States and indigenous peoples.[85] The result was a comprehensive non-binding declaration, representing a global consensus on indigenous peoples' rights.[86] The rights contained within the UNDRIP are detailed, systematic and represent a landmark achievement in international human rights law.[87] This instrument is a clear pronouncement by the international community to respect the rights of indigenous peoples, which has expanded collective rights, the right to culture, self-determination, self-governance and participatory rights (including indigenous juridical systems).[88]

As with the GPID, the UNDRIP is soft law but in the traditional meaning of this terminology. As such, considerable weight should be afforded to this instrument, given the negotiation process was undertaken by the UN in conjunction with indigenous peoples and organisations, culminating in a non-binding declaration consented to by a majority of States. While there is not a monitoring body to oversee adherence to the declaration, the United Nations Permanent Forum on Indigenous Issues (UNPFII) promotes respect for and application of the UNDRIP and advises the Economic and Social Council.[89] In addition, the Expert Mechanism on the Rights of Indigenous Peoples (EMRIP) in conjunction with the Special Rapporteur on the Rights of Indigenous Peoples promotes the UNDRIP at the Human Rights Council (HRC), continuing a dialogue between indigenous peoples, States and the UN.[90] The UNDRIP has

[85] UNDRIP (A/RES/61/295), adopted 13 September 2007. Also adopted by the Human Rights Council on 29 June 2006.
[86] The majority of States votes in favour of the resolution (144 in favour, 11 abstentions and four opposed). The four States which opposed the declaration later reversed their decision.
[87] Gomez Isa, F. '*The UNDRIP: an increasingly robust legal parameter*', The International Journal of Human Rights, Volume 23, 2019, Issue 1-2.pp.7.
[88] Anaya, S.J. and Rodriguez-Piñero, L. '*Chapter 2: The Making of the UNDRIP*' in Hohmann, J. Weller, M. (eds) '*The UN Declaration on the Rights of Indigenous Peoples: A commentary*' (2018) p.38.
[89] Article 42 UNDRIP. The UNPFII meets annually to discuss and present findings on indigenous peoples' rights and each of these sessions encapsulates a theme.
[90] Examples include the publication of UN Department of Economic and Social Affairs '*The State of the World's Indigenous Peoples*' Report, (https://www.un.org/development/desa/indigenouspeoples/publications/state-of-the-worlds-indigenous-peoples.html).

been widely disseminated since its adoption to hold States to account and realise rights, such as, CERD[91], CEDAW[92] and CESCR[93].

2.2.1.1 'Indigenous Peoples' Defined

There is no internationally accepted definition of 'indigenous peoples' nor does the UNDRIP define it, which can lead to ambiguity especially in comparison to fluid terms such as 'minority', 'peoples' and 'tribal peoples'.[94] The preamble of the UNDRIP refers to indicators of indigenousness, such as, distinctive culture and language, dispossession of lands, territories and resources and pre-colonial history.[95] The most widely used definition was grafted by J Martinez Cobo during the 'UN Study on the Problem of Discrimination against Indigenous Populations'.[96] One clear marker of indigenous peoples is a common ancestry and occupation of ancestral lands which has subsequently been occupied by colonial settlers.[97] This is mixed in which the notion of 'first occupancy' of territory, pre-invasion or pre-colonisation.[98] Additionally, a further marker is 'self-identification' or a mindset of an 'indigenous group consciousness' which is reflected in culture or other manifestations (language, tribal system or means of livelihood).[99] Indigenous peoples have a distinct cultural identity and tend to '*...consolidate and strengthen the separateness...from other groups in society*.'[100] This by no means an exhaustive definition but will be the working definition for

[91] CERD, *General Recommendation 23: Rights of Indigenous Peoples*, UN Doc A/52/18 (18 August 1997).
[92] UN Committee on the Elimination of Discrimination Against Women (CEDAW), *Consideration of reports submitted by States parties under article 18 of the Convention, Combined fourth to sixth periodic reports of States parties due in 2014 : Suriname*, 30 September 2016, CEDAW/C/SUR/4-6 (available at: https://www.refworld.org/docid/5863bf654.html).
[93] CESCR, *General comment no. 21, Right of everyone to take part in cultural life (art. 15(1a) of the Covenant on Economic, Social and Cultural Rights)*, 21 December 2009, E/C.12/GC/21.
[94] Castellino, J., Doyle, C. 'Part I The UNDRIP's Relationship to Existing International Law, Ch.1 Who are Indigenous Peoples?: An Examination of Concepts Concerning Group Membership in the UNDRIP' in Hohmann, J. Weller, M. (eds) '*The UN Declaration on the Rights of Indigenous Peoples: A commentary*' (2018) p.7.
UN Economic Council '*Prevention of Discrimination Against and the Protection of Minorities: Working paper on the relationship and distinction between the rights of persons belonging to minorities and those of indigenous peoples*', E/CN.4/Sub.2/2000/10.
[95] Preamble to the UNDRIP
[96] J Martínez Cobo (Special Rapporteur of the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities) Study on the Problem of Discrimination against Indigenous Populations, UN Doc E/CN.4/Sub.2/1986/Add.4 (1986) Chapter V.
[97] *Ibid.*
[98] *Ibid.*
[99] *Ibid.*
[100] UN Economic Council '*Prevention of Discrimination Against and the Protection of Minorities: Working paper on the relationship and distinction between the rights of persons belonging to minorities and those of indigenous peoples*', E/CN.4/Sub.2/2000/10 §23.

the purpose of this thesis. Similarly, ILO Convection no. 169 does not strictly define 'indigenous peoples', but rather describes the 'peoples' it intends to protect.[101]

2.2.1.2 Fragmentation, conflict of laws and the relationship between the GPID, UNDRIP and ILO Convention no. 169

At this juncture, it is important to be mindful that the GPID, UNDRIP and ILO Convention no. 169 are not self-contained regimes and are part of a fragmented system of international law. In this context, the interaction between these instruments is undefined and there is no clear relationship or hierarchy that exists between these instruments in the strata of international law.[102] International law-making is '*...spontaneous, decentralized and unhierarchical*'[103], which invariably leads to norm conflicts. Additionally, there is the added substantive problem of 'soft law' being isolated from 'hard law'. It is not within the ambit of this thesis to venture into the complexity of fragmentation and conflict of laws at international law. Suffice it to say that the focus is on what protection exists for indigenous peoples during internal displacement and not whether there is conflict between the sources of protection. Where a conflict does exist, a 'pluralistic' and 'harmonised' approach will be taken or the conflict will be highlighted (as shown in subsections 2.1.5 and 2.2.1.3). It is imperative to keep in mind that States are compelled to see '*...all human rights are universal, indivisible and interdependent and interrelated.*'[104]

2.2.1.3 Approach to interpretation of the UNDRIP and conceptual overlap

There will be some conceptual and terminological overlap amongst the UNDRIP, ILO Convention no. 169 and ACHR/IACtHR when framing indigenous peoples' rights. A 'synergistic' approach (as advanced in the *Yakye Axa* case) to the understanding of indigenous peoples' rights will be taken, so as to create a common understanding of rights

[101] Article 1, ILO Convention no. 169. '*Indigenous and Tribal Peoples' Rights in Practice: A Guide to ILO Convention No. 169*', International Labour Standards Department (2009).pp.9. (Available at https://www.ilo.org/global/publications/ilo-bookstore/order-online/books/WCMS_171810/lang--en/index.htm)
[102] Koskenniemi, M. *supra* note 74.
[103] *Ibid* §486.
[104] Vienna Declaration and Programme of Action, adopted by the World Conference on Human Rights in Vienna on 25 June 1993. Part I §5.

throughout this thesis.[105] S J Anaya advances a 'realist' approach based on *Awas Tingni* case, which is a broad, contextual reading of human rights instruments which advances the rights of indigenous peoples in a progressive way, honouring indigenous peoples' worldview.[106] The central purpose is of interpreting indigenous peoples' rights is to affirm their cultural and group identity, and to avoid legal 'formalism'.[107] A more detailed analysis of this methodology will be discussed in chapter 3.

The interpretation of the UNDRIP will be conducted using these methodical tools, diving into the context, purpose and spirit in which the instrument was created, having due regard to the full enjoyment of human rights. As such, interpreting the ordinary meaning of the words within the provisions of the UNDRIP as they apply to internal displacement will be advanced. The groundwork for how indigenous peoples' rights can be applied in situations of internal displacement will be explored here but will be argued in earnest in chapter 3. Most of the concepts discussed within this subchapter can be synergised with the jurisprudence of the IACtHR. Importantly, this reflects the pronouncements made during the forty-fourth session of the General Assembly OAS which the adoption of the UNDRIP by all States within the Organization.[108]

2.2.2 Self-Determination: Articles 3, 4, 5, 23 and 34

This subchapter will trace how the articles within the declaration are applicable during internal displacement, which will involve some overlap with subchapter 2.1. The examination of how the UNDRIP protects indigenous peoples during internal displacement will be examined thematically, rather than article by article. As such, each individual article discussed is not mutually exclusive to their respective theme but in the pursuit of clarity and brevity, this is the optimal method of presentation. Each of the articles extracted from the UNDRIP can be applied, in varying degrees, directly to indigenous peoples during internal displacement. While not all of the articles within the UNDRIP will be touched upon, there will be an attempt to carve out the underlying norms.

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[105] *Case of the Indigenous Community Yakye Axa v Paraguay* (Merits, Reparations, and Costs), IACtHR Series C No 125 (17 June 2005). This was highlighted in Charters, C. '*Part IV Rights to Land and Territory, Natural Resources, and Environment, Ch. 14 Indigenous Peoples' Rights to Land, Territories, and Resources in the UNDRIP: Articles 10, 25, 26, and 27*' in Hohmann, J. Weller, M. (eds) '*The UN Declaration on the Rights of Indigenous Peoples: A commentary*' (2018).pp.407.*

[106] Anaya, S.J. '*Divergent Discourses about International Law, Indigenous Peoples, and Rights over Lands and Natural Resources: Toward a Realist Trend*' (2005) 16 Colorado J Intl Env'l L & Policy.pp.240.

[107] *Ibid.*

[108] General Assembly of the OAS (AG/DEC. 79 (XLIV-O/14)).

As eluded to, the UNDRIP saw an expansion of the right to self-determination, which triggered much controversy during the drafting of the UNDRIP and contributed to its truncated negotiation process.[109] Governments were concerned the *classical* expression of the right to self-determination would lead indigenous peoples down the path of challenging state sovereignty through an independence movement or secession.[110] In actuality, the UNDRIP draws a distinct new category for the meaning of self-determination to be '*the right to be different and to remain free to promote, preserve and protect values which are beyond the legitimate reach of the rest of society*'.[111] In any event, UNDRIP cannot be the basis for a claim to independence, nor any other action that would dismember territorial integrity or sovereignty of a State.[112]

The right to self-determination is a recognition of the historic injustice that occurred during colonisation and dispossession of lands, whereby the rights of indigenous peoples to develop their culture, political, social and economic interests were interrupted and suppressed.[113] Article 4 pronounces that indigenous peoples have the '*right to autonomy or self-government in matters relating to their internal and local affairs*.' Similarly, Article 5 asserts the right to strengthen and maintain this autonomy, while retaining the right to participate within the mainstream structures of the State they inhabit. As such, it can be deduced that the principles underlying self-determination are applicable when States create policies or take actions which concern indigenous peoples during internal displacement. However, the UNDRIP does not stipulate how a genuine and meaningful arrangement between indigenous peoples and the State can be actualised.[114] Some academics believe States remain fearful of the right to self-determination, as it challenges the very notion of state sovereignty.[115] Nevertheless, the right

[109] Imai, S. Gunn, K. '*Part II Group Identity, Self-Determination, and Relations with States, Ch.5 Self-Determination of Indigenous Peoples: Articles 3, 4, 5, 18, 23, and 46(1)'* in Hohmann, J. Weller, M. (eds) '*The UN Declaration on the Rights of Indigenous Peoples: A commentary*' (2018).
[110] Cassese, A. '*Self-determination of Peoples: A Legal Reappraisal*' Cambridge University Press (1995).pp.126-129. Classical in the sense of a *jus cogens* rule that it defined under international law, such as in the UN Charter, Article 1(2), Common Article 1 of the ICCPR and ICESCR which is generally the '*need to pay regard to the freely expressed will of the people'* as expressed in *Western Sahara ICJ, Reports 1975, 33 §58*.
[111] Discrimination against Indigenous Populations, Report of the Working Group on Indigenous Populations on its Tenth Session, UN Doc E/CN.4/Sub.2/1992/33 (20 August 1992) Annex 2 §32.
[112] Article 46 UNDRIP.
[113] Preamble and Articles 3, 4 and 5 UNDRIP. Anaya, S.J. *supra* note 7.pp.98.
[114] Imai, S. Gunn, K. *supra* note 109.pp.144.
[115] Cassese, A. *supra* note 110.pp.59.

to self-determination creates a legal anchor from which indigenous peoples can be a stakeholder in displacement law and policy.

2.2.3 The Right to Culture: Articles 9, 11, 12 and 25

Intrinsically connected with indigenous peoples is the contribution their rich culture and identities give all humanity. Thus, the recognition of the right to culture seeks to protect this contribution, as well as to address historic injustice. The right further aims to prevent injustices from occurring, such as, forced assimilation, removal of children from their families, suppression of cultural manifestations and destruction of cultural objects.[116] The UNDRIP does not define 'culture', so as not to restrict its application and to capture all iterations of culture expression among indigenous peoples.[117] Broadly speaking, 'culture' is associated with '*... language, literature, philosophy, religion, science, and technology, as well as 'ideological systems', such as knowledge, beliefs, values, customs, and habits.*'[118] The UNDRIP is the first instrument of its kind to detail the aspects of the right to culture, recognise these aspects as human rights and link them to a sub-national group.[119] Furthermore, being a member of this sub-group is a right, which a person may not be discriminated upon.[120]

Article 11(1) pronounces the right of indigenous peoples to practice and revitalise their cultural traditions and customs through manifestations of culture, archaeological and historical sites, ceremonies and so forth. In conjunction with this right, Article 12 provides that indigenous people have the right to manifest, practice, develop and teach their spiritual and religious traditions, while retaining agency over their ceremonial objects.[121] Encapsulated in Article 12 is a positive duty on the State to facilitate in providing access to human remains and ceremonial objects.[122] Furthermore, Article 25 proclaims the right to maintain and strengthen indigenous peoples' distinctive spiritual relationship with lands, territories, waters and resources. Collectively, these rights should be a key consideration of duty-bearers and/or

[116] Xanthaki, A. '*Part III Right to Culture, Ch.10 Culture: Articles 11(1), 12, 13(1), 15, and 34*' in Hohmann, J. Weller, M. (eds) '*The UN Declaration on the Rights of Indigenous Peoples: A commentary*' (2018).pp.274.
[117] This is consistent with other interpretations of the Right to Culture. See CERD, General Recommendation 23: Rights of Indigenous Peoples, UN Doc A/52/18 (18 August 1997).
[118] Hohmann, J. Weller, M. *supra* note 116.pp.283.
[119] *Ibid*.pp.284.
[120] Article 9 UNDRIP.
[121] Article 12(1) UNDRIP.
[122] Article 12(2) UNDRIP.

States during displacement, to act in a positive manner consistent with the right to culture.[123] An inference can be drawn from the case of *Plan de Sánchez Massacre v Guatemala,* where the State violated an indigenous community's right to manifest their cultural, spiritual and religious beliefs after denying them the practice of burial ceremonies subsequent to forcible relocation.[124] Thus, cultural rights are not extinguished during internal displacement and the State must incorporate this within its domestic legal framework.

2.2.4 Rights to Lands, Territories and Resources: Articles 10, 25, 26, 27, 30 and 32

This subsection will examine indigenous peoples' rights to lands, territories and resources, which are undeniably linked to issues surrounding internal displacement. During the drafting of the UNDRIP, indigenous groups and organisation placed significant weight on their ability to exercise a spiritual, cultural and economic relationship with their environment.[125] This is integral to their cultural survival and the essence of their identity. Within many indigenous cultures, traditional lands represent the life-force from which they have been created.[126] Indigenous peoples have the right to foster their distinctive spiritual connection to land, territories and resources.[127] States shall implement processes to give due recognition to this, for which they have the right to participate.[128] Article 10, is the strongest expression of this call for protection, it states that

'*Indigenous people shall not be forcibly removed from their lands or territories. No relocation shall take place without the free, prior and informed consent of the indigenous people concerned and after agreement on just and fair compensation and, where possible, with the option of return*'

Within the context of displacement, this provision not only provides protection from forcible removal but requires States to actively seek '*free, prior and informed consent*' during relocation. Furthermore, if relocation does take place, then just and fair compensation and the option to return shall be sort. Note the causes of the forcible removal or relocation are not

[123] Hohmann, J. Weller, M. *supra* note 116.pp.291.
[124] *Plan de Sánchez Massacre v Guatemala* (Merits), IACtHR Series C No 105 (2004) § 42(30).
[125] UNCHR, Report of the Working Group (4 January 1996) § 84.
[126] UNCHR, Indigenous Open-Ended Inter-Sessional Working Group on a Draft United Nations Declaration on the Rights of Indigenous Peoples, Consideration of a Draft United Nations Declaration on the Rights of Indigenous Peoples 'Information Received from Non-Governmental and Indigenous Organizations', UN Doc E/CN.4/1995/WG.15/4.
[127] Article 25 UNDRIP.
[128] Article 27 UNDRIP.

expressed here and thus ought not to necessitate or predicate the ambit of protection given to indigenous peoples during internal displacement. Thus, a contextual reading of Article 10 can be applied to situations of forcible removal or relocation caused by, *inter alia*, climate change, disasters, conflict or development project. In these situations, the State has a duty to protect its citizens.[129] As such, if relocation by the State were to occur, the '*consent, compensation and option of return*' would operate as a condition subsequent of Article 10.

Article 26(1)-(3) is simply a pronouncement of indigenous peoples' right to control the lands, territories and recourses they possess. The State has an obligation to respect customs, traditions and land tenure systems of indigenous peoples and give legal protection and recognition to this land. In situations of internal displacement, this legal recognition lends itself to asserting that indigenous peoples are to be considered stakeholders, for example, in decision-making concerning disaster risk reduction, climate change mitigation and management of IDPs during conflict.

Article 30(1) prohibits military activities on indigenous lands or territories, unless in the interest of public or agreed to by the indigenous community. The State must consult with indigenous peoples prior to military activities taking place.[130] This is crucial in the context of internal displacement of indigenous peoples in Colombia, which will be explored in chapter 4.

Article 32(1) gives agency to indigenous peoples over the use and development of their land, territories and other resources. Additionally, consultation and cooperation between the State and indigenous peoples is required before any project affecting their lands, territories or resources is conducted.[131] Mechanisms for redress are required if these projects are undertaken, which shall consider the cultural and spiritual impact on indigenous peoples.[132]

Read together, these rights place a considerable obligation on the State as a duty-bearer to protect indigenous peoples' rights to land, territories and resources. The key underlying

[129] United Nations General Assembly Resolution 36/225 on strengthening the capacity of the United Nations system to respond to natural disasters and other disaster situations (United Nations General Assembly) UN Doc A/RES/36/225, GAOR 36th Session Supp 51, 153, Preamble. Gevena Convention I-IV and AP I and II. *Kankuamo Indigenous Peoples v Columbia* (Provisional Measures) IACtHR Series E (2004) §2.
[130] Article 30(2) UNDRIP.
[131] Article 32(2) UNDRIP.
[132] Article 32(3) UNDRIP.

message is States must consult and respect indigenous peoples' cultural connection to land if activities are proposed. While the causes of displacement are not specified or vary within the articles above, it can be inferred that this is not necessarily relevant in garnering protection. Thus, it could be implied where policy or law contemplates the displacement of indigenous peoples due to climate change, disaster, conflict or other factor – there is always a duty to consult.[133] This argument will be furthered in chapter 3, in light of the case law of the IACtHR.

2.2.5 Consultation, Cooperation and Participation: Articles 18, 19 and 20

Following on from subsection 2.2.4, consultation, cooperation and participation is fundamental to the realisation of indigenous peoples' rights. In order to be fully represented within the States they reside, indigenous peoples need to be recognised as a stakeholder in government and policy. Thereby engaging in mainstream decision-making structures, whilst also maintaining their own. Article 18 states that,

'*Indigenous people have the right to participate in decision-making in matters which would affect their rights...*'

In addition, States are obliged to '*...consult and cooperate in good faith with indigenous people*' through their chosen representation in order to obtain free, prior and informed consent before adopting and implementing legislation that may affect them. [134] The duty to consult or collaborate in decision making can be directly applied to legislation concerning, *inter alia,* IDPs, disaster risk management, climate change adaptation or military operations on traditional lands.

2.2.6 Redress and Implementation of UNDRIP: Articles 28, 38, 39, 43 and 45

The right to redress is crucial in a post-displacement setting. Article 28 provides for restitution as one possible remedy, which in the context of displacement would be to facilitate the free, voluntary and dignified return of indigenous peoples to their traditional land.

[133] This has been suggested by Feiring, B. '*Indigenous peoples' rights to land territories, and resources*' International Land Coalition (2013).pp.20 available at (https://www.landcoalition.org/sites/default/files/documents/resources/IndigenousPeoplesRightsLandTerritoriesResources.pdf.)
[134]Article 19 UNDRIP.

In terms of implementing the rights contained within the UNDRIP, States are encouraged to effectively implement all of the rights of indigenous peoples, within the UNDRIP and other international instruments.[135] Furthermore, indigenous peoples have the right to get financial support from the State to fully realise the UNDRIP.[136] The rights contained within the UNDRIP are minimum standards that ensure the '*... survival, dignity and well-being of the indigenous peoples of the world*' and should be actualised through domestic legislation.[137] Finally, nothing within the UNDRIP shall diminish the rights of indigenous peoples have now or in the future.[138] The UNDRIP morally binds States to the rights contained within it, this is especially cogent for indigenous peoples during displacement. It is well documented fact that indigenous peoples are marginalised, targeted, discriminated against and excluded from assistance during displacement,[139] as such, interlinking IDP policy and the UNDRIP should be encouraged.[140] In the case study there will be stark examples of how conflict displacement continues to disproportionately affect indigenous peoples.[141]

2.2.7 Conclusion

In summation, the UNDRIP represents the key component in the advancement of indigenous peoples' rights at international law. Whilst a soft-law instrument, the UNDRIP has been utilised by actors to advance the human rights of indigenous peoples. A broad and contextual reading of the provisions shows States as duty-bearer are to engage and consult with indigenous peoples during internal displacement. One obvious drawback to the UNDRIP is no overt pronouncement of the protection of indigenous peoples' rights during internal displacement, beyond the prohibition of forced displacement in Article 10. Nevertheless, making deductions as displayed above and applying them within the context of displacement

[135] Preamble to UNDRIP.
[136] Article 39 UNDRIP.
[137] Articles 38 and 39 UNDRIP.
[138] Article 45 UNDRIP.
[139] There are Report of the Special Rapporteur on the human rights of internally displaced persons on his mission to the Philippines. Also see, UN OHCHR, Forst, M. '*End of Mission Statement: Colombia - 20 November to 3 December 2018*', United Nations Special Rapporteur on the situation of human rights defenders. (Sourced from https://www.ohchr.org/Documents/Issues/Defenders/StatementVisitColombia3Dec2018_EN.pdf).
[140] Article 2 UNDRIP prohibits discrimination against indigenous peoples.
[141] For a resent example of this see, UN OHCHR, Forst, M. '*End of Mission Statement: Colombia 20 - November to 3 December 2018*', United Nations Special Rapporteur on the situation of human rights defenders. (Sourced from https://www.ohchr.org/Documents/Issues/Defenders/StatementVisitColombia3Dec2018_EN.pdf).

is clearly within the ambit of States obligation under the UNDRIP. Most importantly, it provides a clear parameter for norm setting for indigenous peoples' rights.

2.3 ILO Convention no. 169 [142]

2.3.1 Background

The International Labour Organization is the preeminent standard producing limb of the UN family.[143] ILO Convention no. 169 is one of the two lone hard-law legal instruments that governs indigenous and tribal peoples' rights at international law.[144] The origins of the Convention is incredibly interesting and was considered by some States to be outside the mandate of the ILO's core functions.[145] ILO Convention no. 169 materialised due in part to the inadequacy of its predecessor (ILO Convention no. 107), which was outdated, paternalistic, assimilative and promoted integration of indigenous peoples.[146] Further, a lack of protection for indigenous peoples' living and working conditions persisted and the emergence of an indigenous peoples' movement and NGO advocacy accelerated the development a new convention.[147]

ILO Convention no. 169 and UNDRIP are 'compatible and mutually enforceable'[148], being that they are built upon the same foundation and share a common orientation.[149] The origin of ILO Convention no. 169 derives from the ILO's work on decolonisation and through the advocacy of indigenous representatives who were 'observers' in the process, while not formally involved in the drafting of the Convention.[150] States, in ratifying ILO Convention no. 169, are required to firmly commit to the adherence and application of the Convention

[142] Convention Concerning Indigenous and Tribal Peoples in Independent Countries 1989 (ILO Convention no. 169)
[143] Swepston, L. '*The Foundation of Modern International Law on Indigenous and Tribal Peoples*', Volume 1: Basic Policy and Land Rights, Brill Nijhoff (2015).pp.5.
[144] The other being ILO Convention no. 107. ILO Convention no. 169 was adopted on 27 June 1989 and entered into force 5 September 1991.
[145] Swepston, L. *supra* note 143.pp.20. The Portuguese, Australian and Canadian Governments considered the Convention '*...outside the constitutional or traditional field of competence of the ILO...*'
[146] Yuspsanis, A. '*ILO Convention No. 169 Concerning Indigenous and Tribal Peoples in Independent Countries 1989-2009: An Overview*', Nordic Journal of International Law 79 (2019).pp.436. Convention concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal populations in Independent Countries (ILO Convention no. 107). At the time of ILO Convention no. 107, the ILO was the only body capable of being tasked with drafting such a convention (See Swepston, L. *supra* note 143.pp.15).
[147] Swepston, L. *supra* note 143.pp.15-16. Also see, ILO Conditions of Indigenous Populations in Independent Countries, *Report VIII* (*1*) 1956.
[148] '*Indigenous and Tribal Peoples' Rights in Practice: A Guide to ILO Convention No. 169*', International Labour Standards Department (2009). Available at (https://www.ilo.org/global/publications/ilo-bookstore/order-online/books/WCMS_171810/lang--en/index.htm).
[149] Swepston, L. '*Indigenous and Tribal Peoples' Culture and Work Under the ILO'* in Short, D. and Lennox, C. (eds) *'Handbook of Indigenous Peoples*' Routledge International Handbooks, 1st ed. (2016). Ch. 23.
[150] Swepston, L. *supra* note 143.pp.6.

within domestic law and to report on this at regular five-year intervals.[151] Furthermore, the Committee of Experts has encouraged States to engage the participation of indigenous peoples in their compliance with the Convention.

While it is fully acknowledged the ILO Convention no. 169 has some shortcomings, not to mention the meagre 23 ratifications, it has had a profound impact on the rights of indigenous peoples. For instance, the Convention gives rise to the development of customary international law by 'crystallising' a new consensus or *opinio juris* among States as to their obligations to indigenous peoples.[152] This is acutely evident given the participation of States in advocating and drafting stronger rights for indigenous peoples, such as, New Zealand, Australia and Canada but who did not intend to become signatories.[153] The slipover effect of the ILO Convention no. 169 cannot be overstated, it has reach beyond the States that have ratified and is used as a tool for norm creation and standard setting to further the rights of indigenous peoples with governments.[154] In the same spirit, it is asserted here that ILO Convention no. 169 has great capacity to create norms applicable to indigenous peoples in the context of internal displacement. More will be developed in chapter 4 concerning the burgeoning customary international law for the rights of indigenous peoples.

ILO Convention no. 169 does not overtly prohibit displacement or deal directly with displacement in the context of climate change, disasters, conflict or generalised violence. Thus, much of the application of the provisions of ILO Convention no. 169 to displacement will be deduced through a 'realist', broad and contextual reading of its articles.[155] Furthermore, due regard will be paid to the object and purpose of the Convention's text in

[151] ILO '*Applying and Promoting International Labour Standards*', (available at https://www.ilo.org/global/standards/applying-and-promoting-international-labour-standards/lang--en/index.htm).
[152] Anaya, S.J. *supra* note 68.pp.61.
[153] *Ibid*.pp.144.
[154] Joona, T. '*The Political Recognition and Ratification of ILO Convention No. 169 in Finland, with Some Comparion to Sweden and Norway'*, 23 Nordisk Tidsskrift for Menneskerettigheter 305 (2005).pp.306 and 317. The Swedish National Assembly (the Riksdag) commissioned 'The Heurgren Report' to examine Sami in Sweden and concluded Sweden fulfils most of the requirements under ILO Convention no. 169. See SOU 1999:25, Samerna -ett ursprungsfolk i Sverige. Fragan om Sveriges anslutning till ILO:s konvention nr 169, Stockholm, 31 March 1999.
Doyle, C.M. '*Indigenous Peoples, Title to Territory, Rights and Resources: The transformative role of free and informed consent*', Routledge (2017).pp.89. The Philippines enacted the *Indigenous Peoples Rights Act* (1997) which was partly modelled on ILO Convention no. 169.
[155]Anaya, S.J. '*Divergent Discourses*' *supra* note 106.pp.240.

light of Article 31 of the Vienna Convention on the Law of Treaties, and also to the *travaux preparatoires*.[156] A more detailed analysis of this methodology will be discussed in chapter 3. In aid of clarity and brevity, this subsection of the thesis will be examined thematically, in a consistent fashion to the previous subsection on the UNDRIP. There will undoubtedly be some conceptual and terminological overlap with the UNDRIP but in most instances there will be no need to rehash what has already been stated above. However, this subsection will diverge from the previous subsection by analysing the supervisory functions of the ILO, focusing on 'representations' and 'observations' made concerning ILO Convention no. 169 and displacement.

2.3.1.1 'Indigenous and Tribal Peoples' Defined

ILO Convention no. 169 does not have a complete definition of 'Indigenous and Tribal Peoples'. Article 1(1) describes the groups the Convention is intended to apply to and indicates markers of indigenousness. These markers are as follows: (1) Pre-conquest/colonisation society; (2) Territorial connection to the country or region; (3) Distinct historical continuity of social, economic, cultural and political institutions; and (4) Self-identification as indigenous.[157] These markers are in conformity with similar descriptions and definitions at international law, and is used as the working definition within UN agencies.[158] The only inconsequential difference between the UNDRIP, the two ILO Conventions and J Martinez Cobo study's definition is the former instrument does not differentiate between whether a coloniser is a neighbouring power or from another region of the globe.[159] The determination on which peoples are considered indigenous, and thereby covered by the Convention, is not solely vested with the ratifying State.[160] The ILO's Committee of Experts is willing to push and question States on domestic classification of indigenous or tribal peoples, especially when there is an attempt to exclude groups from protection.[161]

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[156]Articles 5, 31 and 33 of the Vienna Convention on the Law of Treaties. Also see, ILO Committee of Experts, General Observations concerning Convention no. 169 (2010/81).
[157] Article 1(1)(b) and 2 ILO Convention no. 169. Markers 1-3 are objective and marker 4 is objective. *Working paper by the Chairperson-Rapporteur, Mrs. Erica-Irene Daes, on the Concept of 'Indigenous People,'* U.N Doc. E/CN.4/Sub.2/AC.4/1996/2.
[158] J Martinez Cobo *supra* note 96. Note 147.
[159] *Working paper by the Chairperson-Rapporteur, Mrs. Erica-Irene Daes, on the Concept of 'Indigenous People,'* U.N Doc. E/CN.4/Sub.2/AC.4/1996/2 §63.
[160] ILC: Interpretation of a decision concerning Convention No. 169, Indigenous and Tribal Peoples, 1989 – Switzerland. Published: 2001 (koninklijke brill nv, leiden, 2015).
[161]Swepston, L. *supra* note 143.pp.96-103.

2.3.2 Self-Determination: Articles 3(1) and 7(1)

There is not an express right to self-determination under ILO Convention no. 169, as the matter is controversial. The Meeting of Experts, who are mandated to apply economic, social and cultural rights, decided that it would be counterproductive and outside their mandate to include such a term as 'self-determination' within ILO Convention no. 169.[162] As discussed at 2.2.2, 'self-determination of peoples' has international legal and political connotations of independents movements or secession.[163] To appease States and indigenous peoples some of the constituent elements of 'self-determination' are present in the articles but are carefully worded to exclude any connotations of a right of indigenous peoples to secede from the States they live. Many of the provisions within ILO Convention no. 169 are connected with the right to 'self-determination', which can be loosely defined as a collective right to determine political status and have agency over economic, social and cultural development.[164] This should include the ability to '*...maintain and develop their identities, languages and religions, within the framework of the States in which they live.*'[165] Essential to the application of this, is the inherent right of all people to enjoy human rights and fundamental freedoms without discrimination.[166]

One particular article worth mentioning in connection to self-determination is Article 7(1) which expresses indigenous peoples' right to,

'*...decide their own priorities for the process of development that affects their lives, beliefs, institutions and spiritual well-being and the lands they occupy or otherwise use and to exercise control, to the extent possible, over their own economic, social and cultural development. In addition, they shall participate in the formulation, implementation and evaluation of plans and programmes for national and regional development which may affect them directly.*'

In a broad and contextual reading of Article 7(1), this can translate to an obligation on States to engage with indigenous peoples in developing their own priorities before, during and post

[162]Swepston, L. *supra* note 143.pp.156
[163]Anaya, S.J. *supra* note 7.pp.156. Article 1(2) UN Charter. Common Article 1 of the ICCPR and ICESCR.
[164] *East Timor (Portugal v Australia)* Judgement, I.C.J Reports 1995 §90. Imai, S. Gunn, K '*Part II Group Identity, Self-Determination, and Relations with States, Ch.5 Self-Determination of Indigenous Peoples: Articles 3, 4, 5, 18, 23, and 46(1)*' in Hohmann, J. Weller, M. (eds) '*The UN Declaration on the Rights of Indigenous Peoples: A commentary*' (2018).pp.116.
[165] Fifth Preambular of ILO Convention no. 169.
[166] Article 3(1) ILO Convention no. 169.

displacement. For instance, if an indigenous community is located within a disaster-prone area, then consultations with indigenous peoples in the development of durable solutions, such as an early warning communication system between villages should be developed in alignment with their priorities and spiritual connection to the land.[167] Further exploration of this will be conducted in subsection 2.3.8 in relation to examples of State non-compliance with ILO Convention no. 169.

2.3.3 The Right to Culture: Articles 4, 23 and 30

The right to culture is threaded throughout ILO Convention no. 169, and this is most prominently reflected within Articles 23 and 30. Unlike the UNDRIP, there is not a directly pronounced right to culture *per se*, but Article 23 requires States to ensure cultural activities are strengthened and promoted. In addition, Article 30 requires governments to make known their obligations to indigenous peoples under the Convention, in a manner that is compatible with indigenous peoples' cultures and traditions.

In terms of implementation, Article 4 requires States to adopt appropriate special measures for safeguarding culture. Furthermore, States are required to promote the full realisation of cultural rights within ILO Convention no. 169, specifically indigenous peoples' cultural identity, customs and traditions. Flowing from these articles is an obligation on States to safeguard, strengthen and promote indigenous peoples' culture, which should not be extinguished during situations of internal displacement. Like links in a chain, internal displacement is a break to indigenous peoples' cultural continuation and States have a positive obligation to remediate such a break, by fostering an environment during internal displacement which gives agency to indigenous peoples, see *Yakye Axa*.[168] This will be further exemplified within 2.3.8.

2.3.4 Rights to Lands, Territories and Resources: Articles 13, 14, 15, and 16

This thesis broadly asserts the amassed body of international law developed over the last 30 years concerning indigenous peoples' rights can be partitioned within a class of their own (*sui generis).* ILO Convention no. 169 has placed a significant emphasis on the rights of

[167] UN Office for Disaster Risk Reduction 'Sendai Framework for Disaster Risk reduction 2015-2030' available at https://www.unisdr.org/files/43291_sendaiframeworkfordrren.pdf. The Sendai Framework incorporates indigenous knowledge into disaster risk reduction policy.
[168] *Indigenous Community Yakye Axa v Paraguay* (Merits, Reparations, and Costs), IACtHR Series C No 125 (17 June 2005).

indigenous peoples to lands, territories and resources, recognising them as *sui generis* rights.[169] Indigenous peoples believe themselves to be 'guardians' or 'communal stewards' of land, territories and resources.[170] In essence, '*...the land is not merely a possession and a means of production... Their land is not a commodity which can be acquired, but a material element to be enjoyed freely*.'[171] Thus, the Convention seeks to redress the historical lack of recognition of indigenous modes of understanding of corporeal property, in part due to the concerted effort by the drafters to include an indigenous worldview and conceptualisations of the physical environment within its articles.[172] Article 13 affirms this concept of collective land rights, as a special 'cultural and spiritual value'.

Of particular import is Article 14(1) which is expansive in nature, and includes '*...a combination of possessory, use and management rights*', that can operate outside of western understandings of land tenure.[173] Article 14(1) states,

'*The rights of ownership and possession of the peoples concerned over the lands which they traditionally occupy shall be recognised. In addition, measures shall be taken in appropriate cases to safeguard the right of the peoples concerned to use lands not exclusively occupied by them, but to which they have traditionally had access for their subsistence and traditional activities. Particular attention shall be paid to the situation of nomadic peoples and shifting cultivators in this respect*.'

This provision recognises an entitlement to continuity in the relationship between indigenous peoples to their land and resources in line with patterns of traditional use and occupation, from which a further deduction can be made within the context of displacement.[174] Displacement does not extinguish this right, it merely interrupts the continuity temporarily (which Article 16 also caters for). Furthermore, Article 14(1) employs the word 'occupy', which is suggestive of a reconnection with lands which have been lost but still retain cultural significant.[175]

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[169] Anaya, S. J. *supra* note 7.pp.142.
[170] *Ibid*.pp.141.
[171] Jose R. Martinez Cobo, Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities: Study on the Problem of Discrimination Against Indigenous Populations. UN Document No.E/CN.4/Sub.2/1986/7/Add.1 § 196 and 197.
[172]Anaya, S. J. *supra* note 7.pp.142.
[173] *Ibid*.pp.143.
[174] *Ibid*.pp.144.
[175] *Ibid*.pp.144.

Article 15(1) specifically safeguards indigenous peoples' right to use, manage and conserve natural resources. Where the State has ownership of mineral, sub-surface resources or other land resources, prior consultation when conducting activities on these spaces *must* take place as a minimum standard.[176] The ILO, when interpreting this standard, has made it clear that consultation and mitigation measures are necessary, even if indigenous peoples do not have formal ownership of the ancestral land where the extraction is proposed to take place.[177] The reasoning here is that their ancestral lands have the potential to be irrevocably altered. Where these resources are extracted, indigenous peoples *shall* benefit from this and receive compensation.[178] This principle can be applied by analogy to situations of displacement, in the sense that, where a State envisages activities to take place on indigenous peoples' ancestral land, the same minimum standard of prior consultation *must* be applied. Invariably, mineral extraction or hydroelectric projects that impact indigenous peoples which result or could result in displacement are captured by this provision. Where a State neglects to consult or where consultation is farcical, the ILO will take steps to intervene within its supervisory functions.

Article 16 is the provision within the ILO Convention no. 169 that most closely deals with displacement. It states that indigenous peoples shall not be removed from their lands, but

'*Where the relocation of these peoples is considered necessary as an exceptional measure, such relocation shall take place only with their free and informed consent. Where their consent cannot be obtained, such relocation shall take place only following appropriate procedures established by national laws and regulations, including public inquiries where appropriate, which provide the opportunity for effective representation of the peoples concerned*.'[179]

Additionally, if relocation occurs indigenous peoples have the right of return, as soon as the grounds for relocation cease.[180] Further, if the return is not possible then compensation is envisaged, either with land of equal quality and legal status or with monetary compensation

[176] *Ibid*.pp.143. Article 15(2) ILO Convention no. 169.
[177] *Ibid*.pp.143.
[178] Article 15(2) ILO Convention no. 169.
[179] Article 16(2) ILO Convention no. 169.
[180] Article 16(3) ILO Convention no. 169.

for which indigenous peoples can express a preference.[181] Significantly, the cause of the relocation is not listed here and so this can be read to include conflict, climate change or disaster displacement. The ILO purposely sought not to list 'exceptional measures', so as to 'meet certain unforeseeable' occurrences.[182] To establish a justifiable relocation, the State must first establish there is an 'exceptional measure'. If this is met, then it must obtain free and informed consent of the indigenous peoples concerned. Reading further into the provision, there is an express assurance for effective representation of indigenous peoples in this process (if informed consent cannot be secured). Such an example would be the inclusion of indigenous peoples in developing post-disaster voluntary return action plans.

2.3.5 Consultation, Cooperation and Participation: Articles 2(1) and 6(2)

The provisions contained with ILO Convention no. 169 are threaded with the concepts of consultation, cooperation and participation, in order for indigenous peoples to have agency over their own fate. ILO Convention no. 169 seeks to redress the past policies of paternalism, assimilation and cultural domination.[183] Article 2(1) sets the tone by placing a positive obligation on States to develop, with indigenous peoples, co-ordinated and systematic actions for the protection of the rights contained in the Convention.

Article 6(2) states that consultations shall be undertaken in good faith, with the aim to achieve agreement or consent between the State and indigenous peoples. States are encouraged to participate in genuine dialogue with indigenous peoples, using the provisions of ILO Convention no. 169 as an instrument for the 'prevention and resolution of conflict'.[184] The Committee of Experts has explained that an informal information meeting with indigenous peoples *does not* satisfy the consultation provisions, and invalidates the decision-making process.[185] Thus, in pursuing the objective of seeking consent, States need to ensure the formal, full and good faith consultations within the decision-making process, not just as a formality.[186] For the purpose of this thesis, that translates to indigenous peoples being stakeholders in displacement policy and legislation. This is in accordance with the notion of

[181] Article 16(4) ILO Convention no. 169.
[182] Doyle, C.M. '*Indigenous Peoples, Title to Territory, Rights and Resources: The transformative role of free and informed consent*', Routledge (2017).pp.87.
[183] ILO Committee of Experts, General Observations concerning Convention no. 169 (2010/81).pp.3.
[184] *Ibid.*
[185] *Ibid.*pp.8.
[186] ILO Representation – Brazil- Convention no. 169. ILC, 76th Session, 1989, Report IV(2A).pp.19-21.

'belated State-building', a joint effort among States and indigenous peoples.[187] Underpinning this is the obligation to consult, which is a recognised general principle in international law.[188]

2.3.6 Penalties, Redress and Implementation: Articles 5(c), 18 and 34

In addition to the measures already mentioned, ILO Convention no. 169 provides comprehensive and detailed measures States must undertake in compliance with the Convention. Article 18 provides that States must establish penalty provisions for the unwarranted intrusion into indigenous peoples' land. In terms of implementation of the Convention, States shall take a flexible approach to the nature and scope of the provisions.[189] This is to ensure that the law caters to the differential nature of indigenous and tribal peoples' needs.

As expressed throughout this thesis, indigenous peoples face marginalisation and discrimination during displacement. Article 5(c) provides the State should develop policies to mitigate against difficulties faced by indigenous peoples, with participation and co-operation. Thus, this provision goes some way to redress inequality and can additionally be applied to situations of displacement. Likewise, it rectifies some of the power imbalance between the State and indigenous peoples.

2.3.7 Supervision, Reporting and Complaint Mechanisms of the ILO

The ILO offers a robust regime of compliance and supervision of its Conventions. The structure of the ILO is based on 'tripartism' model of inter-government organisation, whereby States, representatives of employers' and workers' organisations and the ILO participate in standards setting.[190] Pursuant to Article 22 of the ILO Constitution, every Member State must provide periodical reporting every five years or upon request of the Committee of Experts on the Application of Conventions and Recommendations (Committee

[187] Daes, I. '*Discrimination Against Indigenous Peoples: An explanatory note concerning the draft declaration on the rights of indigenous peoples*', Commission on Human Rights, Distr.GENERAL E/CN.4/Sub.2/1993/26/Add.1 (19 July 1993).
[188] *Case of the Kichwa Indigenous People of Sarayaku v. Ecuador*, IACtHR, judgment of 27 June 2012. §164.
[189] Article 34 ILO Convention no. 169.
[190] Swepston, L. *supra* note 143.pp.5.

of Experts).[191] In addition, organisations of employers and of workers can report separately from their governments, and this has been done with the most frequency in relation to ILO Convention no. 169.[192] Supervision is conducted by two bodies within the ILO, the Committee of Experts and the Conference Committee on the Application of Standards, which run simultaneously with the ILO 'representations' and 'complaints' mechanisms.[193] Under Article 24 of the ILO Constitution, an industrial association of employers or workers may lodge a 'representation' against a government for failing to observe an ILO Convention, with the possibility for the Governing Body to seek a statement in response from the government concerned. The sum of all of this is, a special tripartite committee is convened to examine the representation and the State is asked to file a statement.[194] If the Governing Body is not satisfied with the State's compliance, a recommendation will be furnished and this may be accompanied by a published supplemented with its own notes on the case.[195] In the normal course of events, the ILO's supervisory bodies will usually follow up with the State during regular reporting to examine the matter or during the annual International Labour Conference, irrespective of status of the State's compliance.[196] On occasion the International Labour Office will visit the country in question as part of a fact-finding mission or to provide assistance.[197] Many of these representations have been lodged in relation to ILO Convention no. 169 and selected cases will be examined in subsection 2.3.8.

Complaints may be furnished under Article 26, resulting in a Commission of Inquiry conducting a full investigation. Failure of the State to comply or respond to the recommendations could result in a referral to the ICJ or the General Conference of the ILO.[198] This mechanism has not been triggered in relation to ILO Convention no. 169. It is not in the interest of this thesis to delve further into the inner workings of the ILO, suffice it to say that supervision and complaints mechanisms within the ILO are scrupulous and methodical. Each of the mechanisms described work cyclically and in tandem to ensure the compliance of the ILO Conventions and standards, which are then brought to the fore at the International Labour Conference (Conference).

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[191] ILO '*Rules of the Game: An introduction to the standards-related work of the International Labour Organization'*, Centenary Edition (2019).pp.106. Also see the ILO Constitution.
[192] Swepston, L. *supra* note 143.pp.9. See Article 23 of the ILO Constitution.
[193] Swepston, L. *supra* note 143.pp.8.
[194] Article 27 ILO Constitution.
[195] Swepston, L. *supra* note 143.pp.10.
[196] Swepston, L. *supra* note 143.pp.10.
[197] Swepston, L. *supra* note 143.pp.226.
[198] Articles 30-34 ILO Constitution.

2.3.8 Non-compliance with ILO Convention no. 169 and Displacement

This part of concerns the interaction between the mechanisms discussed within subsection 2.3.7 and cases of non-observance of ILO Convention no. 169 which touch on displacement. The intention here is to show the human rights of indigenous peoples in action, illuminating upon the reciprocal dialogue between the rights holders (indigenous peoples), duty bearers (States) and the ILO as intermediary. It should be noted that these examples were selected because they directly engage with displacement or the possibility of displacement. These take the form of 'reservations' (as discussed above) and 'observations and direct requests' which are published comments of the Committee of Experts raised on fundamental application of a convention.[199] The observations are examined in a tripartite setting, selected from a pool of observations, in which governments are invited to respond.

(i) Reservation: Chile - First Inter-Enterprise Trade Union of Mapuche Bakers of Santiago 2016 [200]

Briefly, this case relates to the obligations of Chile to consult with indigenous peoples on '*measures that may affect them directly*' pursuant to Article 6(1)(a) of ILO Convention no. 169.[201] Chile enacted Decree No.66 (2014) which seeks to put a finer point on when such an obligation would or would not arise. Under the decree, consultation concerning mining or other projects would occur if there existed a '*direct, significant and specific impact*' upon indigenous peoples.[202] The union representing the indigenous people asserts this phrasing was highly subjective and agency over what 'may affect them directly' ought to be vested to indigenous peoples, not the State.[203] Furthermore, the union asserts the State intended only to 'consider the opinion' of indigenous peoples during consultation, effectively deliberately misrepresenting Article 6(2) of the Convention.[204] In response, the Committee of Experts asked for more information (within the reporting mechanism) regarding the application of the decree and expressed the hope for inclusive consultation and environmental impact studies. It

[199] Swepston, L. *supra* note 143.pp.106.
[200] ILO – Representation – Chile '*Fifth Supplementary Report of the Committee set up to examine the representation alleging non-observance by the Government of Chile of the Indigenous and Tribal Peoples Convention, 1989 (no. 169), made under Article 24 of the ILO Convention by the First Inter-Enterprise Trade Union of Mapuche Bakers of Santiago*' GB.326/INS/15/5.
[201] Article 6(1)(b) ILO Convention no. 169.
[202] ILO – Representation – Chile *supra* note 200 §22.
[203] *Ibid* §20.
[204] *Ibid* §50.

also chided the State for its misguided interpretation on the parameters of consultation, which are clearly articulated in Article 6(2).

The union argues the decree attempts to circumvent the duty to consult during emergencies or disasters, which should be 'prior, free and informed.'[205] The Committee of Experts or the Representation Committee signals that consultation should occur, even in the event of an emergencies or disasters but permissible exceptions exist for quick and decisive decision making.[206] While that seems a reasonable proposition, an alternate interpretation would be for a decision-making process that has already appropriated the views of indigenous peoples within the emergency response. In the view of the union, and not contradicted by the Committee of Experts, the Convention is operative during disasters or other emergencies.[207]

Observations

The 2019 Observations by the Committee of Experts concerning Chile has generally been positive, reflecting the efforts the State has made in terms of consultation measures, such as binding agreements with indigenous communities conducted as part of the '*record of the outcomes of the national dialogue on the process of consultation concerning the constitutional recognition of the rights of indigenous peoples.*'[208] The Committee of Experts recalls the Mapuche case, in which agreements have been reached with various communities and dialogue continues around the impact of various development projects. The ILO continues to monitor and encourage the State to comply with the Convention.

(ii) Reservation: Peru - General Confederation of Workers of Peru (CGTP) 2012 [209]

Briefly, the State considered proposals for the construction of a system of dams, including three proposed hydroelectric plants. One of the sites would be located in Ene valley where indigenous Ashaninka peoples hold title, and which is the mythical birthplace of their

[205] *Ibid* §134.
[206] *Ibid.*
[207] *Ibid* §136.
[208] Observation- Chile- ILO Convention no. 169 (available at https://www.ilo.org/dyn/normlex/en/f?p=1000:13100:0::NO:13100:P13100_COMMENT_ID:3962694).
[209] ILO Representation- Peru- C169 '*Report of the Committee set up to examine the representation alleging non-observance by Peru of the Indigenous and Tribal Peoples Convention 1989 (no. 169), made under article 24 of the ILO Constitution by the general Confederation of Workers of Peru (CGTP)*.' There were no observations for Peru concerning ILO Convention no. 169.

community. The CGTP alleges the project will have a significant ecological impact, including, flooding upriver, deprivation of water flow downriver, loss of soil fertility, destruction of ecosystems and ten thousand people displaced.[210] The Peruvian Government awarded a Brazilian company with a temporary concession to conduct a feasibility study on the future construction of the project. The CGTP argues the Ashaninka Community should have been consulted before and during the consideration of granting the feasibility study. The Ashaninka people believe that if the project was to go ahead that it would seriously threaten their lives, creating poverty and extermination.

The Committee of Experts expressed regret that indigenous peoples were not consulted (as provided for in Article 7(3) of ILO Convention no. 169) and hoped that new legislative measures in Peru would facilitate dialogue between the groups. It is evident that States are required to consult indigenous peoples prior and during activities taking place on their traditional land, even if these are merely 'contemplative'. To apply this by analogy, the contemplation of activities around disaster risk reduction, climate change adaption and evacuation policy fits within the ambit of 'contemplative' measures by the State.

(iii) Reservation: Colombia - Central Unitary Workers' Union (CUT) and Colombian Medical Trade Union Association (ASMEDAS) 2001 [211]

This matter concerns the construction of Urra hydroelectric dam and the failure of the Colombian Government to conduct prior consultation with Embera Katio indigenous peoples in contravention of Articles 6 and 15(2) of the Convention. Furthermore, once the dam was constructed, flooding destroyed arable land, altered the ecosystem, fishing stocks depleted and communities were displaced. ILO convention no. 169 is not operative retroactively but occurrences after the date of entry into force are within the temporal scope of Convention. Part of the dam project involved the deviation of Rio Sinu, which occurred after the Convention had entered into force in Colombia. In addition, indigenous peoples were the

[210] *Ibid* §12.
[211] ILO – Colombia – C169 '*Report of the Committee set up to examine the representation alleging non-observance by Colombia of the Indigenous and Tribal Peoples Convention, 1989 (No. 169), made under article 24 of the ILO Constitution by the Central Unitary Workers' Union (CUT)and the Colombian Medical Trade Union Association*'.

victims of acts of violence and threatened or intimidated due to protests and advocacy against this project.[212]

Among many other recommendations, the Committee of Experts observed that moving forward the government should engage with indigenous communities affected by displacement, in a dialogue of 'cooperation and mutual respect' in order to come to some solutions.[213] The Committee of Experts required the Colombian Government to provide a more information regarding these issues.

Observation

A direct request was made to the Colombian Government to furnish updated information concerning their non-compliance with ILO Convention no. 169, in which this matter above was followed up in an 'Observation' adopted in 2009 and published in the 99th ILO Session (2010).[214] Unions are able to send communications to the ILO concerning non-compliance of Conventions their State is party to alongside their State's annual reporting. These may will not necessarily become representations but may form part of the 'Observation' for that year. In a follow up to the Embera Katio case, the Committee '*...notes with regret that according to the ITUC's communication of 2009, there has been no compensation for the damage caused to the Embera Katío people by the Urrá I dam, and that, in 2008, a project for the construction of a new dam on their territory was submitted*.'[215]

These observations take into consideration the wider human rights context within the State, in addition to the compliance with the ILO conventions. For instance, this observation reports concerns around violence against human rights defenders, generalised violence, ethnic discrimination and refers to a CERD report. The Observation continues with specific alleged instances of non-compliance with ILO Convention no. 169, which is considerably more direct and adversarial about non-compliance. Here follows an excerpt concerning intrusion into Chidima and Pescadito reservations in which the State asserts that prior consultation is not required,

[212] *Ibid.*
[213] *Ibid* §68.
[214] Observation- Colombia- ILO Convention no. 169 (2010) (available at https://www.ilo.org/dyn/normlex/en/f?p=1000:13101:0::NO:13101:P13101_COMMENT_ID:3141204).
[215] *Ibid.*

'*The Committee urged the Government to take steps as a matter of urgency to put an end to the intrusion and asked it to join the three plots of the Chidima reservation into one in so far as there had been traditional occupation of the land. It also asked the Government to suspend activities arising from concessions granted for exploration and/or infrastructure projects, pending the consultation and participation of the indigenous peoples, in accordance with Articles 6, 7 and 15 of the Convention.*'[216] As such, where there is a risk of displacement the ILO will take a stronger stance against States.

(iv) Observation: Central African Republic (CAR)[217]

The Central African Republic in recent years has experienced large volumes of displacement caused by internal conflict and significant political unrest. Mass displacement of indigenous peoples from the Aka and Mbororo communities has occurred, who are extremely marginalised, impoverished and vulnerable.[218] The ILO has placed particular attention on indigenous farmers who have been displaced due to violence. While the focus of this thesis is concerned with States Party to ACHR, the observations made by the ILO in connection with displacement of indigenous peoples set standards of application for all States Party and to emulate best practice for other States.[219] The Committee asserts that CAR, under Article 2 and 3 of ILO Convention no. 169, must protect the human rights and fundamental freedoms of indigenous peoples which extends to '*protect their integrity and to enable the return of persons displaced.*'[220] Furthermore, the ILO requests the government to provide information on the participation of indigenous peoples in measures undertaken by CAR to address displacement and other human rights issues. The Conference adopted a direct request for CAR to provide information on the relocation of indigenous peoples, reciting the requirements of Article 16(2).[221]

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[216] *Ibid.*
[217] CAR- Direct Request- ILO Convention no. 169. Published at 105th ILC Session (available at https://www.ilo.org/dyn/normlex/en/f?p=1000:13100:0::NO:13100:P13100_COMMENT_ID:3960169). Note, no representation has been taken up by the ILO in relation to the Central African Republic. 'Observation (CEACR) - adopted'.
[218] *Ibid.*
[219] Swepston, L. *supra* note 143.pp.108.
[220] *Ibid.*
[221] ILO - Direct Request - CAR *supra* note 217.

2.3.9 Critique of ILO Convention no. 169: Formalism

ILO Convention no. 169 was never intended to be the primary source of binding international law governing the rights of indigenous peoples, but this is now the status quo.[222] Furthermore, given the origin of the Convention within the ILO, it naturally contains formalist and regulatory language in the tradition of international law, which often times is '*...read narrowly without much regard to the core principles it advances.*'[223] This predicates any arguments that advance the rights of indigenous peoples on a'*...utopian faith in the force of particular wording and fear of calamity if that wording is not maintained*.'[224] The argument advanced here is that indigenous peoples' rights, within the *juris corpus* of international human rights law, hinges on the normative thrust. As such, interpretation is conducted beyond the mere words, to a realist, contextual discourse.[225] Irrespective of this, the Convention does pose challenges to States to transform norms into reality and formalist language need not restrict a wider reading of ILO Convention no. 169, especially in light of the progress made within the jurisprudence of the IACtHR.[226]

2.3.10 Conclusion

It is clear that the mechanisms within the ILO function in unison and concurrently to ensure compliance with the provisions of ILO Convention no. 169. As displayed within these examples, displacement is a key issue that the ILO is willing to address within the ambit of the Convention. In most, if not all instances, this displacement pertains to economic interests or infrastructure projects, but the interpretation of these observations can be applied by analogy to other types of displacement. This is not a difficult deduction to make given the provisions can be applied broadly to various contexts of internal displacement, irrespective of the cause. As evidenced in the Peru example above, consultation with indigenous peoples is required before legislative or administrative measures are undertaken that directly affects them, this extends to disaster risk reduction legislation.

Upon deeper reflection, the various mechanisms within the ILO provide for broader norms for State engagement with indigenous peoples in the application of the Convention. These

[222] Swepston, L. *supra* note 143.pp.17.
[223]Anaya, S.J. '*Divergent Discourses*' *supra* note 106.pp.247.
[224]*Ibid.*pp.248.
[225]*Ibid.*pp.248.
[226]*Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, IACtHR, Judgement of August 31, 2001 (Merits, Reparations and Costs). Statement of Rodolfo Stavenhagen Gruenbaum §83(d).

mechanisms promote the implementation of the Convention through observations, direct reporting and periodic review, but beyond this, the promotion and protection of indigenous peoples' rights in the abstract. They are intended to provide exemplars for the application of the Convention, whilst also directing a particular State towards observance of the law. Thus, giving rights holders and duty bearers norms from which to apply rights by analogy. As in the Colombian observation, a State that fails to consult before the intrusion upon indigenous peoples' lands and the granting of economic concessions that could result in displacement, *prima facie,* breaches articles 6, 7, 13, 15 and 16. As such, the failure to consult in drafting of legislation determining the State's response to disasters, which is envisaged to result in intrusion on indigenous peoples' land and displacement, requires a similar onus on the State. These examples provide concrete standards and modes of application of the Convention to indigenous peoples during internal displacement, irrespective of the cause.

While the ILO Convention no. 169 is a significant contribution to the rights of indigenous peoples, it was intended to be a placeholder for a UN-led comprehensive rights framework. Swepston notes that '*All of us thought that the ILO was filling a gap that would be eventually filled by the UN.*'[227] This is not to minimise or detract from the progress of indigenous peoples' rights made through activism, the UNDRIP or ILO Convention no. 169 but it remains to be seen if a UN-led framework can provide State accountability for indigenous peoples' rights. Ultimately, the ILO's supervisory mechanisms succeeds in facilitating a dialogue with States and accountability through periodic reporting. The creation of the Convention is a watershed moment in the progressive realisation of indigenous peoples' rights and has reach beyond the borders of the States Party. In subsection 3.15 there will be a discussion of the application of ILO Convention no. 169 within the jurisprudence of the IACtHR, which will further highlight the Convention's reach.

[227] Swepston, L. *supra* note 142.pp.17.

2.4 The Pinheiro Principles[228]

This subsection will briefly examine the Pinheiro Principles as they intersection with the rights of indigenous peoples during internal displacement. The focus will be narrowed to the principles that directly relate to the return of indigenous peoples to their lands after displacement. Furthermore, many of the rights contained within the Pinheiro Principles are akin to those in the GPID, such as the right to be 'free from arbitrary displacement' and will not be rehashed within this subchapter. Similar to the GPID, the principles are non-binding 'soft law' which are based on and interpret international human rights, refugee and humanitarian law.[229] In contrast to the GPID, these were developed following consultation with States and civil society.

2.4.1 Background

The Pinheiro Principles attempt to provide durable solutions to IDPs and refugees by facilitating safe and dignified return to their homes, land, properties or places of habitual residence. The principles set out to assist IDPs or refugees to reclaim their homes, property and land under the authority of international legal norms.[230] In addition, they seek to protect those who have been arbitrarily or unlawfully deprived of their former homes, lands, properties or places of habitual residence.[231] The Principles recognise an 'individual's' right to regain lost property as a result of conflict.[232] While the principles do not formally acknowledge concepts of indigenous peoples' land tenure or collective rights, there is an acknowledgement in the Pinheiro Principle's Handbook those without a 'fixed abode' are entitled to restitution without discrimination.[233]

2.4.2 Principle 7

[228] Economic and Social Council, 'Housing and property restitution in the context of the return of refugees and internally displaced persons', Final report of the Special Rapporteur, Paulo Sergio Pinheiro. ('The Pinheiro Principles') E/CN.4/Sub.2/2005/17.
[229] *Ibid* §8.
[230] The right to property (Article 21 ACHR).
[231] Preamble and Principle 1.1 Pinheiro Principles.
[232] Anderson, M.J. '*The UN Principles on Housing and Property Restitution for Refugees and Displaced Persons (the Pinheiro Principles): Suggestions for Improved Applicability*', Journal of Refugee Studies Vol. 24, no.2, Oxford University Press (2011).pp.304.
[233] UN Office for the Coordination of Humanitarian Affairs '*Handbook on Housing and Property Restitution for Refugees and Displaced Persons: Implementing the 'Pinheiro Principles*' (2007).pp.34.

Principle 7.1 affirms the right to peaceful enjoyment of possessions. Principle 7.2 caveats this in favour of the State, only if the public interest so determines it necessary as provided by law. However, this is subject to the condition that the restriction on the right aligns with international law and the caveat should be read restrictively. According to the Pinheiro Principles Handbook, indigenous understandings of property and collective rights should be recognised by the State in line with ILO Convention no. 169.[234] Thus, the right to peaceful enjoyment of possession is more expansive than the 'right to property' which is a western and neo-liberal concept of property, which traditionally does not reflect indigenous peoples' worldview.[235] For instance, if indigenous peoples are displaced, this does not extinguish their rights to peacefully enjoy and possession of traditionally occupied lands.

2.4.3 Principle 14.2

Under Principle 14.2 there is push to consult marginalised groups within the decision-making process. Principle 14.2 declares that,

'*States and other involved international and national actors should, in particular, ensure that women, indigenous peoples, racial and ethnic minorities, the elderly, the disabled and children are adequately represented and included in restitution decision-making processes, and have the appropriate means and information to participate effectively...*'[236]

This is by no means as authoritative in comparison to the UNDRIP or ILO Convention no. 169 but it does go some way to address the lack of representation of indigenous peoples' right post-displacement.

2.4.4 Conclusion

The Pinheiro Principles represent a global commitment to restitution of property post-conflict, which requires the consultation of indigenous peoples. However, it is apparent that the principles fall short of differing understandings of ownership to include indigenous perspectives, such as collective, communal or nomadic use. While these principles touch on indigenous peoples' issues, there is not a reiteration of other international legal standards for the return of their land as articulated in ILO Convention no. 169 or the UNDRIP.

[234] Particularly Articles 14 and 16 ILO Convention no. 169.
[235] Anderson, M.J. *supra* note 232.pp.45.
[236] Principle 14.2 Pinheiro Principles.

3. The Organization of American States (OAS): The Inter-American Human Rights System

This chapter will examine the Inter-American Human Rights System within the Organization of American States (OAS), with particular focus on the case law of the IACtHR and the decisions of the Inter-American Commission on Human Rights (IACHR or the Commission) concerning indigenous peoples during internal displacement. It is proposed that this will illustrate the flourishing nature and breadth of human rights protection for indigenous peoples, which will in some instances be applied by analogy to contexts of internal displacement. In addition, there will be a discussion of the induction of the ILO Convention no. 169 within the jurisprudence of the IACtHR. It will become evident through this inquiry how the cumulative effect of indigenous peoples' rights found within these instruments forms *sui generis* rights and norms.

3.1 Background

The OAS is a regional body which brings together 25 independent States within the American continent to make collective decisions to progress political, judicial and social development. One of the main purposes of the OAS is the promotion and protection of human rights, and it has been acutely concerned with the human rights of indigenous peoples.[237] The ACHR has two organs watching over its implementation and enforcing its provisions. First, the IACtHR is the judicial body of that adjudicates over the ACHR. Second, the Commission functions as the 'consultative organ' to the OAS, overseeing the 'observance and protection of human rights.'[238] Petitions can be made to the Commission against a State for alleged non-compliance with the ACHR, for which an applicant must exhaust all domestic remedies.[239] Furthermore, cases can be submitted to the IACtHR after the Commission has furnished its report and may only be submitted by the Commission or a State Party, in compliance with procedures laid out in Articles 48 and 50.[240]

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[237] Anaya, S.J. and Williams Jr, R.A. '*The Protection of Indigenous Peoples' Rights over Lands and Natural Resources Under the Inter-American Human Rights System*' 14 Harv. Hum. Rts. J. 33 (2001).
[238] OAS Charter, Article 106.
[239] Articles 44, 45 and 46 ACHR.
[240] ACHR: Article 48: 1. When the Commission receives a petition or communication alleging violation of any of the rights protected by this Convention, it shall proceed as follows:
a. If it considers the petition or communication admissible, it shall request information from the government of the State indicated as being responsible for the alleged violations and shall furnish that government a transcript

It is not within the ambit of this thesis to fully explore the functions of the OAS' organs and so the focus will be limited to a discussion of the mechanisms and judicial decisions that focus on indigenous peoples' rights during internal displacement.

3.2 Methodology: Interpreting Indigenous Peoples' Rights within the Inter-American Human Rights System

The purpose of this subsection is to flesh out the methodology employed by the IACtHR when interpreting the rights of indigenous peoples and to use this as a tool to further expand on the indigenous peoples' rights during *all* forms of internal displacement. The purpose of this is to apply the law as the Court potentially would by using their exegesis tools, as a 'no man's land' exists within the law at present. As was shown in the previous chapter, a formalist interpretation of international law displays the inadequacies in protection for indigenous peoples.

A 'realist', 'contextual' and *pro homine* approach to the rights of indigenous peoples will be explored in order to lay the methodological groundwork for the proceeding subsections. This

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of the pertinent portions of the petition or communication. This information shall be submitted within a reasonable period to be determined by the Commission in accordance with the circumstances of each case.
b. After the information has been received, or after the period established has elapsed and the information has not been received, the Commission shall ascertain whether the grounds for the petition or communication still exist. If they do not, the Commission shall order the record to be closed.
c. The Commission may also declare the petition or communication inadmissible or out of order on the basis of information or evidence subsequently received.
d. If the record has not been closed, the Commission shall, with the knowledge of the parties, examine the matter set forth in the petition or communication in order to verify the facts. If necessary and advisable, the Commission shall carry out an investigation, for the effective conduct of which it shall request, and the states concerned shall furnish to it, all necessary facilities.
e. The Commission may request the states concerned to furnish any pertinent information and, if so requested, shall hear oral statements or receive written statements from the parties concerned.
f. The Commission shall place itself at the disposal of the parties concerned with a view to reaching a friendly settlement of the matter on the basis of respect for the human rights recognized in this Convention.
Article 50 1. If a settlement is not reached, the Commission shall, within the time limit established by its Statute, draw up a report setting forth the facts and stating its conclusions. If the report, in whole or in part, does not represent the unanimous agreement of the members of the Commission, any member may attach to it a separate opinion. The written and oral statements made by the parties in accordance with paragraph 1.e of Article 48 shall also be attached to the report.
2. The report shall be transmitted to the states concerned, which shall not be at liberty to publish it.
3. In transmitting the report, the Commission may make such proposals and recommendations as it sees fit.
Article 61: 1. Only the States Parties and the Commission shall have the right to submit a case to the Court.
2. In order for the Court to hear a case, it is necessary that the procedures set forth in Articles 48 and 50 shall have been completed.

approach focuses less on viewing indigenous peoples' rights based upon a 'continuation of historical sovereignty' which posits the idea that indigenous peoples are 'nations'.[241] Flowing forth from this idea is a 'formalist' approach that advocates legal texts to be read narrowly or as having a fixed legal meaning within State practice.[242] Rather than deconstructing the law piece by piece, a realist approach takes a broad, contextual reading of the human rights instruments related to indigenous peoples.[243] This places an emphasis on the purpose, intentionality, values, the evolving thinking, and realisation of human rights as a tool to apply the law. Whereas, a strict formalist and *individualist* approach to human rights texts, accompanied by a conventional western understanding of international law does not allow for the protection of indigenous peoples' *collective* rights.[244] By way of example, the right to property as traditionally interpreted in the UDHR, ICCPR or the ACHR can be interpreted in a way that is supportive of indigenous peoples' collective ancestral land tenure, as opposed to a Lockean individualist idea of property ownership.[245] As asserted in the leading case of *Awas Tingni*, the 'right to property' need not be defined in such a restrictive formalist manner, as it can encompass both iterations.[246] Thus, this thesis aims to break the chains of legal formalism and to ensure the fullest expression of indigenous peoples' rights during internal displacement. Traditional formalism and positivism has been used as a tool to deny indigenous peoples' rights, '*...endorsing, evolving socially sanctioned racist theories.*'[247] A bundle of methodological tools are adopted by the IACtHR in the determination of indigenous peoples' rights and these will be highlighted in the forthcoming subsections.

A corollary tool for interpretation within the ACHR is the *pro homine* principle (or *pro persona* principle) which promotes the fullest realisation of human rights and the preservation of human dignity.[248] As such, human rights treaties are living instruments which require an

[241] Anaya, S.J. '*Divergent Discourses*' *supra* note 106.pp.241.
[242] *Ibid.*pp.240.
[243] *Ibid.*pp.240.
[244] *Ibid.*pp.245.
[245] *Ibid.*pp.245. Article 27 ICCPR, Article 21 ADHR and Article 2 and 17 UDHR.
[246] *Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, IACtHR, Judgement of August 31, 2001 (Merits, Reparations and Costs) §28-34.
[247] Doyle, C.M. *supra* note 182.pp.47.
[248] Article 1(1) ACHR.
Fuentes, A. 'S*ystemic Interpretation of International Human Rights Law in the Jurisprudence of the Inter-American Court of Human Rights*', Research Brief, Raoul Wallenberg Institute of Human Rights and Humanitarian Law (2019).pp.3.

evolutive interpretation that reflects society.[249] Similarly, Article 29 of the ACHR provides for the fullest enjoyment and exercise of rights and freedoms contained within the Convention, incorporating the principle of non-restrictive interpretation.[250] This non-restrictive reading is consistent with the object and purpose of the Convention, taking into account the wider context of the Convention's aim (as espoused in Article 31(1) of the Vienna Convention on the Law of Treaties (VCLT)). As eluded to within the subsection on fragmentation of international law, the ACHR, UNDRIP and ILO Convention no. 169 do not operate in separate jurisdictional spaces but part of a wider international human rights system. Therefore, there is the presumption against normative conflict at international law[251] and the IACtHR has adopted the principle of 'systematic integration' or 'harmonising' of these instruments - particularly with indigenous peoples' rights.[252] The VCLT considers relevant instruments, agreements and rules of international law to be used within the interpretation of the ACHR, recognising the wider human rights systems which it forms part of.[253] Overall, instruments related to indigenous peoples' rights are not contained within separate and distinct silos but exist within a greater context of international human rights law. Similarly, to silo IDP rights and indigenous peoples' rights would only seek to further fragment international human rights law, rather than allow for an integrative approach.

3.3 Displacement Protection under the ACHR

Briefly this section will ponder some selected articles within the ACHR and the Additional Protocol of San Salvador that have been applied in a *pro homine* and 'realist' manner to the rights of indigenous peoples.[254] The articles have been selected based upon the frequency in which they have been discussed within academia and the jurisprudence in relation to the rights of indigenous peoples. They are as follows, Article 3 (The Right to Legal Personality), Articles 4 (Right to Life), Article 5 (Right to Humane Treatment), Article 13 (Freedom of Thought and Expression), Article 16 (Freedom of Association), Article 17 (Rights of the

[249] See *Case of the Gómez Paquiyauri Brothers* Judgment of July 8, 2004. Series C No 110, para. 165; *Case of the Mayagna (Sumo) Awas Tingni Community* §146; *Case of the "Street Children" (Villagrán Morales et al.)* §193, and *The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law*. Advisory Opinion OC16/97 of November 14, 1997. Series A No. 16, §114.
[250] Fuentes, A. *supra* note 248.pp.5.
[251] Koskenniemi, M. '*Fragmentation of International law: Difficulties Arising from the Diversification and Expansion of International Law*', Report of the Study Group of the International Law Commission, A/CN.4/L.682 13 April 2006 §37.
[252] Fuentes, A. *supra* note 248.pp.5.
[253] Articles 31(2)(a)(b) and 31(3)(c). Also see Fuentes, A, *supra* note 248.pp.5.
[254] Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights 'Protocol of San Salvador' 1988.

Family), 21 (Right to Property), 22 (Freedom of Movement), Articles 23 (The Right to Participate in Government), Articles 24 (Right to Equal Protection) and Article 25 (Right to Judicial Protection). Each of these articles will be examined within the cases below, in conjunction with the ancillary provisions of Article 1(1) (Obligation to Respect Rights), Article 2 (Obligation to Give Domestic Legal Effect to Rights), 26 (Progressive Development of the Convention) and 29 (Restrictions Regarding Interpretation) of the American Convention on Human Rights.

3.4 Case Law

The following leading cases are presented here to illustrate the protection of indigenous peoples' rights, with the aim to delimit the scope of protection and hypothesise the widening of indigenous peoples' rights during all forms of displacement. The cases will be examined chronologically, reflecting the cumulative effect of the IACtHR's jurisprudence. Where the facts of the case are pertinent to the examination of indigenous peoples during internal displacement, then these shall be more thoroughly discussed.

3.4.1 Reasoning by analogy

Let us venture into some logical equivalences we can form from the cases below. The IACtHR applies an 'evolutionary interpretation' of property rights, invoking and replicating the same understanding of indigenous peoples' rights as iterated within the *corpus juris* of international law. It is strongly asserted that the cases provide a blueprint for the law to be applied by analogy, *lex lata* to *lex ferenda*. Analogical reasoning (*per analogian)* is a common legal tool '*...to draw conclusions about a lesser-known situation (the target) based on the similarities it shares with a well-known situation (the source).*'[255] At international law, it has been used as an effective tool to close normative gaps, or where similar cases arise.[256] Additionally, the International Law Commission and the International Federation for the Red Cross are advocates of analogic reasoning in applying norms of humanitarian law to disaster

[255] Hertogen, A. '*The Persuasiveness of Domestic Law Analogies in International Law*', The European Journal of International Law, Vol.29 no.4 (2019).pp.1127.
[256] Vöneky, S. '*Analogy in International Law*', Max Planck Encylopedia of Public International Law, Oxford University. §2 (Sourced from https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1375 on 5 May 2019). For example, the ICJ has employed analogy to close normative gaps, as in *Military and Paramilitary Activities in and against Nicaragua*, Judgment, 26 November 1984, ICJ Reports (1984) 392, at 420, §63.

relief.[257] As such it can be harnessed to illustrate the ACHR possible protection of indigenous peoples during internal displacement. Take for instance a hypothetical situation where the State allows *x* actor a logging concession over indigenous peoples' land before conducting land demarcation/titling and without seeking consent/consultation of indigenous peoples - this would result in a *prima facie* breach. By analogy, if a State legislates or enacts policy concerning climate change adaptation, disaster risk reduction, or movement of people due to conflict or emergency, without consultation or consent, the same logical nexus exists. The potential for interference on indigenous peoples' territorial rights is analogist.

3.5 Community Mayagna (Sumo) Awas Tingni v Nicaragua (2001)[258]

The Mayagna (Sumo) Awas Tingni set a very promising jurisprudential standard for indigenous peoples' rights, triggering a line of cases that opened the IACtHR to judicial inquiry and re-conceptualising indigenous peoples' rights within the corpus of international human rights law. The case centres on a community of around 600 hundred Mayagna and Sumo indigenous peoples living in Northern Atlantic Autonomous Region of Nicaragua (RAAN). The State granted a Korean logging company a thirty-year concession to manage and utilise 62,000 hectares of forestland. Within the region, the communities subsist on communal agriculture, hunting, fishing and medicinal plant gathering.[259] An anthropologist explains that tied up in the physical space of their territory exists their cultural self-identification and social self-perception.[260] For example, this territorial space holds sacred burial grounds which adjoin the Wawa River and local indigenous peoples believe the mountains are home to spirits who control animals that inhabit these lands.[261] Furthermore, '*...each community have their own mechanisms, customs and habits, customary law to distribute egalitarian access among the household communities the community*.'[262] The land in which they reside has not been demarcated, nor has title been granted to the Community. After much domestic litigation, and the Inter-American Commission of Human Rights' decision, the case was submitted to the IACtHR. Many violations were alleged, most crucially, Article 21 (The Right to Property) in conjunction with Article 1(1) (Obligation to

[257] Sivakumaran, S '*Techniques in International Law Making: Extrapolation, Analogy, Form and the Emergence of an International Law of Disaster Relief*', The European Journal of International Law, Vol.28 no.4 (2018).pp.1116.
[258] *Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, IACtHR, Judgement of August 31, 2001 (Merits, Reparations and Costs).
[259] *Ibid* §83-103.
[260] *Ibid*. Expert evidence of Mr. Rodolfo Stavenhagen Gruenbaum, anthropologist and sociologist at §71-72.
[261] *Ibid* §83(c).
[262] *Ibid* §83(d).

Respect Rights), Article 2 (Obligation to Give Domestic Legal Effect to Rights), 26 (Progressive Development of the Convention) and 29 (Restrictions Regarding Interpretation) of the American Convention. [263]

3.5.1 Article 21: The Right to Property

Article 21 of the ACHR states, that

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

The Court determined the right to property encompasses collective indigenous ownership of communal property, which exists outside of the traditional land tenure system.[264] This is based upon '*...traditional patterns of use and occupation of territory...*', which form indigenous customary norms protected by Article 21.[265] Additionally, the Nicaraguan Constitution, the laws governing the RAAN and international conventions affirm these norms.[266]

The Court deconstructs the term 'property' to be understood as '*...those material things which can be possessed, as well as any right which may be part of a person's patrimony; that concept includes all movables and immovables, corporeal and incorporeal elements and any other intangible object capable of having value*'.[267] Article 1(1), 2 and 29 lend credence to this conclusion, as the Convention must be interpreted to include indigenous peoples'

[263]Full list of Articles alleged: Article 4 (Right to Life), Article 11 (Right to Privacy), Article 12 (Freedom of Conscience and Religion), Article 16 (Freedom of Association), Article 17 (Rights of the Family), Article 21 (Right to Private Property), Article 22 (Freedom of Movement and Residence), Article 23 (Right to Participate in Government) and Article 25 (Right to Judicial Protection). All in relation to Article 1(1) (Obligation to Respect Rights) and Article 2 (Obligation to Give Domestic Legal Effect to Rights) of the American Convention.
[264] *Ibid* §140.
[265] *Ibid* §140(b).
[266] *Ibid* §148.
[267]*Ibid* §144.

worldview.[268] Furthermore, the Convention is a living human rights instrument reflective of current society, that entails an approach which is progressive, *pro homine* and 'realist'. [269] This approach acknowledges that ownership of ancestral territory by indigenous peoples is essential to their culture, spiritual life and survival.[270] The Court concluded the State is to provide formal titles for communal lands, delaminate and demarcation the boundaries of Awas Tingni's territory.[271] Thus, the State has an obligation to respect the 'existence, value, use and enjoyment' of these land until the titling process is complete. The Court recognises the right to property can be limited by the principles of necessity, proportionality and in the pursuit of the legitimate aims of a free and democratic society.[272] However, this threshold was not met in this instance, the State did not take the necessary steps to ensure the right was respected but rather it created a 'climate of constant uncertainty.'[273]

3.5.2 Joint Separate Opinion of Judges A.A Cancado Trindade, M. Pacheco Gomez and A. Abreu Burelli

One crucial insight to be noted in the joint separate opinion in this case is the notion that cultural manifestations of indigenous peoples reflected in their property and goods, is a substratum of the right to property.[274] Thus, this connection forms a norm which the Judges in the joint separate opinion believe is justiciable.

Overall, this decision is ground-breaking. It discards the exegesis formalist tools for interpreting 'property', in favour of a *pro homine* approach. This approach opens the door for differential understandings of property rights, which can be applied by analogy to indigenous peoples during internal displacement. For example, the Awas Tingni's territory was encroached upon by the State and a third party, and one could imagine displacement resulting in this scenario were indigenous peoples excluded from their ancestral in favour of the

[268] *Ibid* §148(ñ).
[269] OAS '*The Right to Information on Consular Assistance in the Framework of Guarantees for Due Legal Process*' Advisory Opinion OC-16/99 of October 1, 1999. A Series No. 16, para 114.
[270] *Ibid* §149.
[271] *Ibid.*
[272] *Sawhoyamaxa Indigenous Community v Paraguay (2006), IACtHR, Judgment of 29 March 2006 (Merits, Reparation and Costs)* §114(c).
[273] *Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, IACtHR, Judgement of August 31, 2001 (Merits, Reparations and Costs) §152-153.
[274] *Ibid*. Joint Separate Opinion of Judges A.A Cancado Trindade, M. Pacheco Gomez and A. Abreu Burelli §11.

Korean logging company. This would further aggravate their right to enjoy and use communal property, and so the duty falls upon the State not only to remediate this, but to prevent it.[275] Like with a title, domestic legislative protection is required to ensure this right is implemented in its fullest expression.

The IACtHR is commended for being judicially progressive and employing a *pro homine* lens when interpreting the right to property, the decision is clearly forward looking and banishes the ghosts of formalism.[276] However, this can be viewed another way, the decision was not a legal aberration, more it was an opening towards the perspective by this Court to dispense with strict legal formalistic concepts of property rights to allow for an interpretation of property that encompassed those understood by indigenous peoples, as *lex lata* realised. It is tempting to accept the narrative of a landmark decision arising from a historic injustice but be mindful that such thinking undercuts the value of the evolutionary process of the indigenous peoples' rights movement, as seen with ILO Convention no. 169 and the UNDRIP. This case is a turning point for indigenous peoples within the OAS, but on a larger continuum which is not limited to the judicial 'recognition' of existing rights. Thus, this thesis shows that rights may yet have to be fully fleshed out or discovered, not for lack of existence but for lack of realisation. Further, there will be points of departure from the Court's reasoning, where perhaps they did not intent to go.

3.6 Kankuamo Indigenous Peoples v Columbia (Provisional Measures)(2004)[277]

This case concerns an interim injunction to prevent the displacement of the Kankuamo Community due to the operations of the Colombian military. The geographic location of the Community's territory is of strategic military importance and so they were exposed to threats from armed groups and paramilitary soldiers continuously, resulting in the deaths of 144 people in a 10-year period.[278] Unlike the other matters discussed in this subchapter, the judgement in an interim measure and is not a substantive case. Thus, the Court does not enter into substantive reasoning based upon the merits of the case, but some important conclusions are reached concerning indigenous peoples and displacement. In essence, the State has an obligation to protect the Community of six thousand indigenous people form third party

[275] Article 2 requires States Party to the ACHR to enact domestic legislation or measures to realise these rights.
[276]Anaya, S.J. '*Divergent Discourses*' *supra* note 106.pp.249.
[277] *Kankuamo Indigenous Peoples v Columbia* (Provisional Measures) IACtHR Series E (2004) §2.
[278] Pasqualucci, Jo M. '*The Evolution of International Indigenous Rights in the Inter-American Human Rights System*', Human Rights Law Review, Bluebook 20th edition (2006).pp.281-322.

military groups.[279] This principle is secured with Article 4 (Right to Life), for which they have a positive obligation to adopt provisional measures to secure the safety of the Community.[280] The State is then obligated to follow up with the Court on its progress. As will be illustrated within other cases, the right to life requires the State to protect indigenous peoples' cultural connection to land.

3.7 YAMATA v Nicaragua (2005)[281]

This case broadly concerns the voting rights of indigenous peoples in the North Atlantic Autonomous Region (RAAN) of Nicaragua. Whilst this matter does not concern displacement directly, there are elements of this decision that touch upon a State's obligations to include indigenous peoples in decision making. YAMATA (Yapti Tasbah Masraka Nanih Aslatakana) is an indigenous peoples' organisation and political party that was effectively barred from participating in elections as a result of a decision by the Supreme Electoral Council of Nicaragua. The Supreme Electoral Council imposed a series of unrealistic and excessive requirements, which YAMATA argue they could not meet.

3.7.1 Articles 23 and 24: The Right to Participate in Government and The Right to Equal Protection

Fundamental to democracy is the notion of participation of the citizenry in government. The representatives of YAMATA argue the Supreme Electoral Council deliberately 'erected barriers' to the participation of indigenous peoples in this election. Thus, *'the safeguard of the individual in the face of the arbitrary exercise of powers of the State is the primary purpose of international protection of human rights.*'[282] As such, the State failed to ensure equal footing for indigenous peoples during the electoral process and to access public office, in a manner that respects indigenous views. Article 23 ensures that every citizen of a State Party to the Convention is able to enjoy the right to vote, universal and equal suffrage and have equal conditions to enter into public service. Additionally, Article 24 was invoked by the Court, it ensures equality and equal protection before the law for all people. To properly secure these rights, and in conjunction with Articles 1(1) and 2 of the ACHR, the State has an

[279] *Kankuamo Indigenous Peoples v Columbia* (Provisional Measures) IACtHR Series E (2004) §10-11.
[280] *Ibid* §1.
[281] *YAMATA v Nicaragua,* IACtHR, Judgement of 23 June 2005 (Preliminary Objections, Merits, Reparations and Costs).
[282] *Ibid* §167.

active obligation to introduce non-discrimination laws. In this sense, detailed policy and law are required for 'optimal conditions and mechanisms' for electoral participation, and thus fostering an environment of inclusion, achieved through direct engagement between the States and indigenous peoples.[283] Within the context of the Americas, indigenous peoples are marginalised and excluded from government participation owing to language barriers, understanding of customs and forms of governance and access to information. Thus, when the Court considers whether these above articles are consistent with the Electoral Act, it does so in the least restrictive manner to 'not deprive rights of their essential content'.[284] If the Court was to allow the legitimate aim of domestic regulations to hold priority over the fullest expression of these rights, it would render them perfunctory. Reasoning this by analogy to the situation of indigenous peoples during internal displacement may at first glance appear difficult, however, the logic is simple. In the exercise of government, States ought to include indigenous peoples in all forms of State-building, not limit this to participation within elections.

As shown within subsections on the UNDRIP (2.2.5 and 2.3.5), States must consult with indigenous peoples when legislation affects them and include them in decision making, aligning with the Court's findings. The Court ordered the State to adopt all measures to ensure indigenous peoples '*... can [be] incorporate[d] [into] State institutions and bodies and participate directly...and also do this from within their own institutions and according to their values, practices, customs and forms of organization, provided these are compatible with the human rights embodied in the Convention*.'[285] Take the specific situation of disaster displacement, this requires central and regional government planning and policy mechanisms to implement durable solutions to internal displacement. For indigenous peoples in RAAN, disaster displacement and climate change induced disasters can be used to illustrate how lack of State engagement with indigenous peoples and a non-HRBA can have an impact. Nicaragua lies on the ring of fire and is periodically prone to earthquakes and volcanic eruptions, and also acutely prone to cyclical flooding, storm surges and hurricanes.[286] Oxfam has stated that indigenous Miskito peoples who inhabit this area, live on the '*frontlines of*

[283] *Ibid* §195-197.
[284] *Ibid* §204.
[285] *Ibid* §225.
[286] IDMC 'Nicaragua' (Available at http://www.internal-displacement.org/countries/nicaragua).

climate change'. [287] In 2007, Nicaragua's Atlantic Coast was struck by Hurricane Felix which caused widespread flooding and displacement. The State had limited capacity to be able to cope, which the UN described as a '*human-cultural-ecological-productive tragedy.*'[288] It is argued here that by taking the jurisprudence of the Court, in conjunction with a HRBA, would require the State to induct durable solutions for disasters that is not only inclusive of indigenous peoples, but gives them agency. Agency in this sense means applying indigenous knowledge, views and resources to these issues, and to dispel this misplaced neo-colonial paternalism that indigenous peoples are incapable of adaptation.[289]

3.8 Moiwana Community v Suriname (2005)[290]

In this matter, the N'djuka Maroon village, Moiwana was attacked by State and non-State armed forces, resulting in the massacre of 40 people. These people are of African descent and were forcibly removed to the Americas as slaves and managed to escape into the forest to form communities. The Moiwana Community is spiritually, culturally and materially connected to their traditional land, akin to indigenous peoples - in this case it is acutely relevant in relation to death rituals, processions, rites and burial.[291] It is not imperative to define whether the Community are 'indigenous' or 'tribal', as the principles derived from the judgement can apply to either indigenous or tribal people. As a result of the conflict, many of the Moiwana villagers were internally displaced and no substantive investigation into the massacre was undertaken by the State – which will be the focus of subsection. While Article 21 was breached by the State in this matter, and no new substantive legal ground was broken which has not been covered elsewhere in this subsection.

3.8.1 Article 5: The Right to Humane Treatment (in conjunction with Article 1(1))

Under Article 5(1) every person has the right to be treated humanely, respecting physical, mental, and with moral integrity. In this case, the Moiwana Community was unable to return

[287] Viñuales, D. '*On the front lines of climate change: Nicaragua's Miskito people*', Oxfam, 29 November 2007 (available at https://www.oxfamamerica.org/explore/stories/on-the-front-lines-of-climate-change-nicaraguas-miskitos-people/).
[288] Cupples, J. '*Wild Globalization: The Biopolitics of Climate Change and Global Capitalism on Nicaragua's Mosquito Coast*', Wiley Library, 14 February 2011. (Sourced 10 June 2019 at https://doi.org/10.1111/j.1467-8330.2010.00834.x).pp.11.
[289] *Ibid.*
[290] Case of the *Moiwana Community v. Suriname*, Judgement of June 15 2005 (Preliminary Objections, Merits, Reparations and Costs).
[291] *Ibid* §86(6)-(10).

to their homes and to honour the dead in accordance with their specific and complex rituals. When these rituals are not adhered to, it is considered a 'profound moral transgression' and leads to a disruption in the spiritual realm.[292] Also, it is believed this will manifest into 'spiritually-caused illnesses', which can affect the Community's lineage.[293]

According to the expert witnesses, there is a direct correlation between the preservation of the Community's culture and 'a fluid and multidimensional relationship with their ancestral lands'.[294] Since the massacre, many members of the Community remain internally displaced or refugees in French Guiana, not able to 'restore [their] lives'.[295] The Court found the threshold of 'inhumane treatment' was met in this case due to the significant emotional, psychological, spiritual and economic hardship. This decision directly addresses the potential impact displacement can have on indigenous and tribal peoples. The trauma of forced displacement amounts to inhumane treatment, which the State has a duty to avoid.

3.8.2 Article 22: The Freedom of Movement and Residence

While not dealt with by the Commission, or considered by either party to this proceedings, the Community's forcible eviction and involuntary resettlement amounted to an abridgement of Article 22. The traditional origin and orthodox understanding of this right is associated with the right to protest or political movement, but within the context of the ACHR its scope is broader – although neither the State nor the Community envisaged this as potentially violated in this case. The Court opines that, in light of Court's inherent right to address all possible violations (*iura novit curia*) it could consider article 22. Additionally, the Court acknowledged HRC General Comment no.27 and the GPID as facilitating a wider understanding of the freedom of movement. The Community argues the possibility of returning to their territory was not facilitated by the State and further hostilities awaited them if they did return.[296] The Court concurred and this conclusion rested upon the denial of '*…Moiwana community members to return voluntarily, safety and with dignity, to their traditional lands, relation to which they have a special dependency and attachment.* '[297] The Court explicitly recognised the Community's need to appease the spirits of their ancestors

[292] *Ibid* §98-99.
[293] Ibid §99.
[294] *Ibid* §101.
[295] *Ibid* §102.
[296] *Ibid* §110-114.
[297] *Ibid* §120.

and cleanse their lands. Therefore, the Community had a well-founded fear that excluded them from returning, and even though they may have been able to move freely throughout other regions of Suriname, the facts amounted to a *de facto* restriction.[298]

As noted throughout subchapter 2.1, the GPID represents the leading source of international law concerning internal displacement. While the Court references the GPID, little reliance and weight is given to the principles in the *ratio decidendi* and no directions are given by the Court to a wider acceptance of the GPID within the jurisprudence of IACtHR. The Court focuses more on the international humanitarian law and human rights standards that underpin the GPID, such as, the right of voluntary and safe return.[299]

3.8.3 The Configuration of Spiritual Damage

Within the Separate Concurring Opinion of A.A. Cancado Trindade, the Judge conceptualises the possibility of 'spiritual damage' as a subset of moral damages or exemplary damages. He argues that based on the aggravating circumstances of this case, in light of the massacre and spiritual harm from being displaced, an additional remedy should be given. While this is *obiter dicta*, this strengthens the notion that displacement of indigenous peoples is a situation that can amount to spiritual harm requiring rectification and remedy. This further strengthens the onus upon the State to ameliorate any foreseeable harm arising from internal displacement.

One ancillary matter to draw attention to are the breaches of Articles 5 and 22 in this matter comparative to the other cases discussed. While it is not necessary to dwell on this point, it can be argued that many of the other cases could attract a violation of these provisions.

3.9 Indigenous Community Yakye Axa v Paraguay (2005)[300]

This case shows the direct correlation between the denial of ancestry property rights and displacement, falling squarely upon the research questions. As such, this subsection requires

[298] *Ibid* §119.
[299] *Ibid* §111 and §16-17 Concurring opinion of Judge A.A. Cancado Trindade.
[300] *Indigenous Community Yakye Axa v Paraguay* (Merits, Reparations, and Costs), IACtHR Series C No.125 (17 June 2005).

a closer examination of the facts due to their pertinence to the ambit of legal protection covering indigenous peoples during internal displacement within the OAS. The Yakye Axa form part of the Southern Lengua Enxet and the larger Lengua-Maskoy indigenous peoples.[301] The Yakye Axa are predominantly hunter-gatherers, who are also reliant on subsistence farming and raising livestock.[302] Unbeknownst to the Yakye Axa, parcels of their land were sold by the Paraguayan State on the London Stock Exchange to foreign entities in the late 19th century, without consultation or compensation. In 1979, the Community were resettled from their lands and denied access to re-enter as part of a development program. The displacement of the Yakye Axa Community from their traditional lands disavowed them of a means of survival resulting in death, poverty, unsanitary living conditions, inability to access clean food and water and cultural dislocation. In 1993, the Community lodged a land claim which floundered due to the State's inaction and lack of impetus to come to a resolution. In 1996, the Community attempted to reclaim and occupy their land but were denied access, leaving them to settle along a roadside that abutted their ancestral lands. The conditions of this temporary settlement were dire, with no sanitation and limited access to healthcare and no allotted resources within the State's public health policy.[303] In 1999, the situation deteriorated to the point where the State declared a state of emergency in the Community. In the same year, the Community filed a complaint against land clearing, excavation and building that had begun on the disputed territory. In retaliation to this action, the Community was subjected to threats and harassment by third parties. The Yakye Axa filed a petition to the IACHR, after the State's failure to grant them rights to their ancestral lands and an oppressively convoluted and stymied State bureaucratic and judicial processes.

Many of the rights contained within the Convention were discussed in this case. The most pertinent of these will be discussed in the pursuit of answering this thesis' research questions. The State has a positive obligation to ensure the right to life of the Yakye Axa, and this Court affirms the threshold of the State's hand in ensuring the right to life is contextual.[304] Thus, the Yakye Axa's worldview, including the close relationship with their land, life aspirations (individual or collective) are determinative in the assessment of the Yakye Axa's right to life. This is in line with progressive understanding of the right to life, and so Article 1(1) and the

[301] *Ibid.*
[302] *Ibid.*
[303] *Ibid* §175(e).
[304] *Ibid* §163.

duty of progressive interpretation of the convention (Article 26) were considered. Thus, in the same sense as the *Awas Tingni* case, an understanding of the right to life ought to not be confined to a formalist interpretation but within the context of an indigenous worldview.

3.9.1 Article 4 (in conjunction with Article 1(1)): The Right to Life

In essence, the right to life ensures every human is not arbitrarily deprived of his or her life, which also encapsulates the right of each persons to a decent existence and expression of life.[305] The right to life is the foundation from which all other rights rest, without it all other rights would cease to exist and holds the status of a 'non-derogable right'.[306] Thus, the right cannot be derogated in situations of war, disaster or during displacement. However, the obligation on the State to protect life cannot be impossible or burdensome but only arises where the State knew or ought to have known about a possible abridgement of the right to life.[307] The Yakye Axa Community alleges the State failed to ensure the right to life, in the literal sense of the right, by depriving the Community of its ancestral lands, and their means of subsistence. The Community was left to survive in extreme conditions unable to conduct their traditional subsistence methods or to preserve their cultural identity, waiting for the State to effectuate the right to life.[308] The Community argues that, in light of ILO Convention no. 169, the right to life cannot be disassociated with economic, social and cultural rights – as they are means for 'flourishing life aspirations.'[309] The State has an inescapable positive obligation to fulfil the right to life, placing the dignity of each person as a paramount consideration in effectuating the right, especially for the vulnerable.[310]

There is a causal connection between the denial of ancestral lands and cultural identity to the right to life. The logical inference to draw in relation to this study is the displacement of indigenous peoples from their ancestral lands engages the right to life. Thus, the Court established a causal link between the negligence of the State and the grave living conditions of the Yakye Axa. The court pronounced that,

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[305] *Ibid* §157(a).
[306] *Ibid* §161.
[307] *Ibid* §155.
[308] *Ibid* §157.
[309] *Ibid* §158(f).
[310] *Ibid* §162. *Case of the "Street Children" (Villagrán Morales et al.) v. Guatemal*a, Judgement of 19 November 1999 §144.

'*Displacement of the members of the Community from those lands has caused special and grave difficulties to obtain food, primarily because the area where their temporary settlement is located does not have appropriate conditions for cultivation or to practice their traditional subsistence activities, such as hunting, fishing, and gathering*.'[311]

While the majority of the Court concluded there was insufficient evidence attributing liability to the State for the deaths of the Yakye Axa, they denied them a decent life. One consideration that was not furnished in this matter, that is furthered here – the right to life contains the special aspect of culture for indigenous peoples. In *Gómez Paquiyauri Brothers*, the Court concluded being a 'minor' requires special modes of application and to troubleshoot situations that might lead to a violation of the right, in aid of the minor's vulnerability and acknowledgement of the Convention on the Rights of a Child (CRC).[312] By analogy, indigenous peoples' spiritual and cultural connect to land requires a special mode of application, as situations of internal displacement through action or omission of the State could lead to the violation to the right to life and ought to be ameliorated. Through inference, the Court accepted that the Yakye Axa were tethered to the roadside dwelling, not only because of the grave circumstances but their cultural and spiritual connection to their ancestral territory.

3.9.2 The Right to Culture

The right to culture is not a specifically provided for within the ACHR, however, it is provided for within Article XIII of the ADRDM, Article 14 of the additional protocol of the ADHR, embodied within Articles 1(1), 5, 11, 12, 13, 15, 16, 17, 18, 21, 23 and 24 of ADHR and forms an essential part of the right to life.[313] This subsection will examine the right to culture within the facts of the Yakye Axa's case, the intention here is to provide depth of understanding to indigenous peoples during internal displacement. Closely linked with the access to ancestral land is the denial of cultural identity and cultural space, which the

[311] *Ibid* §164.
[312] *Case of the Gómez Paquiyauri Brothers v Peru*, IACtHR, Judgment of 8 July 2004 (Merits, Reparations and Costs) §124.

[313] *Indigenous Community Yakye Axa v Paraguay* (Merits, Reparations, and Costs), IACtHR Series C No 125 (17 June 2005). Dissenting Opinion of Judge Alirio Abreu Burelli §24.

Paraguayan Constitution purportedly seeks to protect.[314] The land serves as the '*...basis for their culture, spiritual life, wholeness, economic survival, and preservation and transmission to future generations*'.[315] Thus, severing indigenous peoples from their territory would result in 'irreparable ethnic and cultural loss'.[316] The territory, meaning all the space the Yakye Axa use, is a vast dwelling overseen by their cosmological 'lords', represented in animals or plants. The shamans use their surrounds to communication with the lords in order to negotiate therapy or goodwill for the ill. The Yakye Axa believe that the compassion of man to their surrounds grants them life and as such, they live *with* nature, as opposed to living *off* nature.[317] They unequivocally assert 'the land is our culture'. Building upon the *Awas Tingni* case, the Yakye Axa's right to property is '*closely linked to guaranteeing said right: the right to life, the right to ethnic identity, the right to culture and to recreate it, the right to survive as an integrated indigenous Community*'.[318] Furthermore, the State has resorted to applying criteria for land assessment under the auspices of non-indigenous rural agrarian law, despite its obligation to do otherwise under ILO Convention no. 169.[319] The Court clearly signalled that Article 13 of ILO Convention no. 169 (special relationship between indigenous peoples and their land) must be safeguarded within the right to property pursuant to Article 21 of the ACHR.[320] By analogy, a State ought to assess the needs of an indigenous community prior, during or post displacement incorporating indigenous perspectives, and using ILO Convention no. 169 as a legal roadmap, throughout a consultation process.

3.9.3 Separate Dissenting Opinion of A.A Cancado Trindade and M.E Ventura Robles

Within this separate dissenting opinions, Judges A.A. Cancado Trindade and M.E. Ventura Robles argue culture is essential to the right to life, they articulate this by stating that '*...the fundamental right to life takes on a higher dimension when the right to personal and cultural identity is taken into consideration*'.[321] In this case, the cultural and personal identity of the Yakye Axa was diminished to such an extent that their right to life was abridged. One could envisage a similar circumstance for indigenous peoples during other situations of

[314] *Indigenous Community Yakye Axa v Paraguay* (Merits, Reparations, and Costs), IACtHR Series C No 125 (17 June 2005) §167. Articles 63, 64, 65 of the National Constitution of Paraguay.
[315] *Ibid* §131.
[316] *Ibid* §11.
[317] *Ibid* §12.
[318] *Ibid* §121(h).
[319] *Ibid* §121(i).
[320] *Ibid* §137.
[321] *Ibid* §4 Separate Dissenting Opinion of A.A. Cancado Trindade and M.E. Ventura Robles.

displacement. As a consequence, it befalls the State to secure the right to life, and by extension - culture, to the fullest enjoyment. As articulated above, the Yakye Axa views their territory as a means of their subsistence and as forming part of their sense of self and to be separated from it is akin to be separated from oneself. In this sense, indigenous peoples occupy a space within ambit of what encompasses 'life' that is *sui generis* to them. This is the ideological basis for the assertion that displacement of indigenous peoples, in whatever manner and form it takes, abridges their right to life.

3.9.4 Article 25: The Right to Judicial Protection

Broadly speaking, the State has an obligation to provide effective recourse and protection against violations of the rights within the ACHR. In this case, the Court affirmed that in order for States to provide effective protection they must consider indigenous peoples' specificities, economic and social characteristics, vulnerability, customary law, values and customs.[322] Thus, where an indigenous community seeks State assistance from violations occurring during internal displacement, there must be effective recourse. To take this a step further, the State ought to develop preventative measures for violations of indigenous peoples' rights through consultation prior to displacement. Article 2 provides that States shall take domestic legislative or other measures necessary for the effective exercise of the rights contained within the Convention.[323] In the case at hand, the State failed to provide an effective land claim procedure, which rendered the Community displaced.

3.10 Sawhoyamaxa Indigenous Community v Paraguay (2006)[324]

The facts of this case are strikingly similar to the previous case, and as such, there will be a discussion of aspects of dicta that adds in some way to the understanding of indigenous peoples' rights during internal displacement, beyond what has already been expressed. In an almost identical fashion to the Yakye Axa, the Sawhoyamaxa's land was sold on the London Stock Exchange at the end of the 19th century. The Sawhoyamaxa and Yakye Axa belong to the Enxet (Lengua) Ethnic Group and have traditionally occupied territory within Gran Chaco

[322] *Ibid* §63.
[323] *Ibid* §100.
[324] *Sawhoyamaxa Indigenous Community v Paraguay (2006)*, IACtHR, Judgment of 29 March 2006 (Merits, Reparation and Costs).

(particularly Pozo Colorado). In 1991, the Community filed a request to the Paraguayan Institute of Indigenous Affairs (INDI) for legal recognition and title to their ancestral land, pursuant to domestic legislation.[325] The Sawhoyamaxa Community lived in extreme poverty on farming estates, and were subjected to exploitative working conditions amounting to 'modern slavery'[326] and subsequently, they moved to live along the roadside abutting their ancestral land (as the Yakye Axa did). By 1999, the scarcity of water, food, sanitation and basic services resulting in the Government calling a state of emergency, and consequently, representatives of INDI provided the Community with food and water. These conditions resulted in malnutrition, diseases, death and eroded the Community's way of living, heritage, language and cultural expression.[327] This can be directly attributed to the acts and omissions of the State in the administration of the Communities land claim, which the Court acknowledged was 'overtly ineffective'.[328]

3.10.1 Article 21: The Right to Property

The Court devises a formula for assessing an indigenous land claim from the previous cases.[329] Notably, a stronger tone is taken in this case by the applicants in relation to the right property. The Court chides the State for the '*...failure to observe the ancestral right of the Community and its members with respect to their lands would radically affect other basic rights, such as, and in a fundamental way, the right to cultural identity and to the very survival of the Indigenous Community and of its members.*'[330] The Court reiterates that denying a differential enjoyment of property, arising from cultural identity, would render Article 21 'illusory'.[331] While a spiritual connection is an incorporeal element to communal property ownership, it is no less actionable. Furthermore, that the domestic agrarian legal framework did not incorporate indigenous views or cater to their needs. In respect of their property rights, it behoves the State to allow for indigenous views to be considered when adopting displacement legislation and policy.

3.10.2 Article 4: The Right to Life

[325] *Ibid* § 73(18).
[326] *Ibid* §158.
[327] *Ibid* §73(75).
[328] *Ibid* §102.
[329] *Ibid* §127-141.
[330] *Ibid* §114(a).
[331] *Ibid* §120.

Unlike the *Yakye Axa* case, the Court was able to attribute some of the deaths of the Sawhoyamaxa to the State on the weight of evidence presented, but also a shift in reasoning has occurred. The Court relied on the *pro personae (pro homine)* principle in coming to this conclusion, as the State attempted to rely on the lack of public records for the deaths as a break in the causation nexus between the deaths and State responsibility. Thus, the State's own omissions cannot mitigate against what it ought to have reasonably foreseen and taken the necessary steps to prevent, which is affirmed by the Court's 'progressive construction' of the right to life.[332] As such, the deaths can be attributed to the State's omissions. It is reasonably foreseeable that the internal displacement of the Sawhoyamaxa triggers a State response, one that uses ILO Convention no. 169 and UNDRIP as a framework to respect the dignity of indigenous peoples.[333]

3.10.3 Article 3: The Right to Legal Personality

Article 3 guarantees every person the right to legal recognition before the law. In essence, this right amounts to duty upon the State to furnish the means and legal conditions enabling the right to personality to be exercised.[334] In this case, most of the members of the Community that died did not have documentation provided by the State to evidence their identity or existence, being a block to access their rights.[335]

An overall interpretation of the ACHR lends itself to promoting indigenous peoples' involvement in governance. In conjunction with Article 3, Article 26 allows fullest expression of rights and Article 23 the right to participate in government. Here begins the exegesis task of applying these by analogy to situations of displacement. Taking this case, and in light of the *pro homine* and contextual interpretation of the Convention, the State has an obligation to foster an environment whereby indigenous peoples are able to exercise governance and agency over issues related to displacement. An example is the active inclusion of indigenous peoples in the planning, policy and implementation of legislation concerning disaster displacement and climate change adaptation. These measures are

[332] *Ibid* §23 Separate opinion of Judge Sergio Garcia-Ramirez.
[333] *Ibid* §233.
[334] *Ibid* §188.
[335] *Ibid* §190.

bolstered by 'duty to consult' provisions within ILO Convention no. 169 and the adaptation of domestic legislation in conformity with the ACHR (Article 2).

3.10.4 Separate Opinion of Judge A.A. Cancado Trindade

Judge A.A. Cancado Trindade expands upon his previous dicta by stating '*The peoples —the human beings and their social environment—, faced with the mystery of life, develop and preserve their cultures in order to understand and relate with the outside world. Hence the importance of cultural identity, as a part or an addition of the fundamental right to life itself.*'[336] Thus, the Judge argues displacement places indigenous peoples in a desperate fight, not only for their physical survival but also for their cultural and historical survival.[337] The Judge clearly articulates a nexus connecting: 1) displacement, 2) the preservation of the right to life, and; 3) the right to a life with dignity and cultural identity.[338] As such, these individuals were unable to develop a 'life project' or their humanity, bury their dead in accordance with their rites and beliefs, and to actualise their culture.[339] The State's duty to fulfil each citizen's right to life is non-discretionary, but rather an obligation as part of international State responsibility.

Drawing an inference from this dictum, safeguarding and fostering indigenous peoples' culture is obligatory during internal displacement, as a fundamental component within their right to life. It ought not to be material the cause of this internal displacement, but rather to ensure rights of the displaced are upheld. How to uphold these is the anticipatory and speculative exercise of this thesis – and is the proverbial 'no-man's land'. Taking the Judge's sentiment further, a pragmatic response from the State should have been to follow the guidance of ILO Convention no. 169 and UNDRIP (which Paraguay is a party/signatory to). Such actions could be to: formulate a national policy for indigenous people during internal displacement, provide temporarily housing for the Community, demarcate their land, process their application for land title, foster cultural expression and indigenous language, provide healthcare (both traditional and western), allow temporary access to traditional land for rituals or activities and promote pathways for consultation. The case study on Colombia in

[336] *Ibid* §4 Separate Opinion of Judge A.A. Cancado Trindade.
[337] *Ibid* §13.
[338] *Ibid* §16.
[339] *Ibid* §30-32.

Chapter 4 will provide some insight into the implementation of the principles laid out by the Court and within ILO Convention no. 169 and UNDRIP.

3.11 Saramaka v Suriname (2007)[340]

This case concerns the application of the Saramaka peoples to seek legal personality as a community, denied to them by the State. Additionally, they are seeking redress for flooding caused by the Afobaka hydroelectric dam on their territory, which has resulted in continuous internal displacement, destruction of sacred and burial sites.[341] The displacement issue was not brought before the Commission when the Saramaka brought their claim in the first instance, and thus, they are barred from asserting new facts and complaints to the Court.[342] Nevertheless, there will be a brief discussion of the duties of the State concerning commercial activities on indigenous territories as it relates to internal displacement arising from these facts. It is imperative to note that Suriname is not a State Party to ILO Convention no. 169, which invariably would have had a significant role in this matter. In any event, some of the norms developed within ILO Convention no. 169 are reflected in this decision.

3.11.1 Article 21: The Right to Property

The Court does address the rights of indigenous peoples to use and enjoy the natural resources within their ancestral territory, as it relates to the Community's Article 21 claim. Suriname granted concessions for logging and exploration and extraction of natural resources within the Saramaka's ancestral territory. The Court's intention is to build upon the jurisprudence of the *Yakye Axa* and *Sawhoyamaxa* cases[343] by asserting the right to property and life would be rendered meaningless if indigenous peoples were unable to use and enjoy the natural resources, as they rely upon these to maintain their way of life.[344] Thus, in order for the Court to determine if the concessions given by the State are in breach of these rights, they must establish if they are essential to their survival.[345] This touches directly upon

[340] *Saramaka People v Suriname*, IACtHR, Judgement of 28 November 2007, (Preliminary Objections, Merits, Reparations and Costs).
[341] *Ibid* §10-13.
[342] *Ibid* §13-16.
[343] *Ibid* §120. *Sawhoyamaxa Indigenous Community v Paraguay (2006)*, IACtHR, Judgment of 29 March 2006 (Merits, Reparation and Costs) and *Indigenous Community Yakye Axa v Paraguay* (Merits, Reparations, and Costs), IACtHR Series C No 125 (17 June 2005).
[344] *Saramaka People v Suriname*, IACtHR, Judgement of 28 November 2007, (Preliminary Objections, Merits, Reparations and Costs) §122.
[345] *Ibid* §123.

displacement and the State's discretion to evict indigenous peoples in favour of third-party concession holders.

The right to property is not an absolute right and can be subordinated in the '*interests of society*'[346] or '*for reasons of public utility or social interest, and in the cases and according to the forms established by law*'.[347] The State may restrict this right by '*a) previously established by law; b) necessary; c) proportional, and d) with the aim of achieving a legitimate objective in a democratic society*.'[348] In contrast, the Saramaka have subsistence activities necessary for their survival, such as, hunting, fishing, gathering fruit and wood, drinking water and so forth. The extraction of natural recourses granted by the concessions affects one or more of these subsistence activities, either directly or indirectly. Generally speaking, the State will be able to restrict the Saramaka's property rights, within definable limits and in alignment with the jurisprudence of the Court. The Court lays out the key duties on the State when considering granting a concession, which directly incorporates international law. They are as follows:

1) The State must put itself on notice in this situation and consider '*whether the restriction amounts to a denial of their traditions and customs in a way that endangers the very survival of the group and of its members.*'[349]

2) The State must apply safeguards against restrictions on the right to property that deny the survival of the Saramaka people. In the first instance, this entails cultivating effective participation of indigenous peoples in the development, investment, exploration or extraction proposed.[350] Additionally, the indigenous peoples affected should receive a benefit from such activities. Lastly, a concession should not be granted, unless and until, an independent environment and social impact assessment is conducted.[351] The Court adopts international

[346] Article 21(1) ACHR.
[347] Article 21(2) ACHR.
[348] *Saramaka People v Suriname*, IACtHR, Judgement of 28 November 2007, (Preliminary Objections, Merits, Reparations and Costs) §129.
[349] *Ibid* §128.
[350] *Ibid* §129.
[351] *Ibid* §129.

legal norms concerning consultation and participation[352], including Article 15(2) of ILO Convention no. 169 and Article 32 of the UNDRIP.[353]

a) The Court breaks down further the right to consultation and duty to obtain consent. This requires the State to disseminate information, in good faith, throughout the process and in a manner that is culturally appropriate.[354] The objective of this is to reach a census between both parties, with the State providing all information regarding the risks to the environment. Consultations should be conducted in line with indigenous modes of decision making.

b) If a large-scale project is proposed, having a considerable impact on the territory of indigenous peoples, a duty to obtain free, prior and informed consent would be required. Notice this draws parallels with both the UNDRIP, ILO Convention no. 169 and also the recommendations of the UN Special Rapporteur on the human rights of indigenous peoples.[355]

3) Benefit-sharing is a further safeguard to indigenous peoples from exploitation. In addition, Article 21(2) of the Convention affirms that 'just compensation' must be given to those whose right to property has been subordinated in the interests of society. Furthermore, the UNDRIP and ILO Convention no. 169 make clear benefit sharing and/or compensation is required where developments take place on indigenous peoples' territories.

In the matter at hand, some concessions had already been granted to logging companies and so the Court applies the legal test laid out above to the facts. For instance, the Court asserts the right to control and to own their own territory without interference should be affirmed.[356] This statement of the law is profound in its application to this matter and to indigenous peoples during internal displacement generally. The law echoes that of the requirements of the UNDRIP and ILO Convention no. 169. This lends itself to the notion that the norms created in these instruments ought to likewise be applied to indigenous peoples during internal displacement, not limited to the Saramaka's situation. The rights and duties outlined

[352] *Apirana Mahuika et al. v. New Zealand* (Seventieth session, 2000), U.N. Doc. CCPR/C/70/D/547/1993, November 15, 2000.
[353] *Saramaka People v Suriname*, IACtHR, Judgement of 28 November 2007, (Preliminary Objections, Merits, Reparations and Costs) §130-131.
[354] *Ibid* §133.
[355] *Ibid* §97.
[356] *Ibid* §155.

by the Court are interconnected and interrelated to displacement in a broader sense because they all involve conducting activities on indigenous peoples' territories, which ought to require participation and consultation. One illustration of this is the concession to build the Afobaka hydroelectric dam. The Saramaka were excluded from the area where the dam was built (no longer able to conduct subsistence activities such as fishing), and subsequently displaced due to the flooding. Similar effects would have been felt were there a flood from heavy rain, both instances require State intervention and safeguarding. Whilst the external agitator in these scenarios differs, it follows that in the circumstances of all internal displacement, consultation and effective participation in decision making secures indigenous peoples' rights. Underpinning this is the right to consultation and the duty to obtain consent, as echoed within ILO Convention no. 169 and the UNDRIP. Thus, in the determination of these principles, the State is obligated to include indigenous peoples in decision making concerning internal displacement.

3.12 Kichwa Indigenous People of Sarayaku v Ecuador (2012)[357]

The Kichwa Sarayaku indigenous peoples live within Amazonian Ecuador, and rely heavily upon collective farming, hunting, fishing and gathering in a very ecological diverse part of the Americas. Within their worldview, the jungle is alive and all living elements have spirits.[358] This case concerns companies seeking to gain access to indigenous peoples' territory in order to conduct seismic prospecting as part of oil exploration.[359] CGC Oil Company, after being unable to get consent, attempted to coerce and divide the Sarayaku in order to gain access to their land.[360] The State granted a contract for oil exploration and exploitation on their territory, CGC entered their land which the Community protested. Much backlash and violence ensued, resulting in the involvement of police, army and CGC security guards. Further, it is alleged the State allowed and supported the oil exploration, failing to protect the Sarayaku's use and enjoyment of property. This resulted in 200 kilometres of forest to be cut down, destruction of sacred areas and the subsequent militarisation of the territory.[361]

[357] *Kichwa Indigenous People of Sarayaku v Ecuador,* IACtHR, Judgment of 27 June 2012 (Merits and Reparations).
[358] *Ibid* §57.
[359] *Ibid* §73.
[360] *Ibid* §75.
[361] *Ibid* §127.

3.12.1 Article 21: The Right to Property (in conjunction with Article 13(1): The Freedom of Thought and Expression and Article 23: The Right to Participate in Government)

Affirming the previous decision and expanding on it a little more, the Court asserts that Article 21 of the ACHR requires consultation with indigenous peoples, in a free and informed manner, so they may participate in decision making concerning their property.[362] In conjunction with this right, the Commission argued that access to information surrounding the proposed oil exploration denied the 'proper exercise of democratic oversight' through lack of consultation. Additionally, the State denied the Sarayaku peoples the right to be informed or consulted about the project and thereby denied their right to participate in government, pursuant to Article 23.[363]

The Court, in recognising the impact of domestic law, international law and ILO Convention no. 169, fully inducts these principles as evidence of a general duty to consult within the scope of indigenous peoples' right to communal property.[364] This will be further explored in subsection 3.15 which analyses the implementation of ILO Convention no. 169 within the jurisprudence of the Court. Building on the previous cases, there are a few points to add in terms of the duty to consult. For instance, the State must organise the entire apparatus of government to foster an environment where indigenous peoples are able to share their views. Additionally, during consultation with indigenous peoples the State must '*...generate sustained, effective and reliable channels for dialogue...*' and supervise and inspect third-party activities.[365]

3.12.2 The Right to Culture

The principle of non-discrimination enshrined within Article 1(1) of the Convention allows the Court to recognise the right to culture and for a broad interpretation to facilitate the realisation of rights for indigenous peoples.[366] Affirming the Court's conclusion is the

[362] *Ibid* §125.
[363] *Ibid* §126.
[364] *Ibid* §163-165. The Court goes so far as to list all of the countries in the OAS that have ratified ILO Convention no. 169.
[365] *Ibid* §166.
[366] *Ibid* §213.

recognition of indigenous peoples' right to self-determination as ascribed within the UNDRIP.[367] The State has an obligation to protect indigenous peoples' culture, due to its fundamental nature and this is not extinguished during internal displacement.

The strength of these rights discussed provide ample space for exploring their impact to indigenous peoples during internal displacement. Based on the dicta, the participation of indigenous peoples in the development of internal displacement policy and law aligns with the requirements on the State under Article 23. Furthermore, that proper exercise of democratic oversight necessitates indigenous views to be considered in this decision-making process. Thus, failure to consult indigenous peoples on activities within their territory was an abridgement of the above rights and international law. It is contended here that any proposed displacement attracts the same obligation for the State. A State may not be able to prevent displacement, however, the process by which displacement is remedied should include indigenous views.

3.13 Kalina and Lokono Peoples v Suriname (2015)[368]

Kalina and Lokono peoples are indigenous to the north-eastern part of Suriname. Their main subsistence activities are agriculture, fishing, hunting and gathering in forests.[369] Part of their understanding of the world is the balance between men and nature through guardians and guiding spirits, known as *jakoewa*.[370] Similarly, to *Moiwana* case, conflict broke out in Suriname in 1986 between the Maroons and the State which disturbed the way of life of the Kalina and Lokono peoples. While the Kalina and Lokono were not involved in hostilities, nonetheless their houses, schools, health clinics and local State offices were destroyed, sacked or set fire to.[371] Additionally pertinent to their claims are a multitude of concessions granted by the State for creating nature reserves, mining bauxite, logging, a housing development and a hotel-casino. Suriname, at this stage of these proceedings, does not recognise the collective juridical personality of indigenous peoples and considers them to merely 'occupy' the land in which they live, ownership is vested with the State.[372] The State was aware of indigenous peoples' claims of restitution but continued to issue titles to third

[367] *Ibid* §217.
[368] *Kalina and Lokono Peoples v Suriname* (2015), IACtHR, Judgment of 25 November 2015, (Merits, Reparations and Costs).
[369] *Ibid* §32.
[370] *Ibid* §36.
[371] *Ibid* §39.
[372] *Ibid* §101-104.

parties, irrespective of this fact. Since the *Saramaka* decision, the State is formulating legislation ensuring their international treaty obligations concerning indigenous peoples' collective rights.[373]

3.13.1 Restitution of Territory based on Article 21

One leading claim and remedy sought by the Community concerns restitution of their land, even though a third party has title to the land.[374] The concept of restitution of territory is to ensure the unique relationship between indigenous peoples and their territory remains, and is not extinguished.[375] However, Article 21 protects both private individuals and indigenous peoples to property, and thus, a conflict of interests arises.[376] In order to adjudicate on this, the Court examines '*... the legality, necessity, proportionality and attainment of a legitimate objective in a democratic society (public utility and social interest) must be assessed on a case-by-case basis, in order to restrict the right to property, on the one hand, or the right to traditional lands, on the other, without the restriction of the latter preventing the survival of the members of the indigenous communities as a people*.'[377] However, this task is left to the State, in accordance with these principles. Suriname should comply with the UNDRIP and other jurisprudential norms concerning indigenous peoples when doing so.[378] The Court offers up an example of expropriated land, it may be advantageous in this instance to agree, in good faith and equal standing, for the State to provide alternate lands (of equal or greater quality), compensation, or a combination of these.[379] In sum, the principles and norms established by the Court and within international law provide solid ground from which to launch a claim for restitution after displacement.

3.14 Analysis and Conclusion

These cases merely represent a fraction of the complaints that could have made their way to the OAS. In Amapa, Brazil, members of the Wajapi Community have recently been forcibly

[373] *Ibid* §104.
[374] *Ibid* §143-160.
[375] *Ibid* §150.
[376] *Ibid* §155.
[377] *Ibid* §155.
[378] MacKay, F. '*The Case of the Kalina and Lokono Peoples v. Suriname and the UN Declaration on the Rights of Indigenous Peoples: Convergence, Divergence and Mutual Reinforcement*' 11 Erasmus Law Review (2018).pp.33.
[379] *Kalina and Lokono Peoples v. Suriname* (2015), IACtHR, Judgment of 25 November 2015, (Merits, Reparations and Costs) §158. See Article 14 ILO Convention no. 169 and Article 28 UNDRIP.

displaced due to mining activities on their ancestral land, with little chance of redress.[380] Whilst the jurisprudence is incredible robust in favour of indigenous peoples' rights, invariably there is a negligible 'implementation gap'.[381] Even within the cases, States have been obstructionist in the implementing the Court's and Commission's rulings. For the *Awas Tingni* it took eight years after the judgement was rendered for titling, delimitation and demarcation of their territory to be completed.[382]

The jurisprudence concerning Article 21 has evolved incredibly over the past two decades in such a way that recognises indigenous understandings of the right to property. The 'evolutionary interpretation' methodology allowed the Court to overcome a strictly formalistic understanding of the rights within the ACHR.[383] This could not have been achieved without the ILO Convention no. 169 and the UNDRIP, which anchored in an international legal authority for collective property rights. Additionally, the weight of testimonial evidence of the leaders of *Awas Tingni* gave the ultimate basis for land-spiritual-cultural nexus.[384]

A cornerstone for the Article (1) non-discrimination equates to a differential understanding of the needs of indigenous peoples. It is firmly asserted here, that such principles apply to indigenous peoples during internal displacement and require specific performance by the State. In sum, the IACtHR recognises that denial of ancestral territorial rights will invariably lead to a denial of their other rights, namely, the right to culture. Thus, *'when they interpret and apply their domestic legislation, the States must take into account the specific characteristics that differentiate the members of indigenous peoples from the general population and that constitute their cultural identity*'[385]

A constant among most of these cases is a narrative of displacement, whatever the cause, resulting in upholding the rights of indigenous peoples. These cases are not meant to exist within a vacuum but to be applied throughout the OAS, as a template for the application of

[380] BBC News '*Brazil's Indigenous People: Miners Kill One in Invasion of Protected Reserve*' 28 July 2019 (available at https://www.bbc.com/news/world-latin-america-49144917).
[381] Isa Gomez, F. '*The Decision by the Inter-American Court of Human Rights on the Awas Tingni vs. Nicaragua Case (2001): the Implementation Gap*', The Age of Human Rights Journal, University of Deusto, (June 2017).
[382] *Ibid.*
[383] *Ibid.*pp.87.
[384] *Ibid.*pp.88.
[385] *Ibid.*

indigenous peoples' rights. It is the prerogative of the Court to interpret the ACHR, however, there is an opportunity for academics, policymakers and stakeholders to use these judicial tools to further the rights of indigenous peoples. Thus, it is boldly asserted here that the internal displacement of indigenous peoples from their territories is *prima facie* a violation of the right to life and culture.

3.15 ILO Convention no. 169 in IACtHR

This subsection intends to compile and examine selected dicta of the IACtHR that invokes ILO Convention no. 169. Each thread of international law concerning indigenous peoples' rights developed within the jurisprudence of the IACtHR strengthens indigenous peoples as a whole. The IACtHR, when interpreting the ACHR, must take into account other agreements and instruments a State is bound by but also the wider *corpus juris* it forms part of at international law.[386] Bear in mind that, Article 29(b) provides that none of the provisions of the ACHR should be,

'*restricting the enjoyment or exercise of any right or freedom recognized by virtue of the laws of any State Party or by virtue of another convention to which one of the said States is a party*'

Therefore, the Court is willing to apply the norms underlying ILO Convention no. 169 in forming decisions concerning indigenous peoples' rights, which Anaya argues adds to the greater body of customary international norms.[387] In *Yakye Axa*, the framework of ILO Convention no. 169 is applied throughout the judgement, especially as Paraguay (as will all other signatories) are obligated to apply the provisions of ILO Convention no. 169 into domestic legislation.[388] The representatives argued in this matter that '*...ILO Convention No. 169, under the terms of Article 29(b) of the Convention, establishes the scope given by Paraguayan legislation to the right to property, and also places the State under the*

[386] Article 31(2) and (3) VCLT. Also see *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa)*, notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971, pp.16 and 31. Concurring opinion of Judge Sergio Garcia Ramirez in *Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, IACtHR, Judgement of August 31, 2001 (Merits, Reparations and Costs) §5. *The Right to Information on Consular Assistance within the Framework of the Guarantees of Due Process*, Advisory Opinion, IACtHR, OC-16/99.

[387] Anaya, S.J. *supra* note 7.pp.70.

[388] *Indigenous Community Yakye Axa v Paraguay* (Merits, Reparations, and Costs), IACtHR Series C No 125 (17 June 2005). §52, 121 (g) Article 14(3) ILO Convention no. 169.

obligation to protect the right to communal property.'[389] Thus, the Court deemed the scope of Article 21 (Right to Property) and 4 (Right to Life), should be coloured by the framing of indigenous peoples' communal property rights as articulated in Article 13 of ILO Convention no. 169.[390] Overall, the State is obligated, in the restitution of the Yakye Axa's land or payment of compensation, to be in conformity with ILO Convention no. 169.[391] This means to conduct consultations in a manner that aligns with indigenous '*...decision-making processes, values, customs and traditional laws*.'[392] This was echoed in the subsequent judgements of *Sawhoyamaxa*[393], *Saramaka*[394] *and Xakmok Kasek.*[395]

The impact of ILO Convention no. 169 in the *Kichwa Indigenous People of Sarayaku* case is significant and deep. The Court lays out article-by-article indigenous peoples' rights to their lands and territories and the regulation of prior, free and informed consultations.[396] Furthermore, the Court surveys all of the States within the OAS that have implemented ILO Convention no. 169 within their domestic law and jurisprudence. In terms of the obligation to consult, the Court refers to a body of jurisprudence in jurisdictions outside of the OAS which applies these principles. Anaya articulates this as a mobilisation of customary law and the ILO Convention no. 169 through the social forces of the indigenous peoples' movement.[397] Irrespective of this push factor, the Court asserts that Article 1(1) guarantees consultation as the free and full exercise of rights as articulated in the ACHR.[398] States are required to organise the government apparatus to facilitate 'effective consultation' in accordance with international law.[399] For indigenous peoples during internal displacement, the adoption of ILO Convention no. 169 as a tool in shaping the jurisprudence of the IACtHR solidifies their rights in an actionable way.[400]

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[389] *Ibid* §121(c).
[390] *Ibid* §136. Article 13(1) of ILO Convention no. 169. '*In applying the provisions of this Part of the Convention governments shall respect the special importance for the cultures and spiritual values of the peoples concerned of their relationship with the lands or territories, or both as applicable, which they occupy or otherwise use, and in particular the collective aspects of this relationship.*'
[391] *Ibid* §150-151.
[392] Courtis, C. '*Notes on the Implementation by Latin American Courts of the ILO Convention 169 on Indigenous Peoples*' 18 International Journal on Minority and Group Rights 433 (2011).pp.463.
[393] *Sawhoyamaxa Indigenous Community v Paraguay*, 29 March 2006, IACHR §117-119 and 150-151.
[394] *Saramaka People v Suriname*, 28 November 2007, IACHR §93-94.
[395] *Xakmok Kasek Indigenous Community v Paraguay*, 24 August 2010, IACHR §157.
[396] *Kichwa Indigenous People of Sarayaku v. Ecuador*, IACtHR, Judgment of 27 June 2012, (Merits and Reparations) §163.
[397] Anaya, S.J. s*upra* note 167.pp.72.
[398] *Kichwa Indigenous People of Sarayaku v. Ecuador*, IACtHR, Judgment of 27 June 2012, (Merits and Reparations) §166.
[399] *Ibid* §166.
[400] Courtis, C. *supra* note 392.pp.463.

3.16 Advisory Opinion 18: Juridical Conditions and Rights of Undocumented Migrants[401]

In addition to the IACtHR's contentious jurisdiction, they have a role in providing clarification on points of law related to the ACHR. Based upon Article 64(1) of the ACHR a State can request the Court to for an advisor opinion. The two advisory opinions have been selected, as they enter into a discourse concerning internal displacement under the ACHR. Mexico made such a request concerning the '*... deprivation of the enjoyment and exercise of certain labor rights [of migrant workers,] and its compatibility with the obligation of the American States to ensure the principles of legal equality, non-discrimination and the equal and effective protection of the law embodied in international instruments for the protection of human rights.*'[402] Additionally, Mexico requested clarification of the interplay between international human rights obligations, including obligations *erga omnes,* and domestic policy objectives of an American State.[403] Tied within this discussion, the request concerns the principles of legality, non-discrimination and the equal and effective protection before the law in light of the progressive nature of human rights law.[404]

For the purpose of this thesis, there will be an examination of the rights that engage undocumented migrants and displacement within the Court's advisory opinion. It should be noted from the outset, the Court does not mention indigenous peoples in any great detail, least of all concerning them during internal displacement. However, well-formed deductions can be syphoned from the generality of Court's opinion and applied to indigenous peoples during internal displacement. As with the case law, the hermeneutic and methodological tools of the IACtHR and Anaya will be used here to develop the Court's opinion.

3.16.1 Obligation to Respect and Guarantee Human Rights and the Fundamental Nature of the Principle of Equality and Non-discrimination

[401] *Juridical Condition and Rights of Undocumented Migrants*, IACtHR Advisory Opinion OC-18/03 of September 17, requested by the United Mexican States.
[402] *Ibid* §1.
[403] *Ibid* §1.
[404] *Ibid* §1. As part of the request, Mexico asked the following Articles to be interpreted: Articles 3(1) and 17 of the Charter of the Organization of American States; Article II (Right to Equality before the Law) of the American Declaration on the Rights and Duties of Man (hereinafter "the American Declaration"); Articles 1(1) (Obligation to Respect Rights), 2 (Domestic Legal Effects), and 24 (Equality before the Law) of the American Convention; Articles 1, 2(1) and 7 of the Universal Declaration on Human Rights (hereinafter "the Universal Declaration"), and Articles 2(1), 2(2), 5(2) and 26 of the International Covenant on Civil and Political Rights.

As a starting point, States Parties to the ACHR have a fundamental duty to respect and guarantee the rights contained within the Convention.[405] The exercise of public power that abridges the Convention is *ultra vires*, whether that be an act or omission of an organ, official, agent or public entity.[406] Additionally, there is a general provision to give all the human rights contained within the Convention legal effect domestically.[407] This is two-fold, firstly, quashing rules and practices that violate the Convention and, secondly, enabling rules and practices that effectively uphold the Convention.[408] The principle of equality and non-discrimination derives '*...directly from the oneness of the human family and is linked to the essential dignity of the individual*.'[409] The Court asserts this '*...permeates every act of the powers of the State, in all their manifestations, related to respecting and ensuring human rights.*'[410] Thus, a State cannot discriminate against any person, owing to a non-exhaustive list of personal statuses, including indigenous peoples.[411]

3.16.2 Application the Fundamental Principle of Equality and Non-discrimination to Indigenous Peoples during Internal Displacement

As has been illustrated throughout the cases, indigenous peoples find themselves vulnerable, marginalised and excluded from State assistance during internal displacement, which is both *de jure* and *de facto* forms of discrimination. For instance, in Colombia, based on clear evidence, internal displacement is a result of inherently 'racists' government policies (*de jure*) and pervasive societal discrimination *(de facto).*[412] Escobar shows that Afro-Colombians and indigenous peoples are demographically more likely to be adversely affected by internal displacement.[413] This is based on the failure of the State to, (i) demarcate,

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[405] Article 1(1) ACHR.
[406] *Juridical Condition and Rights of Undocumented Migrants*, IACtHR Advisory Opinion OC-18/03 of September 17, Requested by the United Mexican States §76.
[407] *Ibid* §77 Article 2 ACHR.
[408] *Ibid* §78.
[409]*Ibid* §100.
[410] *Ibid* §110. Also note that, '*The effects of the fundamental principle of equality and non-discrimination encompass all States, precisely because this principle, which belongs to the realm of jus cogens and is of a peremptory character, entails obligations erga omnes of protection that bind all States and give rise to effects with regard to third parties, including individuals.*'
[411] *Ibid* §101. The Court articulates that, '*Nowadays, no legal act that is in conflict with this fundamental principle is acceptable, and discriminatory treatment of any person, owing to gender, race, color, language, religion or belief, political or other opinion, national, ethnic or social origin, nationality, age, economic situation, property, civil status, birth or any other status is unacceptable*.'
[412] Escobar, A '*Displacement, development, and the modernity in the Colombian Pacific*', International Social Science Journal, (2003).pp.160.
[413] *Ibid*.pp.158-161.

delimitate and title land, (ii) prevent military objectives aimed at encroaching on indigenous territories rich in natural resources, and (iii) prevent Colombian societal norms being geared towards cultural assimilation.[414] This insight shows that patterns of displacement are symptomatic of State policy and law. While this will be examined at length within chapter 4, it certainly highlights the intersection between displacement, equality and non-discrimination and the ACHR. Furthermore, structural discrimination in Colombia has led to the indigenous peoples' territory remaining unrecognised by the law and vulnerable to exploitation. In turn, this exploitation has contributed to indigenous peoples being internally displaced.

3.17 Advisory Opinion 21: Rights and Guarantees for Children in the Context of Migration and/or in need of International Protection[415]

Advisory Opinion 21 was requested by the Argentina, Brazil, Paraguay and Uruguay to '*determine the precise obligations of the States in relation to the possible measures to be adopted regarding children, their immigration status or the status of their parents.*'[416] Whilst the opinion does not specifically touch upon the rights of indigenous peoples during internal displacement, it does provide some insight into the Court's interpretation of rights contained within the Convention. By analogy, these insights can be applied more broadly using the Court's hermeneutic and methodological tools.

Profoundly, the Court reiterates some general considerations concerning the Convention, that are applicable to internally displaced persons. First, that in the exercise of state sovereignty, a State limits its territorial jurisdiction in the pursuit of the respect for human rights for all people, which sits above domestic laws.[417] Secondly, the cause, motive or reason for displacement does not alter the State's human rights obligations, even where a person is in transit or in an irregular migratory situation.[418] Thirdly, special emphasis should be placed upon indigenous peoples and groups or individuals in special need of protection due to a vulnerable situation.[419]

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[414] *Ibid*.pp.161.
[415] *Rights and Guarantees for Children in the Context of Migration and/or in need of International Protection, IACtHR,* Advisory Opinion OC-21/14 (19 August 2014).
[416] *Ibid* §1.
[417] *Ibid* §62.
[418] *Ibid* §62.
[419] *Ibid* §71.

3.17.1 Article 17: The Right to Family[420]

Article 17 of the ACHR protects the family as a fundamental element of society, which cannot be arbitrarily or abusively interfered with.[421] As such, the State is obligated to protect and develop the family unit, which is often disturbed during internal displacement.[422] In this advisory opinion, there is a focus on the actions of the State in the separation of children to the family unit due to deportation.[423] In a broad sense, the forced eviction of indigenous peoples by a State could foreseeably be an abridgment to this right, due to the arbitrary interference of State upon the indigenous peoples' actualisation of the family unit. The Court accepts there is no single model for a family, and by extension can go beyond traditional notions of the nuclear family to indigenous understandings of family.[424] One possible illustration of this, to be made in light of this opinion, can be taken from the *Kichwa Indigenous People of Sarayaku* case. The Sarayaku family structure consists of groups *of ayllus* (extended families), which are divided into *huasi* (households) and all overseen by *kurakas* or *varavuks* (community leaders) at the *Tayja Saruta-Sarayacu* (community assembly).[425] Additionally, the Community subsists on 'collective family based' activities, such as, farming, hunting and fishing.[426] Thus, in this sense, the expression of the family unit, which is unlike that of a family in the western tradition, is connected to territory and a wider communal structure. Article 17 of the American Declaration on the Rights of Indigenous Peoples requires States to various forms of indigenous family structures. Thus, if the State

[420] Article 17. Rights of the Family
1.The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.
2.The right of men and women of marriageable age to marry and to raise a family shall be recognized, if they meet the conditions required by domestic laws, insofar as such conditions do not affect the principle of non-discrimination established in this Convention.
3.No marriage shall be entered into without the free and full consent of the intending spouses.
4.The States Parties shall take appropriate steps to ensure the equality of rights and the adequate balancing of responsibilities of the spouses as to marriage, during marriage, and in the event of its dissolution. In case of dissolution, provision shall be made for the necessary protection of any children solely on the basis of their own best interests.
5. The law shall recognize equal rights for children born out of wedlock and those born in wedlock.
[421] Article 17, in conjunction with Article 11(2) 'The Right to Privacy'.
[422] *Rights and Guarantees for Children in the Context of Migration and/or in need of International Protection, IACtHR,* Advisory Opinion OC-21/14 (19 August 2014) §264-265.
[423] *Ibid* §263.
[424] *Ibid* §272.
[425] *Kichwa Indigenous People of Sarayaku v. Ecuador*, IACtHR, Judgment of 27 June 2012, (Merits and Reparations) §52-55.
[426] *Ibid* §54.

were to, in this all too familiar scenario, forcibly remove the Sarayaku from their land in favour of a third-party concession holder, it would *prima facie* disrupt the right to family.

3.18 Conclusion

The line of cases explored within this chapter are not an aberration but represent a deliberate attempt by the IACtHR to incorporate indigenous understandings into human rights law. As such, the interpretative tools employed by the Court and Anaya can be utilised in advancing the protection of indigenous peoples during internal displacement. Consultation and participation of indigenous peoples in the decision-making apparatus of the State has been a crucial development, holding States accountable to their regional and international obligations. By using reasoning by analogy, the legal practitioner is able to challenge the State to adhere to these obligations, *lex lata* and *lex ferenda*.

4. Case Study: Conflict and Indigenous Peoples Internally Displaced in Colombia

This chapter will pull into focus conflict displacement in Colombia, as a contemporary indicator of the human rights situation of indigenous peoples during internal displacement. There will be a brief description of drivers, patterns and impacts of conflict displacement on indigenous and Afro-Colombian peoples, drawing on statistical and theoretical analytics. Accompanying this discussion will be an examination of the decisions of the Constitutional Court of Colombia in relations to ILO Convention no. 169 and the Court's declaration of an unconstitutional state of affairs. Finally, there will be an application of the findings of the previous chapters to real world situations of internal displacement, using the jurisprudence of the IACtHR and a HRBA to model durable solutions.

4.1 Snapshot of Internal Displacement in Colombia

This case study attempts to draw meaningful conclusions from the experience of indigenous peoples displaced by conflict in Colombia. Some qualitative and quantitate analysis will be undertaken to illustrate the extent of internal displacement, focusing on indigenous peoples and Afro-Colombians. Colombia has been subjected to over five decades of conflict and violence, resulting in one of the globes most acute situations of internal displacement.[427] The Government of Colombia and the Fuerzas Armadas Revolucionarias de Colombia (FARC or FARC-EP) were in a stalemate of internal conflict, unlike any in human history. As such, the enormity, scale and deep scars of conflict were widely felt and are difficult to convey within the confines of this thesis. Briefly, a bilateral ceasefire was brokered between 2012-2016 after a historic internal armed conflict since the 1940s. Whilst the 2016 Peace Accords between the Government and the FARC markedly improved the political climate in Colombia, isolated conflict and displacement persists to this very day.[428] This is due to concentrated armed actions by armed militia, organised crime groups and FARC dissident groups clashing with the Colombian Armed Forces.[429]

[427] IDMC 'Colombia' (available at http://www.internal-displacement.org/countries/colombia).
[428] IDMC 'Global Report on Internal Displacement (GRID 2018): Conflict Displacement Figures Analysis', (Sourced from http://www.internal-displacement.org/sites/default/files/2018-05/GRID%202018%20-%20Figure%20Analysis%20-%20COLOMBIA.pdf).
[429] *Ibid*.pp.12. Such as, Ejercito Nacional de Liberacion (ELN), Ejercito Popular de Liberacion (EPL), Clan del Golfo or Autodefensas Gaitanistas de Colombia (AGC) and other new armed groups such as FARC-EP dissidents Espacios Territoriales de Capacitacion y Reincorporacion (ETCP).

In Colombia between 1985-2018 8 million people were forcible displaced,[430] and as at the end of 2018 5.8 million people remain displaced due to conflict (see *figure 1 in Supplement A*). At present there is a continual cycle of conflict displacement, which is updated constantly by the UN Office of the Coordination of Humanitarian Affairs' (OCHA) internal displacement register called 'Monitor'. For instance, an armed conflict between the Ejercito Nacional de Liberacion and the National Army on the 22 August 2019 resulted in over five thousand people being displaced in San Juan River, Chocó province, 30% of these were indigenous peoples.[431] This is not unusual, between January and October 2018 over twenty thousand people became displaced or confined to their homes according to Monitor reporting, an overwhelming 61% of these were indigenous peoples.[432] Furthermore, in the five months to May 2019, 52% of indigenous communities in the Pacific Coast region (including Chocó) have been affected by forced displacement or confined to an area due to conflict or anti-personnel landmines.[433] This is striking when of Colombia's almost 50 million people, indigenous peoples represent 3.5% of this number (approximately 1.5 million people).[434] Additionally, during this period, indigenous peoples made up 44% of IDPs in mass events.[435]

The Internal Displacement Monitoring Centre (IDMC) provides statistics for total mass displacement events in Colombia for 2017 and 2018, and these align with the trends signalled above (see *figure 2 and 3 in Supplement A, respectively*). In the Pacific region of Colombia, there are severe restrictions on the movements of indigenous peoples. One of the main drivers of displacement is the exploitation of mineral rich regions, where Afro-Colombians and indigenous peoples inhabit.[436] Historically, mining in these areas has been conducted

[430] OCHA '*2019 Humanitarian Needs Overview: Colombia*', Report Part 1.pp.11. (Available at https://www.humanitarianresponse.info/sites/www.humanitarianresponse.info/files/documents/files/290119_hno_2019_en.pdf)
[431] OCHR, 'Monitor' (sourced from https://monitor.salahumanitaria.co/).
[432] OCHA '*2019 Humanitarian Needs Overview: Colombia*', Report Part 1.pp.15.
[433] UNHRC '*Universal Periodic Review: 3rd Cycle, 30th Session: Colombia (May 2019)*' Submission by the United Nations High Commissioner for Refugees for the Office of the High Commissioner for Human Rights' Compilation Report.pp.3. '*The most affected regions are in the Pacific region: Chocó, Nariño, Valle del Cauca and border regions in Norte de Santander.*'
[434] International Work Group for Indigenous Affairs, 'Colombia' (Available at https://www.iwgia.org/en/colombia).
[435] *Ibid.*
[436] Idrobo, N., Mejia, D., Tribin, A.M. '*Illegal Gold Mining and Violence in Colombia',* Peace Economics, Peace Science and Public Policy, Vol.20 Issue 1 (2014) *'Our interpretation is that the increase in the profitability of illegal mining activities has sparked a dispute over territorial control between illegal armed groups in order to monopolize the extraction of the precious minerals*.' Escobar, A '*Displacement, development, and the modernity in the Colombian Pacific*', International Social Science Journal, (2003).

illegally, and can be directly correlated with violence.[437] Many factors have contributed to this state of affairs, such as, weak government structures, corporate demand, armed groups and vulnerable communities. This instability has culminated in a protracted or cyclical displacement patterns, leaving indigenous peoples and Afro-Colombians acutely vulnerable to further human rights abuses.[438] These groups can be disaggregated further, for women and children are the most susceptible in situations of displacement. For instance, indigenous and Afro-Colombian women face deepened vulnerability due to intersectional discrimination, inequality and poverty as a result of '*...disproportionate impact of the armed conflict in conjunction with the negative impact of agricultural and mining mega-projects.*'[439] Also, FARC infamous conscripted child soldiers and in the current state of post-Peace Accords Colombia demobilisation, there persists the use and recruitment of indigenous and Afro-Colombian child soldiers by illegal armed groups.[440]

From this quantitative evidence, it can be concluded that indigenous peoples and Afro-Colombians are demographically overrepresented and disproportionately affected in conflict induced internal displacement.[441] Drawing on the previous chapters, it is difficult to reconcile the reality of displacement in Colombia with the robust jurisprudential framing of indigenous peoples' rights. Nevertheless, the task of the legal practitioner is to draw down the jurisprudence and apply this, giving rights holders the agency to advocate for themselves. Additionally, other stakeholders (businesses, NGOs and INGOs) and the State have a template in which to protect rights. This will be explored later in this chapter.

4.2 Constitutional Court of Colombia

[437] Idrobo, N., Mejia, D., Tribin, A.M. '*Illegal Gold Mining and Violence in Colombia',* Peace Economics, Peace Science and Public Policy, Vol.20 Issue 1 (2014). Cremers, L et al. '*Small-Scale Gold Mining in the Amazon: The Cases of Bolivia, Brazil, Colombia, Peru and Suriname*', Centre for Latin American Studies and Documentation (2013).pp.61.
[438] Escobar, A. *supra* note 413.
[439] UNHRC '*Universal Periodic Review: 3rd Cycle, 30th Session: Colombia (May 2019)*' Submission by the United Nations High Commissioner for Refugees for the Office of the High Commissioner for Human Rights' Compilation Report.
[440] *Ibid.*pp.14. Also see, Vivanco, J.M. '*A Challenge to FARC's Narrative on Child Recruitment*', 11 March 2019, Human Rights Watch. (available at https://www.hrw.org/news/2019/03/11/challenge-farcs-narrative-child-recruitment).
[441] HRC, 'Summary of Stakeholders' Submissions on Colombia', Report of the Office of the United Nations High Commission for Human Rights. 12 March 2018 (A/HRC/WG.6/30/COL/3) §106. HRC '*Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, Mr. James Anaya*', The situation of indigenous peoples in Colombia: follow-up to the recommendations made by the previous Special Rapporteur. (A/HRC/15/37/Add.3).pp.2.

This subsection will briefly survey the domestic legal framework, in which the Constitution of Colombia and the decisions of the Constitutional Court which touch upon the rights of indigenous peoples during internal displacement. There are many provisions within the Constitution that support indigenous peoples' rights, *inter alia*, ethnic and cultural diversity, culture, autonomy and self-governance, and recognising autonomous indigenous institutions [442] and property rights.[443] Colombia, like most States within the OAS, has ratified ILO Convention no. 169, which the Constitutional Court has utilised in over 40 cases to ensure the rights of indigenous peoples are upheld.[444] One such case is *Decision 004-2009*, the Court declared the state of indigenous peoples was dire, due to food shortages, forced displacement and inadequate healthcare.[445]

The Constitutional Court has gone a step further to incorporate it into its 'constitutionality block'[446], blending it with other constitutional and human rights law, in a manner that is *pro homine*.[447] For instance, the Constitutional Court overturned a presidential veto of a statute, which was intended to align ILO Convention no. 169 with domestic legislation.[448] To illustrate the extent of domestic legal protection for indigenous peoples during internal displacement, selected cases will be examined.

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[442] Rueda-Saiz, P. '*Indigenous Autonomy in Colombia: State-building Processes and Multiculturalism*', Cambridge University Press, Global Constitutionalism (2017) 6:2, 265–297.

[443] UN OHCHR, Forst, M. 'End of Mission Statement: Colombia 20 November to 3 December 2018', United Nations Special Rapporteur on the situation of human rights defenders. (Sourced from https://www.ohchr.org/Documents/Issues/Defenders/StatementVisitColombia3Dec2018_EN.pdf) '*The Colombian Constitution recognises: the ethnic and cultural diversity of the nation (arts 1 and 7); dialects and languages of ethnic groups (art 10); special voting constituencies (arts. 171 and 176) as well as property over the lands Indigenous Peoples occupy or use for their livelihood (article 63). The Constitution also recognises their right to constitute indigenous territories with autonomy to govern themselves, with their own authorities and to administer resources; the right to exploit natural resources in indigenous territories; to respect cultural, social and economic integrity and the right to be consulted. (art. 286, 287, 328, 329 in accordance with art. 1 and 330), as well as their right to establish a special jurisdiction and indigenous authorities (art. 246 and 330). It also recognizes access to culture (art. 70); the right to Colombian nationality of indigenous peoples sharing territory in border areas (art. 96)*.'

[444] Courtis, C. *supra* note 392.pp.438. Marino, C. Botero '*Multiculturalismo y derechos de los pueblos indigenas en la jurisprudencia de la Corte Constitucional colombiana*', in Revista Precedente, Anuario Juridico, Facultad de Derechoy Humanidades (Cali, Universidad ICESI, 2003).pp.45-87. Additionally, the Court supports the UNDRIP.

[445] Decision 004/09, Constitutional Court of Colombia (Decision given by Judge Manuel Jose Cepeda Espinosa) §2.2.5.

[446] Former Colombian Constitutional Court President JM Cepeda states: '*These norms as principles are incorporated into the so-called "constitutionality block", a French-inspired notion with rather specific traits in the Colombian legal system. By way of this figure, all of the provisions included in human rights treaties to which Colombia is a party, as well as the human rights provisions with a customary nature.*' See Cepeda, M.J. '*The Internalization of Constitutional Law: A note on the Colombian Case*', Verfassung und Recht in Übersee (VRÜ) 41 (2008).pp.62.

[447] *Ibid*.pp.439.

[448] *Ibid*.pp.441.

Decision T-025[449] recognised that, due to the armed conflict, the conditions of IDPs in Colombia was an 'unconstitutional state of affairs'.[450] This decision was primarily based on international humanitarian law, international human rights law and the GPID, which had been violated due to forced displacement as a result of the conflict. They used the Guiding Principles as a template for determining the scope of the State's obligations.[451] However, the Court needed to go further and provide more specificity to this situation, to fully satisfy the constitutional rights of IDPs.

The State has attempted to address the problem of indigenous peoples in displacement through the 2006 '*Directive for the Comprehensive Care of the Indigenous Population in Situations of Displacement and Risk, with a differentiated approach*'.[452] However, the Constitutional Court in *Decision 004/2009* noted that tackling these issues would require translating the directive into pragmatic measure beyond treating the symptoms of displacement.[453]

Decision SU-039/97[454] held the government to account for issuing an oil exploration licence on the territory of the U'wa indigenous community, without adequate consultation. The Court applied Articles 6 and 15 of ILO Convention no. 169, concerning the duty to consult and rights of indigenous peoples to natural recourses.[455] The former being recognised as fundamental right within the Constitutional framework.[456] Furthermore, the Community argued the State had violated their right to territory, self-determination, language and ethnic culture due to the risk of displacement and to their survival.[457]

[449] Decision T-025/2004, Constitutional Court of Colombia (Opinion delivered by Manuel José Cepeda Espinosa, J.).
[450] Cepeda, M.J. '*The Internalization of Constitutional Law: A note on the Colombian Case*', Verfassung und Recht in Übersee (VRÜ) 41 (2008).
[451] *Ibid*.pp.67.
[452] HRC '*Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, Mr. James Anaya*', The situation of indigenous peoples in Colombia: follow-up to the recommendations made by the previous Special Rapporteur. (A/HRC/15/37/Add.3) §33.
[453] *Ibid* §32.
[454] Decision SU-039/97, 3 February 1997, Constitutional Court of Colombia (Opinion delivered by Antonio Barrera Carbonell).
[455] Courtis, C. *supra* note 392.pp.17.
[456] *Ibid.*
[457] *Ibid.*

Decision C-030/08 [458] declared a congressional General Forest Act (Law 1021/2006) unconstitutional for lack of adequate consultation with indigenous and Afro-Colombian communities. This translates to a duty of prior consultation of indigenous and Afro-Colombians must be undertaken before the adoption and enactment of legislation that engages these groups, in line with Article 6(1)(a) of ILO Convention no. 169. This judgement is significant as it provides for indigenous peoples' participation in governance and advocating for displacement policy and legislation.

Running counter to the progressive achievement of the Court, is the agenda of the State. It is often at odds with their obligations under ILO Convention no. 169, UNDRIP and the jurisprudence of the IACtHR. The Organización Nacional Indígena de Colombia points out that 30 issued decrees limiting the scope of ILO Convention no. 169 have been issued without consultation with indigenous and tribal peoples.[459] Additionally, a lack of legal recognition for ancestral lands, including, delays in granting title to or expanding title for both indigenous and Afro-Colombian peoples.[460]

4.3 Durable Solutions to Conflict Displacement in Colombia

This section will examine durable solutions for Indigenous and Afro-Colombians, some of which are at a grave risk of extinction, either culturally or physically.[461] As has been shown, the progressive legal protections discussed are often antithetical to the real world experiences of indigenous and Afro-Colombian peoples during conflict displacement. Thus, through this case study on Colombia, it is apparent that a dichotomy exists, where government structures and institutions are unwilling or unable to effectuate the law, creating a *de facto* legal no man's land. This thesis, by no means, attempts to provide a silver-bullet solution to these issues, nor can there be a single remedy for the complex geo-political and cultural dimensions. Additionally, it is beyond the scope of this thesis to proport to have a

[458] Decision C-030/08, 23 January 2008, Constitutional Court of Colombia (Opinion delivered by Rodrigo Escobar Gil).
[459] HRC, 'Summary of Stakeholders' Submissions on Colombia', Report of the Office of the United Nations High Commission for Human Rights. 12 March 2018 (A/HRC/WG.6/30/COL/3) §100.
[460] *Ibid* §103.
[461] *Ibid*.pp.18. With 34 of the 102 constitutionally recognised indigenous groups at risk of extinction due to armed conflict, there is a pressing need to find durable solutions to displacement. These include the following: Arhuaco, Awá, Betoy, Chimila, Guayabero, Embera-Chamí, Embera-Dobidá, Embera-Katío, Eperara-Siapidaara, Guambiano, Huitoto, Inga, Kamentzá, Kankuamo, Kichwa, Kofán, Kogui, Kokonuko, Koreguaje, Kuiva, Kuna, Nasa, Nukak-Makú, Pijao, Sikuani, Siona, Totoró, U'wa, Wayúu, Wiwa, Wounaan, Yanacona, Yukpa, Zenú.

comprehensive or monolithic remedy on actualising indigenous peoples' rights. However, the law is perfunctory unless it is applied, and so some selected issues will draw down the law discussed above into the Colombian context.

A human rights-based approach is advocated for more durable solutions to the current situation. A HRBA is a conceptual lens from which to view development, placing human rights objectives at the forefront of desired outcomes.[462] Durable solutions are those that look beyond the symptoms of displacement and address the causes in a meaningful and long-lasting way, rejecting reactionary or clandestine actions.[463] There needs to be a State-led implementation of the legal norms derived from the UNDRIP, ACHR and ILO Convention no. 169. One specific example will be explored in the context of Colombia and demilitarisation.

The starting point is allowing for the self-determination of indigenous peoples in developing durable solutions to internal displacement and demilitarisation, giving them agency and mainstreaming indigenous issues within the process.[464] This should be undertaken in a culturally sensitive manner, having due regard to indigenous peoples' governance structures. Any measures taken by the government to issue laws and policy concerning indigenous peoples during internal displacement should include the following:

(1) States must consult indigenous peoples regarding laws and policies that may affect them and to participate in government (*ILO Convention no. 169*: Article 6; *UNDRIP*: Articles 3 and 4 (self-determination) Article 19 (Consulted on measures that effect indigenous peoples); *ACHR*: *YAMATA v Nicaragua.)*

(2) States shall consult indigenous peoples concerning military activities on their land (*UNDRIP*: Article 30 (demilitarisation of indigenous land), Articles 3 and 4 (self-determination), Article 8 (effective measures for preventing dispossession of land), Article 15 (consultation to eliminate discrimination), Article 19 (Consulted on measures that effect indigenous peoples); *ILO Convention no. 169*: Article 6 (good faith consultation and participation in decision-making processes), Article 18 (domestic legislation must penalise unwarranted intrusion on indigenous peoples' land and territories); *ACHR*: *Sarayaku, Matter*

[462] See Human Rights-Based Approach Portal (available at https://hrbaportal.org/)
[463] Valcarcel, A., Samudio, V. '*Colombia: durable solutions for the forcibly displaced*', Forced Migration Review, October 2017.pp.28.
[464] Articles 3, 4, 18, 19, 23, 32 and preamble to UNDRIP and Articles 2 and 7 ILO Convention no. 169. Also https://hrbaportal.org/wp-content/files/UN DG_guidelines_EN.pdf.

of the Indigenous Community of Kankuamo and Moiwana Community (restitution of land, consultation and military activities).
(3) States shall ensure the right of return (*ILO Convention no. 169*: Article 14, 15(d), 16 and 28 (right of return, or land of equal value); *UNDRIP:* Article 10 (option of return or just and fair compensation); *ACHR*: *Kichwa Indigenous People of Sarayaku* (return of territory).
(4) Delimitation, demarcation and titling of land (*ILO Convention no. 169*: Part II and observations; *UNDRIP*: Article 26 (right to land and territory); *ACHR*: Yakye Axa).
(5) Respect for Culture (*ILO Convention no. 169*: Article 13 and 23 (cultural and spiritual connection to land); *UNDRIP*: Article 11 (practice and revitalise culture); *ACHR*: Yakye Axa)

These principles are not stagnant, they can be engaged with and operated by the Colombian Government in a transitional peace process. One such example, is a programme to delimitation, demarcation and titling of indigenous and Afro-Colombian territories will ensure that any encroachment by paramilitary groups or illegal miners will trigger domestic legal actions. In sum, closing the implementation gaps is an achievable goal given the strength of the legal framework, however, further research is needed and cannot be covered in much detail with the confines of this thesis. Escobar suggests this involves a struggle between '*...displacement-producing tendencies and displacement-averting mechanism*.'[465]

[465] Escobar, A *supra* note 413.pp.158.

5. Conclusion

"*[The] living jungle*" there are "*noises and special phenomena*" and it is "*the inspiration where, when we are in these places, we feel a breath, an emotion and then when we return to the people, to our family, we are strengthened.*" These spaces "*give us the power, potential and energy that is vital to our survival and life. And everything is interconnected with the lagoons, the mountains, the trees, the beings and also us as an exterior living being.*" He further stated: "*[W]e were born, we have grown, our ancestors have lived on these lands, and also our parents, in other words, we are natives of this land and we live from this ecosystem, from this environment.*"[466] Sarayaku President, José Gualinga

There remains some unclaimed legal space concerning the rights of indigenous peoples during internal displacement. Through the layers of international human rights law, there is a definitive gap in protection for internally displaced persons. The GPID are able to provide some soft law guidance for State and non-State actors to enhance protection, but it lacks usage and acceptance within government structures. Additionally, there is not a meaningful application of indigenous peoples' differential worldview within the Guiding Principles, which ought to recognise their cultural and spiritual connection to ancestral land.

While the Guiding Principles may not have progressed the rights of indigenous peoples during internal displacement, the UNDRIP has profoundly shifted '*...the existing international consensus regarding the individual and collective rights of indigenous peoples in a way that is coherent with, and expands upon, international developments, including the interpretations of other human rights instruments by international bodies and mechanisms*'.[458] However, there is no overt pronouncement against displacement, the articles strengthen indigenous rights in general can be applied thusly, so that it elevates the obligations upon the State. Additionally, the harmonisation of the UNDRIP with ILO Convention no. 169 has created acceptance of norms within the OAS. It has been suggested within this thesis, that through the IACtHR's acceptance in *Saramaka People vs. Suriname,* the UNDRIP forms part of a *sui generis* body of law for indigenous peoples.

[466] *Case of the Kichwa Indigenous People of Sarayaku v Ecuador*, Judgement of June 27, 2012 (Merits and Reparations) §152.

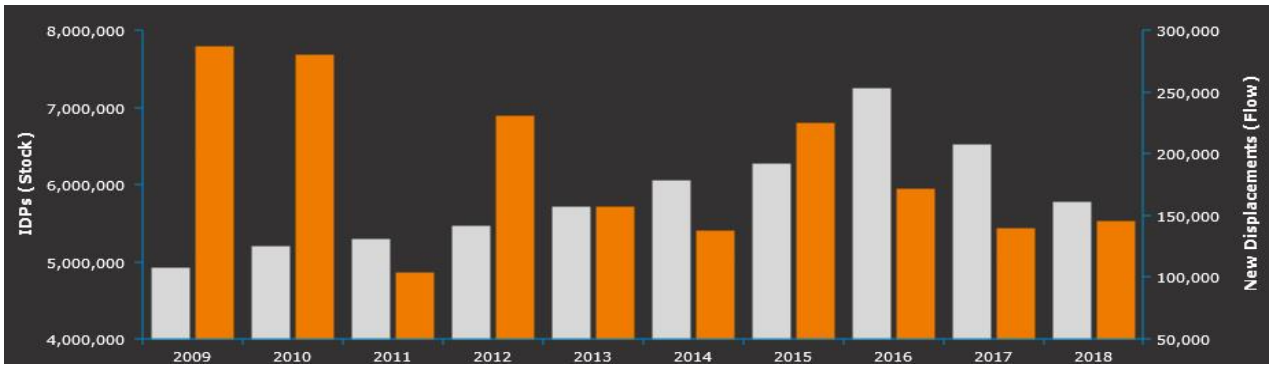
The findings of this thesis concerning ILO Convention no. 169 are profound. The reach of the Convention within the IACtHR and into the realm of customary international law is wide. For indigenous peoples during internal displacement, the Convention offers the most robust protection through monitoring, supervision and follow up mechanisms. The ILO provides for definitive obligations for State engagement with indigenous peoples. These mechanisms promote the implementation of the Convention through observations, direct reporting and periodic review, but beyond this, the protection of indigenous peoples' rights in the abstract. While the language of the Convention may be within the definition of 'formalist', it can be interpreted in a *pro homine* manner and perhaps in this sense softens the hard-formalist edges.

A 'realist', 'contextual' and '*pro homine*' approach to the rights of indigenous peoples has yielded the fullest expression of rights within the context of the IACtHR. Through the cases examined it has been shown that this approach has fostered *sui generis* subset of human rights for indigenous peoples during internal displacement. The right to life and the right to property presented themselves clearly within the jurisprudence and bundled within these rights is the undercurrent of cultural and spiritual connection to land. Using reasoning by analogy gives legal practitioners the ability to utilise the jurisprudence to further indigenous peoples' rights.

There persists a legal no man's land for indigenous peoples during internal displacement. The Colombian case study shows an ever-widening implementation gap and a disproportionate impact on indigenous peoples, which runs counter to its international, region and domestic obligations. Colombia is encouraged to adopt a human rights-based approach in the pursuit of durable solutions for conflict displacement, which requires further research. While the case study shows some uncertainty, one thing is for sure, the trajectory of the indigenous peoples' movement is gaining considerable momentum. This momentum will indubitably lead States to respect indigenous peoples' cultural connection to their lands, and by proxy strengthen the diversity of all humanity.

Supplement A

Figure 1: Internal Displacement in Colombia – End of 2018



(Source: Internal Displacement Monitoring Centre - http://www.internal-displacement.org/countries/colombia#)

Figure 2:

2017		
Tipo de Población	***Afectados***	***Participación***
Afrocolombianos	7 376	41%
Indigenas	5 917	33%
Otros	4 865	27%
Total	**18 158**	***100%***

(Source: Internal Displacement Monitoring Centre)

Figure 3:

2018		
Tipo de Población	***Afectados***	***Participación***
Afrocolombianos	9 969	30%
Indígenas	4 649	14%
Otros	18 623	56%
Total	**33 241**	**100%**

(Source: Internal Displacement Monitoring Centre)

Bibliography

Books, Journal Articles and Publications

Anaya, S.J. '*Indigenous Peoples in International Law'*, Second Edition, Oxford University Press (2004)

Anaya, S.J. '*Divergent Discourses about International Law, Indigenous Peoples, and Rights over Lands and Natural Resources: Toward a Realist Trend*' (2005) 16 Colorado J Int'l Env'l L & Policy.

Anaya, S.J. and Rodriguez-Piñero, L.'*Chapter 2: The Making of the UNDRIP*' in Hohmann, J. Weller, M. (eds) '*The UN Declaration on the Rights of Indigenous Peoples: A commentary*' (2018).

Anaya, S.J and Williams Jr, R.A. '*The Protection of Indigenous Peoples' Rights over Lands and Natural Resources Under the Inter-American Human Rights System*' 14 Harv. Hum. Rts. J. 33 (2001).

Anderson, M.J. '*The UN Principles on Housing and Property Restitution for Refugees and Displaced Persons (the Pinheiro Principles): Suggestions for Improved Applicability*', Journal of Refugee Studies Vol. 24, no.2, Oxford University Press (2011).

Callirogs, J. C. '*Neoliberal Discourses and Ethnonormative Regime in Post-recognition Peru: Redefining Hierarchies and Identities*', Cultural Studies 32(3), (2018).

Cassese, A '*Self-determination of Peoples: A Legal Reappraisal*' Cambridge University Press (1995).

Cepeda, M.J. '*The Internalization of Constitutional Law: A note on the Colombian Case*', Verfassung und Recht in Übersee (VRÜ) 41 (2008).

Cohen, R.'*Hardening Soft Law: Implementation of Guiding Principles on Internal Displacement*', ASIL Proceedings 2008, Brookings-Bern Project.

Cohen, R and Deng, F M '*Developing the Normative Framework for IDPs*', International Journal of Refugee Law 30 (2) 310, (2018).

Courtis, C '*Notes on the Implementation by Latin American Courts of the ILO Convention 169 on Indigenous Peoples*' 18 International Journal on Minority and Group Rights 433 (2011).

Cremers, L et al. '*Small-Scale Gold Mining in the Amazon: The Cases of Bolivia, Brazil, Colombia, Peru and Suriname*', Centre for Latin American Studies and Documentation (2013).

Cupples, J. '*Wild Globalization: The Bio-politics of Climate Change and Global Capitalism on Nicaragua's Mosquito Coast*', Wiley Library, 14 February 2011.

Daley, P '*Refugees, IDPs and Citizenship Rights: the Perils of Humanitarianism in the African Great Lakes Region*', Third World Quarterly Vol. 34, No.5 (2013).

Doyle, C.M. '*Indigenous Peoples, Title to Territory, Rights and Resources: The transformative role of free and informed consent*', Routledge (2017).

Escobar, A '*Displacement, development, and the modernity in the Colombian Pacific*', International Social Science Journal, (2003).

Feiring, B '*Indigenous peoples' rights to land territories, and resources*' International Land Coalition (2013). Available at (https://www.landcoalition.org/sites/default/files/documents/resources/IndigenousPeoplesRightsLandTerritoriesResources.pdf.)

Fellmeth, A.X, Horwitz, M. '*Guide to Latin in International Law*', 1st Edition, Oxford University Press (2011).

Fuentes, A. 'S*ystemic Interpretation of International Human Rights Law in the Jurisprudence of the Inter-American Court of Human Rights*', Research Brief, Raoul Wallenberg Institute of Human Rights and Humanitarian Law (2019).

Gomez Isa, F. '*The Decision by the Inter-American Court of Human Rights on the Awas Tingni vs. Nicaragua Case (2001): the Implementation Gap*', The Age of Human Rights Journal, University of Deusto. 8 (June 2017).

Gomez Isa, F. '*The Role of Soft Law in the Progressive Development of Indigenous Peoples' Rights'*, in Lagoutte, S, Gammeltoft-Hansen, T. and Cerone, J (eds) '*Tracing the Roles of Soft Law in Human Rights*', Oxford University Press (2016).

Gomez Isa, F. '*The UNDRIP: an increasingly robust legal parameter'*, The International Journal of Human Rights, Volume 23, 2019, Issue 1-2.

Haleem, A, Jennings, P.W. and Phele, K.E. '*Africa*' in '*The State of the World's Minorities and Indigenous Peoples 2016: Events of 2016'*, Minority Rights Group International, (2016).

Herrera, J. C. '*Judicial Dialogue and Transformative Constitutionalism in Latin America: The Case of Indigenous Peoples and Afro-descendants*', Revista Derecho del Estado no.43, Mayo-Agosto de 2019.

Hertogen, A. '*The Persuasiveness of Domestic Law Analogies in International Law*', The European Journal of International Law, Vol.29 no.4 (2019)

Hohmann, J. Weller, M. (eds) '*The UN Declaration on the Rights of Indigenous Peoples: A commentary*' (2018)

Idrobo, N., Mejia, D., Tribin, A.M. '*Illegal Gold Mining and Violence in Colombia',* Peace Economics, Peace Science and Public Policy, Vol.20 Issue 1 (2014).

Imai, S. Gunn, K '*Part II Group Identity, Self-Determination, and Relations with States, Ch.5 Self-Determination of Indigenous Peoples: Articles 3, 4, 5, 18, 23, and 46(1)'* in Hohmann, J. Weller, M. (eds) '*The UN Declaration on the Rights of Indigenous Peoples: A commentary*' (2018)

Joona, T, '*The Political Recognition and Ratification of ILO Convention No. 169 in Finland, with Some Comparison to Sweden and Norway'*, 23 Nordisk Tidsskrift for Menneskerettigheter 305 (2005).

Kälin, W. '*Consolidating the Normative Framework for IDPs*', International Journal of Refugee Law, Volume 30, Issue 2, June 2018.

Kälin, W '*Guiding Principles on Internal Displacement: Annotations'*, The American Society of International Law and the Brookings Institution – University of Bern Project on Internal Displacement. *Studies in Transnational Legal Policy* 38, i-iv. (2008)

Kälin, W. '*Guiding Principles on Internal Displacement: Section II: Principles Relating to Protection from Displacement*', 38 Study in Transnational Legal Policy 25 (2008).

Kälin, W '*How Hard is Soft Law? The Guiding Principles on Internal Displacement and the Need for a Normative Framework*', 19 December 2001, Brookings Institute Project on Internal Displacement.

Kirton J. J. and Trebilcock, J.M *'Introduction: Hard Choices and Soft Law in Sustainable Global Governance*', in John J. Kirton and Michael J. Trebilcock (eds), Hard Choices, Soft Law: Voluntary Standards in Global Trade, Environment and Social Governance (Burlington: Ashgate Publishing, 2004)

Klabbers, J '*The Redundancy of Soft Law*', Nordic Journal of International Law 65 (1996).

Klein N '*Shock Doctrine: The Rise of Disaster Capitalism*' (2007) New York: Metropolitan Books

MacKay, F. '*The Case of the Kalina and Lokono Peoples v. Suriname and the UN Declaration on the Rights of Indigenous Peoples: Convergence, Divergence and Mutual Reinforcement*' 11 Erasmus Law Review (2018).

Marino, C. Botero '*Multiculturalismo y derechos de los pueblos indígenas en la jurisprudencia de la Corte Constitucional colombiana*', in Revista Precedente, Anuario Jurídico, Facultad de Derecho y Humanidades (Cali, Universidad ICESI, 2003)

McGoldrick, D. '*Multiculturalism and its Discontents*' Human Rights Law Review. Vol. 5, No. 1, 2005.

McGregor, D. '*Living well with the earth: Indigenous Rights and the Environment*' in '*Handbook of Indigenous Peoples*' Routledge International Handbooks, 1st ed. (2016)

Mishra, O. '*Promoting Study and Research on Internal Displacement: Role of Academic Institutions*', Refugee Survey Quarterly, Vol.19, No.2 (2000)

Nowak, M. '*Article 17*', in Nowak (ed.), ICCPR Commentary, 2nd edition (Kehl/Strassburg/Arlington: NP Engel Publishing, 2005)

Ong'ayo, A.O. '*Displacement and Cross-Border Mobility in the Great Lakes Region: Re-thinking Underlying Factors and implications for Regional Management of Migration',* African Insight, Vol. 48(1) June 2018.

Orchard, P '*Protection of Internally Displaced Persons: soft law as a norm-generating mechanism*', Review of International Studies (2010) 36.

Pasqualucci, Jo M. '*The Evolution of International Indigenous Rights in the Inter-American Human Rights System*', Human Rights Law Review, Bluebook 20th edition (2006).

Rueda-Saiz, P. '*Indigenous Autonomy in Colombia: State-building Processes and Multiculturalism*', Cambridge University Press, Global Constitutionalism (2017) 6:2, 265–297.

Schmidt, P. '*The Process and Prospects for the U.N Guiding Principles on Internal Displacement to Become Customary International Law: A Preliminary Assessment*', Geo. J. Int'l L. 483 (2004).

Stavropoulou, M '*Indigenous Peoples Displaced from Their Environment: Is there adequate protection?*' 5 Colorado Journal of International Environmental law and Policy, Vol.5, Issue 1 (1994).

Sivakumaran, S '*Techniques in International Law Making: Extrapolation, Analogy, Form and the Emergence of an International Law of Disaster Relief*', The European Journal of International Law, Vol.28 no.4 (2018)

Swepston, L. '*Indigenous and Tribal Peoples' Culture and Work Under the ILO*' in Short, D. and Lennox, C. (eds) *'Handbook of Indigenous Peoples*' Routledge International Handbooks, 1st ed. (2016).

Swepston, L. '*The Foundation of Modern International Law on Indigenous and Tribal Peoples*', Volume 1: Basic Policy and Land Rights, Brill Nijhoff (2015)

Valcarcel, A., Samudio, V. '*Colombia: durable solutions for the forcibly displaced*', Forced Migration Review, October 2017.

Vöneky, S. '*Analogy in International Law*', Max Planck Encyclopedia of Public International Law, Oxford University.

Xanthaki, A. 'Part III Right to Culture, Ch.10 Culture: Articles 11(1), 12, 13(1), 15, and 34' in Hohmann, J. Weller, M. (eds) '*The UN Declaration on the Rights of Indigenous Peoples: A commentary*' (2018)

Yuspsanis, A. '*ILO Convention No. 169 Concerning Indigenous and Tribal Peoples in Independent Countries 1989-2009: An Overview*', Nordic Journal of International Law 79 (2019).

News Articles

BBC News '*Brazil's Indigenous People: Miners Kill One in Invasion of Protected Reserve*' 28 July 2019 (available at https://www.bbc.com/news/world-latin-america-49144917)

.

Viñuales, D. '*On the front lines of climate change: Nicaragua's Miskito people*', Oxfam, 29 November 2007 (available at https://www.oxfamamerica.org/explore/stories/on-the-front-lines-of-climate-change-nicaraguas-miskitos-people/)

Vivanco, J.M. '*A Challenge to FARC's Narrative on Child Recruitment*', 11 March 2019, Human Rights Watch. (available at https://www.hrw.org/news/2019/03/11/challenge-farcs-narrative-child-recruitment)

Reports

CESCR, *General comment no. 21, Right of everyone to take part in cultural life (art. 15, para. 1a of the Covenant on Economic, Social and Cultural Rights)*, 21 December 2009, E/C.12/GC/21.

CERD, General Recommendation 23: Rights of Indigenous Peoples, UN Doc A/52/18 (18 August 1997)

Collings, N. '*Environment*' in '*State of the World's Indigenous Peoples*'. Department of Social and Economic Affairs. Division for Social Policy and Development. Secretariat for the Permanent Forum on Indigenous Issues, New York: United Nations. 83–128, at (www.un.org/esa/socdev/unpfii/documents/SOWIP/en/SOWIP_web.pdf (accessed on 1 February 2019)).

Commission on Human Rights by the Representative of the Secretary-General in 1996 (E/CN.4/1996/52/Add.2) '*Appendix II: Compilation and Analysis of Legal Norms*' (Part II)

Compilation and Analysis of Legal Norms: Report of the Representative of the Secretary-General, Mr. Francis Deng, submitted pursuant to the Commission on Human Rights Resolution 1995/57, U.N ESCOR, 51st Sess., Provisional Agenda Item 9(d), U.N Doc E/CN.4/1996/52/Add.2 (1995)

Daes, I '*Discrimination Against Indigenous Peoples: An explanatory note concerning the draft declaration on the rights of indigenous peoples*', Commission on Human Rights, Distr. GENERAL E/CN.4/Sub.2/1993/26/Add.1 (19 July 1993).

HRC, 'Summary of Stakeholders' Submissions on Colombia', Report of the Office of the United Nations High Commission for Human Rights. 12 March 2018 (A/HRC/WG.6/30/COL/3) §106. HRC '*Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, Mr. James Anaya*', The situation of indigenous peoples in Colombia: follow-up to the recommendations made by the previous Special Rapporteur. (A/HRC/15/37/Add.3)

HRC '*Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, Mr. James Anaya*', The situation of indigenous peoples in Colombia: follow-up to the recommendations made by the previous Special Rapporteur. (A/HRC/15/37/Add.3).

ILO '*Rules of the Game: An introduction to the standards-related work of the International Labour Organization'* Centenary Edition (2019)

'*Indigenous and Tribal Peoples' Rights in Practice: A Guide to ILO Convention No. 169*', International Labour Standards Department (2009).

J Martínez Cobo (Special Rapporteur of the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities), Study on the Problem of Discrimination against Indigenous Populations, UN Doc E/CN.4/Sub.2/1986/Add.4 (1986)

Koskenniemi, M. '*Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*', Report of the Study Group of the International Law Commission. 13 April 2006, General Assembly (A/CN.4/L.682).

UN Committee on the Elimination of Discrimination Against Women (CEDAW), *Consideration of reports submitted by States parties under article 18 of the Convention, Combined fourth to sixth periodic reports of States parties due in 2014 : Suriname*, 30 September 2016, CEDAW/C/SUR/4-6, (available at: https://www.refworld.org/docid/5863bf654.html)

UN Department of Economic and Social Affairs '*The State of the World's Indigenous Peoples*' Report, (https://www.un.org/development/desa/indigenouspeoples/publications/state-of-the-worlds-indigenous-peoples.html)

UN Economic Council '*Prevention of Discrimination Against and the Protection of Minorities: Working paper on the relationship and distinction between the rights of persons belonging to minorities and those of indigenous peoples*', E/CN.4/Sub.2/2000/10

UN Office for Disaster Risk Reduction 'Sendai Framework for Disaster Risk reduction 2015-2030'

UNHCR, '*Figures at a Glance*', Sourced 10 February 2019, (available at https://www.unhcr.org/figures-at-a-glance.html)

UNCHR, Indigenous Open-Ended Inter-Sessional Working Group on a Draft United Nations Declaration on the Rights of Indigenous Peoples, Consideration of a Draft United Nations Declaration on the Rights of Indigenous Peoples 'Information Received from Non-Governmental and Indigenous Organizations', UN Doc E/CN.4/1995/WG.15/4

UN OHCHR, Forst, M. '*End of Mission Statement: Colombia 20 November to 3 December 2018*', United Nations Special Rapporteur on the situation of human rights defenders. (Sourced from https://www.ohchr.org/Documents/Issues/Defenders/StatementVisitColombia3Dec2018_EN.pdf)

UNHRC '*Universal Periodic Review: 3rd Cycle, 30th Session: Colombia (May 2019)*' Submission by the United Nations High Commissioner for Refugees for the Office of the High Commissioner for Human Rights' Compilation Report.

Working paper by the Chairperson-Rapporteur, Mrs. Erica-Irene Daes, on the Concept of 'Indigenous People,' U.N Doc. E/CN.4/Sub.2/AC.4/1996/2

International legal instruments

Additional Protocol to the Inter-American Declaration on Human Rights 'Protocol of San Salvador'

European Parliament Resolution 2017/2206(INI)) P8_TA-PROV (2018)0279

Great Lakes Region: Protocol on the Protection and Assistance to Internally Displaced Persons

Guiding Principles on Internal Displacement 1998

ILO Convention no. 169 of 1989

Inter-American Declaration on Human Rights 1969

International Covenant on Civil and Political Right 1966

International Covenant on Economic, Social and Cultural Rights 1966

United Nations Declaration of the Rights of Indigenous Peoples 2007

Universal Declaration on the Rights and Duties of Man (OAS) 1948

Universal Declaration of Human Rights 1948

Table of Cases

International Court of Justice
East Timor (Portugal v Australia) Judgement, I.C.J Reports 1995.

Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa), Notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, ICJ Reports 1971.

Military and Paramilitary Activities in and against Nicaragua, Judgment, 26 November 1984, ICJ Reports 1984.

Western Sahara, Advisory Opinion, ICJ Reports 1975.

Human Rights Council
Apirana Mahuika et al. v. New Zealand (Seventieth session, 2000), U.N. Doc. CCPR/C/70/D/547/1993, November 15, 2000.