

BEYOND CULTURE: REIMAGINING THE ADJUDICATION OF INDIGENOUS PEOPLES' RIGHTS IN INTERNATIONAL LAW

BEATRIZ GARCIA* & LUCAS LIXINSKI**

Abstract

This article argues that the current model of Indigenous rights adjudication foregrounds essentialized notions of culture, backgrounding interests of Indigenous peoples (IPs) that are not necessarily related to culture. Culture imposes a burden that limits the possibilities of human rights for Indigenous peoples, which is at least in part attributable to the current model's lack of precision. We show that the jurisprudence on IP rights by international adjudicatory bodies focuses on culture without meaningful attempts to explain and define it, is imprecise on how culture affects the reading of the human right for which it serves as the basis, as well as the engagement with a possible right to culture or the need for cultural accommodation. This lack of precision can be read as a pluralism of approaches, which could open avenues for different versions of culture to be accommodated; however, it also has the effect of enabling other interests to become bycatch, and then be warped and reshaped.

Introduction

After years of rejection, Indigenous peoples (IPs) have since the 1980s increasingly relied on the language of international human rights law to pursue claims against the territorial state where they are found, whether the state is the “original” colonizer or a successor to

* Senior Lecturer, School of Law, Western Sydney University. Ph.D., The Graduate Institute of International and Development Studies.

** Associate Professor, Faculty of Law, UNSW Sydney; Ph.D. in International Law, European University Institute. We are thankful to WSU School of Law's generous financial support that facilitated the research for this article, and to Matthew Kingsland for his excellent research assistance. All errors remain our own.

it.¹ The push for international human rights law as a core strategic aim culminated with the adoption, in 2007 and 2016 respectively, of the United Nations and American Declarations on the Rights of Indigenous Peoples (UNDRIP² and ADRIP³). These instruments build upon decades of advocacy, which often has been pursued through legal mobilization strategies via international adjudicatory and quasi-adjudicatory bodies (IABs).

As much as this litigation has contributed to the advancement of Indigenous peoples' rights and standard-setting, however, it cannot rely on the instruments it contributed to, at least not directly. Specifically, claims made by IPs need to be filtered through rights found in the instruments that give direct competence to those IABs, and likewise through the claims that IPs bring. The instruments, which include the International Covenant on Civil and Political Rights (ICCPR),⁴ the European Convention on Human Rights (ECHR),⁵ and the American Convention on Human Rights (ACHR),⁶ among others, offer great potential for enforcement, and certainly a legal avenue against a state and its institutions. But they also require the translation

¹ Karen Engle, *On Fragile Architecture: The UN Declaration on the Rights of Indigenous Peoples in the Context of Human Rights*, 22 *EUR. J. INT'L L.* 141 (2011); Robert K. Hitchcock, *International Human Rights, the Environment, and Indigenous Peoples*, 5 *COLO. J. INT'L ENVTL. L. & POL'Y* 1 (1994); Mauro Barelli, *The Interplay Between Global and Regional Human Rights Systems in the Construction of the Indigenous Rights Regime*, 32 *HUM. RTS. Q.* 951 (2010).

² *United Nations Declaration on the Rights of Indigenous Peoples*, G.A. Res. 61/295, U.N. GAOR, 61st Sess., Supp. No. 49, at 1, U.N. Doc. A/RES/61/295 (2007) [hereinafter *UNDRIP*].

³ *American Declaration on the Rights of Indigenous Peoples*, OAS Doc. AG/RES. 2888 (XLVI-O/16) (June 15, 2016) [hereinafter *ADRIP*].

⁴ International Covenant on Civil and Political Rights, Dec. 16, 1966, 6 *I.L.M.* 268; 999 U.N.T.S. 171 [hereinafter *ICCPR*]. This instrument is overseen by the Human Rights Committee, and the competence for hearing cases is given in the Optional Protocol to the International Covenant on Civil and Political Rights, *opened for signature* Dec. 19, 1966, 999 U.N.T.S. 171.

⁵ Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221 as amended by Protocols Nos. 11 and 14. This instrument is overseen by the European Court of Human Rights.

⁶ American Convention on Human Rights, Nov. 22, 1969, 1144 U.N.T.S. 123 (1969) [hereinafter *ACHR*]. This instrument is overseen by the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights.

of the claims of Indigenous peoples into the categories that are possible for those instruments, meaning not only individual rights,⁷ but also the need to translate Indigenous worldviews into those that are allowable in the language of international human rights.⁸ On the claims, because IABs are responsive to situations of “crisis” in the context of Indigenous peoples, most claims have had to do with matters of immediate concern, notably securing native land title, and therefore certain types of claims have been privileged over others.

As Karen Engle has shown, too, there is a tendency to see Indigenous rights as couched on culture, and in many respects international adjudication has helped cement that model.⁹ This model of Indigenous rights deriving from an overarching need for cultural survival further constrains the possibilities of human rights for Indigenous peoples. We have thus far a quadruple frame: first, IPs’ claims are made urgent and focused on a narrow subset of claims, mostly related to securing land rights and access to resources indispensable for their livelihoods; second, Indigenous rights must be based on cultural survival; third, cultural survival needs to be translated into a human right; finally, this right needs to be largely individualized. With each funneling, human rights institutions get reinforced, but Indigenous peoples get bent into a shape that, while unavoidable, may not always fit their aspirations.

In this article, we argue that the current model of Indigenous rights adjudication foregrounds essentialized notions of culture, backgrounding interests of IPs that are not necessarily related to culture. Culture therefore imposes a burden that limits the possibilities

⁷ One exception being the African Charter of Human and Peoples’ Rights, which, as the title suggests, makes explicit reference in its text to collective rights. For the purposes of this article, though, this instrument and its jurisprudence, relatively sparse in the area of Indigenous rights, is excluded. African Charter on Human and Peoples’ Rights, Jun. 27, 1981, 1520 U.N.T.S. 217 [hereinafter African Charter]. For a discussion of Indigenous rights jurisprudence in the African system, see Lucy Claridge, *The Approach to UNDRIP within the African Regional Human Rights System*, 23 INT’L J. HUM. RTS. 267 (2019).

⁸ On this issue of translation, see IRENE WATSON, *ABORIGINAL PEOPLES, COLONIALISM AND INTERNATIONAL LAW: RAW LAW* (2004).

⁹ See generally KAREN ENGLE, *THE ELUSIVE PROMISE OF INDIGENOUS DEVELOPMENT: RIGHTS, CULTURE, STRATEGY* (2010).

of human rights for Indigenous peoples, which is at least in part attributable to the current model's lack of precision. As we show below, the jurisprudence on IP rights by IABs focuses on culture without meaningful attempts to explain and define it, and is also imprecise on how culture affects the reading of the human right for which it serves as the basis, as well as the engagement with a possible right to culture or the need for cultural accommodation. This lack of precision can be read as a pluralism of approaches, which can be seen as enabling different versions of culture to be accommodated; however, it also has the effect of enabling other interests to become bycatch, and then be warped and reshaped.

Those interests that fail to be captured by culture, or at least the parts that do not easily fit a cultural narrative, end up backgrounded. There does not seem to be much room for Indigenous peoples to have interests based on claims unrelated to culture heard, such as thinking simply about their development, without the development being couched on their Indigeneity. Indigenous identity in this respect becomes a problematic crutch: it supports Indigenous claims, but also constrains their movement. The idea of Indigenous land title being inalienable, for instance, or restricted in some ways, is a problem.¹⁰ While we show that certain IABs are moving away from these constraints slowly, there is still much room for reimagining IP rights adjudication, and this piece seeks to contribute to that.

We therefore propose a critical mapping of international jurisprudence relating to Indigenous peoples to highlight these shortcomings. Our backbone is the Inter-American system, since it has the most developed jurisprudence in this area. Rethinking the ways Indigenous rights are articulated enables human rights bodies to create better avenues to truly decolonize Indigenous peoples, as opposed to putting them into boxes that are framed by colonial perceptions. Moving beyond culture thus improves the rights of Indigenous peoples, and arguably the possible relationships between Indigenous peoples and the settler societies with whom they coexist.

¹⁰ For example, the Brazilian Constitution states that the Parliament can authorize the use of hydric resources and the prospecting and mining on indigenous lands, BRAZ. CONST. (Federal Constitution of 1988), art. 49.

In what follows we will first outline the existing model of Indigenous rights adjudication, with its intermingling of (weak) self-determination, culture, and environmental concerns. We next move to thinking about the possibilities of Indigenous survival beyond culture, and how IABs could engage with these possibilities. Concluding remarks follow outlining directions for future research.

The Existing Tripartite Model of Indigenous Rights Adjudication

There are roughly three main ways of thinking about the adjudication of Indigenous peoples' claims, from the perspective of interests underlying specific rights. Therefore, while at stake in many of these cases is the need to ensure land rights and access to resources by Indigenous peoples, underlying them are interests that inform the articulation of claims themselves. In this section, we showcase these three underlying interests: self-determination, culture, and environmental protection. Self-determination and cultural protection are endogenous to Indigenous peoples, whereas environmental protection seems to speak to strategic alliances forged by IPs with other social actors, as we discuss below. The sequencing of these three claims is roughly chronological, and shows the rise and fall of self-determination as a ground for claims before IABs, as well as the enduring effects of culture and the potentials and pitfalls of the association between Indigenous identity and the environment.

Self-Determination

Self-determination has historically been a key claim of Indigenous peoples, and that translates into international standard-setting in the area. The UNDRIP covers seven broad categories of Indigenous peoples' rights, including self-determination.¹¹ Article 3 of the Declaration mirrors treaties such as the International Covenant

¹¹ Lorie M. Graham & Nicole Friederichs, *Indigenous Peoples, Human Rights, and the Environment*, 12-01 LEGAL STUD. RES. PAPER Series 3 (2012).

on Civil and Political Rights¹² and the International Covenant on Economic, Social and Cultural Rights,¹³ and asserts the right of IPs to freely determine their political status, and pursue their economic, social and cultural development as culturally distinct groups.¹⁴ Self-determination is also included in the Preamble of the Protocol of San Salvador, associated with the free disposal of Indigenous peoples' wealth and natural resources.¹⁵ The right to self-determination for IPs has been defined as the ability to have choices about their way of life, to live well and humanly in their own ways, and to be in control of their own destinies individually and collectively.¹⁶ Self-determination can also be understood as human freedom, equality, and cultural prosperity¹⁷ and, in the context of IPs, involves a form of group rights that allows for a measure of autonomy and self-government.¹⁸

International treaties, notably the ILO Convention No. 169, are based broadly on the principle of self-determination.¹⁹ This right is also reflected in multilateral environmental agreements, for example,

¹² ICCPR, *supra* note 4, art. 1.

¹³ International Covenant on Economic Social and Cultural Rights art. 1, Dec. 16, 1966, S. TREATY DOC. 95-19; 993 U.N.T.S. 3 (entered into force Jan. 3, 1976) [hereinafter ICESCR].

¹⁴ *UNDRIP*, *supra* note 2, arts. 3 & 4; Graham & Friederichs, *supra* note 11, at 3.

¹⁵ Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social, and Cultural Rights, Nov. 14, 1988, O.A.S.T. S. 69, 28 I.L.M. 156 [hereinafter Protocol of San Salvador].

¹⁶ Graham & Friederichs, *supra* note 11, at 9.

¹⁷ Thomas M. Antkowiak, *Rights, Resources, and Rhetoric: Indigenous Peoples and the Inter-American Court*, 35 U. PA. J. INT'L L. 113, 137 (2013).

¹⁸ Benjamin J. Richardson, *Indigenous Peoples, International Law and Sustainability*, 10 REV. EUR. COMP. & INT'L ENVTL. L. 1, 25 (2001).

¹⁹ International Labour Organisation Convention (No. 169) Concerning Indigenous and Tribal Peoples in Independent Countries, Jun. 27, 1989, 1650 U.N.T.S. 383; 28 I.L.M. 1384 [hereinafter ILO Convention No. 169] Article 7(1) right of Indigenous peoples "to decide their own priorities for the process of development" and "to exercise control, to the extent possible, over their own economic, social and cultural development," Article 15(1) on Indigenous peoples' right to "participate in the use, management and conservation" of their natural resources, and Article 23 requires governments to promote the subsistence economy of indigenous tribes taking into account the importance of sustainable and equitable development.

when states are required to ensure prior informed consent and benefit sharing for economic activities that may involve local and Indigenous communities.²⁰ Chapter 26 of Agenda 21²¹ specifically deals with IPs and requests states to protect their traditional lands from activities that they may consider culturally inappropriate.²² The 1992 Convention on Biological Diversity (CBD) recognizes IPs' vital role in protecting biodiversity, as observed in many countries.²³ The CBD, however, is firmly based on the principle of national sovereignty and accords nation-states the paramount role in proposing biodiversity policies and ultimately protecting it.²⁴

The mainspring of evolving international legal standards concerning the treatment of IPs derives from the decolonization process and movement for the protection of the rights of minorities stimulated by the United Nations Charter.²⁵ In this regard, the two most important concepts in the Charter are: respect for the equal rights and self-determination of peoples, and for human rights and fundamental freedoms for all, without distinction as to race, sex, language or religion.²⁶ The protection of minority rights has been articulated in a series of international treaties, which albeit not addressing Indigenous peoples' rights specifically, recognize the inherent connection between the right to self-determination of all peoples and the observance of individual human rights.²⁷

Historically, the debate in the United Nations concerning Indigenous peoples' rights focused broadly on two questions: who the

²⁰ Convention on Biological Diversity art. 5; art 15(5), Jun. 5, 1992, 1760 U.N.T.S. 79.

²¹ *Agenda 21*, U.N. Doc. A/CONF.151/4 (1992) [hereinafter *Agenda 21*].

²² *Id.* ¶ 26.3.

²³ Matthew F. Jaksa, *Putting the "Sustainable" Back in Sustainable Development: Recognizing and Enforcing Indigenous Property Rights as a Pathway to Global Environmental Sustainability*, 21 J. ENVTL. L. & LITIG. 157, 195 (2006).

²⁴ The CBD affirms the sovereign rights of States over their natural resources. Convention on Biological Diversity arts. 3 & 15(1), Jun. 5, 1992, 1760 U.N.T.S. 79.

²⁵ Charter of the United Nations, Jun. 26, 1945, 1 U.N.T.S. XVI.

²⁶ Richardson, *supra* note 18, at 5.

²⁷ *Id.*, citing ICCPR, *supra* note 4; ICESCR, *supra* note 13; and International Convention on the Elimination of All Forms of Racial Discrimination, Jan. 4, 1969, 660 U.N.T.S. 195.

“peoples” entitled to the right of self-determination are; and how far this right extends.²⁸ States traditionally argued that “peoples” entitled to self-determination did not include sub-national groups, but only larger, sovereign territories who were entitled to recognition by the UN.²⁹ Currently, both regional and international bodies agree that the term “peoples” include sub-national groups and that IPs fit this definition.³⁰ Such groups usually have: (1) a common cultural history (ethnic, linguistic, religious, etc.); (2) claims to territory or land; and (3) a sense of shared political, social, and economic goals.³¹ The right to self-determination applies to IPs as a culturally diverse sub-group.³²

There has been major controversy regarding the meaning of “self-determination” itself. Nation-states feared that sub-national groups could seek to equate self-determination with independent statehood.³³ However, the right to self-determination as a norm of international law does not entail that every group that constitutes a people would have the right to establish its own state and unilaterally secede from an existing, possibly multi-ethnic state.³⁴ It is argued that

²⁸ Graham & Friederichs, *supra* note 11, at 3. *Working Paper by the Chairperson-Rapporteur, Mrs. Erica-Irene A. Daes, on the concept of “indigenous peoples”*, Comm. on Hum. Rts., Sub-Commission on Prevention of Discrimination and Protection of Minorities, Working Group on Indigenous Populations, 14th Sess., U.N. Doc. ECN.4/Sub.2/AC.4/1996/2 (1996); *Study of the Problem of Discrimination Against Indigenous Populations: Final report submitted by the Special Rapporteur, Mr. José Martínez Cobo*, U.N. Doc. E/CN.4/Sub.2/1986/7/Add.4 (1986).

²⁹ *Id.* at 3.

³⁰ *Id.*

³¹ *Id.*, citing, e.g., Reference re: Secession of Quebec, [1998] 37 I.L.M. 1340, 1373; *Report of the Human Rights Committee*, U.N. GAOR, 47th Sess., Supp. No. 40, at 52, U.N. Doc. A/47/40 (1992).

³² Siegfried Wiessner, *The Cultural Rights of Indigenous Peoples: Achievements and Continuing Challenges*, 22 EUR. J. INT’L L. 121, 133 (2011); General Comment No. 23: Article 27 (Rights of Minorities), ¶ 3(2), U.N. Doc. CCPR/C/21/Rev.1/Add.5 (1994) (self-determination is a “right belonging to peoples”).

³³ Jerry Firestone et al., *Cultural Diversity, Human Rights, and the Emergence of Indigenous Peoples in International and Comparative Environmental Law*, 20 AM. U. INT’L. L. REV. 219, 234 (2011).

³⁴ Valentina S. Vadi, *When Cultures Collide: Foreign Direct Investment, Natural Resources, and Indigenous Heritage in International Investment Law*, 42

this right does not authorize secession and the formation of a new state, unless the existing state fails to respect Indigenous peoples' rights under particular conditions such as military occupation, colonial domination or other forms of oppression that may result in the denial of effective participation and other human rights.³⁵

In terms of the meaning and scope of the right to self-determination, a distinction has been made between this right and the right of sovereignty. Sovereignty refers to governmental authority and is often linked to jurisdiction within territorial boundaries, while self-determination is the right of peoples to freely determine their political status and pursue their economic, social, and cultural development.³⁶ Sovereignty is a substantive legal status whereas self-determination is a political right.³⁷ In practice, the debate on Indigenous peoples' rights to self-determination has been generally related to the right to self-government or cultural self-determination, and not to the right to form an independent government, as a result of IPs' distinctive characteristics.³⁸ In that sense, self-determination is linked to Indigenous peoples' cultural identity.

International treaties associate self-determination with notions of cultural survival, economic development, political freedoms and other basic human rights.³⁹ UNDRIP recognizes IPs' "full and unqualified right to self-determination,"⁴⁰ but within the limits of state sovereignty.⁴¹ The contemporary state practice and *opinio juris*

COLUM. HUM. RTS. L. REV. 797, 820 (2011).

³⁵ *Id.*

³⁶ Rebecca Tsosie, *Indigenous People and Environmental Justice: the Impact of Climate Change*, 78 U. COLO. L. REV. 1625, 1663 (2007). See also Ricardo Pereira & Orla Gough, *Permanent Sovereignty over natural resources in the 21st century: natural resource governance and the right to self-determination of indigenous peoples under international law*, 14 MELB. J. INT'L L. 451 (2013); S. James Anaya, *Indian Givers: What Indigenous Peoples Have Contributed to International Human Rights Law*, 22 WASH. U. J. L. & POL'Y 107 (2006); DAVID RAIC, STATEHOOD AND THE LAW OF SELF-DETERMINATION 226-307 (2002).

³⁷ *Id.* at 1663.

³⁸ Wiessner, *supra* note 32, at 129.

³⁹ ICCPR, *supra* note 4, art. 1; ICESCR, *supra* note 13, art. 1.

⁴⁰ UNDRIP, *supra* note 2, art. 3.

⁴¹ UNDRIP, *supra* note 2, art. 46(1); Vadi, *supra* note 34, at 819.

regarding the legal treatment of IPs is based on the recognition of their distinct cultural identity to hold the right to political, economic and social self-determination over the lands they have traditionally occupied.⁴²

The most important aspects of the right to self-determination relate to the political control of traditional lands and the enjoyment of equal rights with nation-states to make decisions affecting such lands.⁴³ However, there is a limited number of IABs that provide some means by which IPs can articulate human rights claims,⁴⁴ including violations to the right to self-determination. Indigenous peoples' organizations have made use of human rights adjudication bodies to investigate human rights violations,⁴⁵ but these claims have to be examined through the lens of individual rights adjudication. However, Indigenous peoples' claims are communal in nature, usually affecting collective lands and shared natural resources.

The traditional adjudication model based on individual rights is criticized for being unsuitable to effectively deal with judicial claims from IPs and other communities, including violations to the right to self-determination or other rights.⁴⁶ The traditional tort model is limited by the requirements of injury, causation and damages, and

⁴² Wiessner, *supra* note 32, at 135, also citing S. James Anaya & Robert A. Williams, *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); S. JAMES ANAYA, *INDIGENOUS PEOPLES IN INTERNATIONAL LAW* 49-72 (2d ed. 2004); Chidi Oguamanam, *Indigenous Peoples and International Law: The Making of a Regime*, 30 QUEEN'S L. J. 348 (2004).

⁴³ Tsosie, *supra* note 36, at 1655.

⁴⁴ Richardson, *supra* note 18, at 5, citing M.M. de Bolivar, *A Comparison of Protecting the Environmental Interests of Latin-American Indigenous Communities from Transnational Corporations Under International Human Rights and Environmental Law*, 8 J. TRANSNAT'L L. & POL'Y 105 (1998).

⁴⁵ For example, the complaints procedures under human rights treaties and procedures under the Optional Protocol to the ICCPR. United Nations Human Rights Office of the High Commissioner, *Complaints procedures under the human rights treaties*, <https://www.ohchr.org/EN/HRBodies/Petitions/Pages/1503Procedure.aspx> (last visited Oct. 20, 2019).

⁴⁶ Tsosie, *supra* note 36, at 1675; Nigel S. Rodley, *Conceptual Problems in the Protection of Minorities: International Legal Development*, 17 HUM. RTS. Q. 48 (1995); Engle, *supra* note 1.

primarily deals with redress for quantifiable past harm but do little to prevent prospective harm.⁴⁷ These limited categories of harm restrict adjudicatory bodies to properly assess different types of harm, for example, immaterial damage or future impacts on IPs such as climate change.

The right to self-determination is not extensively discussed in the IACtHR jurisprudence in cases involving IPs, and in other contexts the right is considered to be non-justiciable precisely because it is a collective right.⁴⁸ The Court links the right to self-determination to the right to property and proposes the following criteria: to read Article 21 (right to property) of the American Convention, in light of the rights recognized under common Article 1 (right to self-determination) and Article 27 (regarding minority groups) of the ICCPR, in order to assert the right of IPs to enjoy property rights in accordance with their communal tradition.⁴⁹ Applying the proposed criteria, the Court concluded, in the *Case of the Saramaka People v. Suriname*, that the community had the right to their territory, derived from their longstanding use and occupation of the land and resources necessary for their physical and cultural survival, and that the state had an obligation to adopt special measures to recognize, respect, protect, and guarantee their communal property rights.⁵⁰

More recent claims brought to the Inter-American Commission on Human Rights, such as that filed by the Inuit

⁴⁷ *Id.* at 1675.

⁴⁸ *See*, for instance, the decisions of the Human Rights Committee in *Apirana Mahuika et al. v. New Zealand*, Hum. Rts. Comm., Communication No. 547/1993, U.N. Doc. CCPR/C/70/D/547/1993 (2000) (concerning Maori fisheries) [hereinafter *Apirana Mahuika*]; *A B et al. v Italy*, Hum. Rts. Comm., Communication No. 413/1990, U.N. Doc. CCPR/C/40/D/413/1990 (1990) (concerning the German minority in South Tirol), to name but two examples. The Human Rights Committee has, however, on at least one occasion transformed claims under the right to self-determination (Art. 1) into claims under the right to minority protection (Art. 27), in what seems to be an application of the principle of *iura novit curia*. *See* Human Rights Committee, *Lubicon Lake Band v Canada*, Hum. Rts. Comm., Communication No. 167/1984, U.N. Doc. CCPR/C/38/D/167/1984, ¶ 13.4 (1990).

⁴⁹ *Saramaka People v. Suriname*, Preliminary Objections, Merits, Reparations and Costs, Inter-Am. Ct. H.R. (ser. C) No. 172, ¶ 95 (Nov. 28, 2007) [hereinafter *Saramaka People v. Suriname*].

⁵⁰ *Id.* ¶ 96.

Circumpolar Conference (ICC),⁵¹ introduce new facets to the right to self-determination. In their petition against the United States, the Inuit people alleged that the impacts of global warming, resulting from various acts and omissions of the United States, constituted a violation of their human rights.⁵² This is illustrative of recent environmental justice claims, as this is not a sovereignty claim but rather a claim for “environmental self-determination.”⁵³ The Inuit Peoples’ case is based on their status as a distinct people, unified in their cultural values and practices and belonging to their traditional lands and territories irrespective of the political boundaries of the nation-states.⁵⁴ The application was deemed inadmissible, on the basis that the application had insufficient information for the IACtHR to determine whether the alleged facts would characterize a violation of rights protected by the American Declaration.⁵⁵

The key themes that arise in connection to the right to self-determination in the IACtHR jurisdiction relate to land ownership and the enjoyment of natural resources. Similar to environmental rights, the Court has examined the right to self-determination in light of Article 21 of the American Convention. The Court maintains that Article 21 is to be interpreted in connection with Articles 1 and Article 27 of the ICCPR. The right to self-determination is also used by IPs to support not only land title claims, but also rights to natural resources. For example, the Saramaka people argued that they had a “right to self-determined economic development of all resources within their

⁵¹ Tsosie, *supra* note 36, at 1669. Sheila Watt-Cloutier, *Petition to the Inter American Commission on Human Rights Seeking Relief From Violations Resulting From Global Warming Caused by Acts and Omissions of the United States*, https://earthjustice.org/sites/default/files/library/legal_docs/petition-to-the-inter-american-commission-on-human-rights-on-behalf-of-the-inuit-circumpolar-conference.pdf.

⁵² Tsosie, *supra* note 36, at 1669.

⁵³ *Id.* at 1670.

⁵⁴ *Id.* at 1670.

⁵⁵ Letter from Ariel E. Dulitzky, Assistant Executive Secretary, *Inter-American Court of Human Rights*, to Paul Crowley, Barrister and Solicitor (Nov. 16, 2006), available at http://blogs2.law.columbia.edu/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2006/20061116_na_decision.pdf (last accessed Oct. 21, 2019).

territory without the interference of the State.”⁵⁶ In this case, self-determination was also linked to the right to legal personality. The failure of the State to recognize the “juridical personality of the Saramaka people as a distinct people, in accordance also with their right to self-determination” was deemed a violation of Article 3 of the American Convention (right to juridical personality).⁵⁷

The right to self-determination in the IACtHR jurisprudence is used to support Indigenous peoples’ claims to communal property and the access and use of natural resources. In the *Case of the Saramaka People v. Suriname*, self-determination is defined by the ability of IPs to “freely pursue their economic, social and cultural development,” and “freely dispose of their natural wealth and resources.”⁵⁸ As stated by the Court, this freedom exists “by virtue of the right to self-determination,” as is viewed as essential to ensuring their cultural and physical survival.⁵⁹ This reasoning is also used in the *Case of the Kaliña and Lokono Peoples v. Suriname*.⁶⁰

As discussed, while the IACtHR generally regards Article 21 as a repository of essential Indigenous rights, some scholars, notably Anaya, attributes these rights to the overarching principle of self-determination.⁶¹ Anaya proposes a self-determination model that involves five core principles: non-discrimination, cultural integrity, social welfare and development, as well as self-government.⁶² For Anaya, and other like-minded scholars, the choice is no longer

⁵⁶ *Saramaka People v. Suriname*, *supra* note 49, ¶ 159.

⁵⁷ *Id.*

⁵⁸ *Id.* ¶ 93.

⁵⁹ Lisl Brunner, *The Rise of Peoples’ Rights in the Americas: The Saramaka People Decision of the Inter-American Court of Human Rights*, 7 CHINESE J. INT’L L. 699, 703 (2008).

⁶⁰ *Kaliña and Lokono Peoples v. Suriname*, Merits, Reparations and Costs, Inter-Am. Ct. H.R. (ser. C) No. 309, ¶ 122 (Nov. 25, 2015) [hereinafter *Kaliña and Lokono Peoples v. Suriname*]. For a commentary, see Lucas Lixinski, *Case of the Kaliña and Lokono Peoples v. Suriname*, 111 AM. J. INT’L L. 147 (2017).

⁶¹ Antkowiak, *supra* note 17, at 159. See also S. James Anaya, *Indigenous Rights Norms in Contemporary International Law*, 8 ARIZ. J. INT’L & COMP. L. 1 (1991); S. James Anaya, *International Human Rights and Indigenous Peoples: The Move Toward the Multicultural State*, 21 ARIZ. J. INT’L & COMP. L. 13 (2004).

⁶² The article mentions “self-determination theory,” *id.* at 138.

between two extremes: self-determination vs. human rights discourses, or secession vs. a limited right to culture.⁶³ He proposes recasting self-determination, as a bundle of rights, which are all required for ensuring Indigenous peoples' rights.

The key element of the self-determination model is Indigenous peoples' right to exercise control over their own cultural, economic, and social development, which also supports the right to control their land and resources.⁶⁴ Consequently, states must seek their consent in order to implement policies in connection with Indigenous lands.⁶⁵ According to Metcalf, the self-determination model recognizes the positive and sustainable relationship with the environment, but it does not constrain the nature of their future cultural relationship with their lands. He argues that an advantage the self-determination approach holds over the cultural integrity model is that it does not construct Indigenous peoples' environmental rights based on a potentially limiting, stereotypical picture of Indigenous culture.⁶⁶

One of the main advantages of the self-determination model is to empower and legitimize Indigenous peoples' control over their lands and natural resources. The recognition that IPs can make decisions regarding their communal lands and resources also confers legal rights for them to limit the encroachment of external drivers on their communal lands (e.g., loggers, agribusinesses, mining companies, developers, etc.). The IACtHR has elaborated a right for IPs to use and manage their land and natural resources, as an essential aspect of their culture. The Court recognizes that self-determination allows IPs to maintain their "spiritual relationship with the territory."⁶⁷ In this light, the focus on self-determination is instrumental to securing other rights, notably cultural rights.

Nevertheless, it is noted that the emphasis on self-determination raises the problem of how special rights for one segment

⁶³ *Id.* at 137.

⁶⁴ Cherie Metcalf, *Indigenous Rights and the Environment: Evolving International Law*, 35 *OTTAWA L. REV.* 101 (2003-4), this article provides a comparison between self-determination and cultural integrity models.

⁶⁵ *Id.*

⁶⁶ *Id.* at 131.

⁶⁷ *Saramaka People v. Suriname*, *supra* note 49, ¶ 95.

of society can be reconciled with overarching governmental responsibilities to ensure environmental protection standards.⁶⁸ Self-determination and environmental protection are mutually reinforcing depending on what is meant by “self-determination.”⁶⁹ Could the right to self-determination justify IPs to choose unsustainable practices on their traditional lands? It is argued that IPs should be free to decide whether they wish to continue their inherited ways of life, modify, or abandon them, and that governments should not create “living museums of peoples,” as culture is in constant flux.⁷⁰ This approach seems to accept the option that IPs may freely deviate from or deny their traditional ways of life, based on their right to self-determination. The danger would then be to prioritize self-determination to the detriment of other rights, such as the right to a healthy environment or cultural rights. Arguably, IPs have the right to a healthy environment, but so do other segments of society. Environmental harm caused on Indigenous lands is likely to also affect non-Indigenous communities. Also, would IPs be able to maintain their cultural identity and traditional ways of life, if they choose to engage for example, in commercial agricultural activities, as we see happening in the Brazilian Amazon and elsewhere?⁷¹

Self-determination has been viewed as the indispensable vehicle of preservation and flourishing of the culture of a group.⁷² In this perspective, the notion of “cultural self-determination” has been used to indicate Indigenous peoples’ will and determination to survive and bloom as a distinct culture, in the face of many existential threats.⁷³ It is suggested that cultural rights include not only rights to culture narrowly conceived (i.e., protection of language, customs, and traditions), but also the culturally grounded right to self-determination.⁷⁴ The exercise of cultural rights relies on the ability of

⁶⁸ Richardson, *supra* note 18, at 1.

⁶⁹ *Id.*

⁷⁰ Wiessner, *supra* note 32, at 140.

⁷¹ *UNDRIP*, *supra* note 2, preamble, “self-determination of all peoples by virtue of which they freely determine their” cultural development.

⁷² Wiessner, *supra* note 32, at 122.

⁷³ *Id.*

⁷⁴ *Id.* at 139.

IPs to freely practice and transmit their customs, traditions, languages and belief systems. Indigenous communities should govern themselves in order to continue the life of its culture and its members. As stated by Vine Deloria Jr., a Native American leader and scholar, the purpose of the sovereignty of an Indigenous people is to protect its cultural integrity.⁷⁵

The right to self-determination is also considered in its connection with environmental protection. The unique cultural relationship that IPs have with their traditional lands justifies their right to “environmental self-determination.”⁷⁶ This approach recognizes indigenous peoples’ right to continue their longstanding relationship with the environment and honor their traditional knowledge and practices that guide their interactions with the land and natural resources.⁷⁷ Arguably, UNDRIP supports the notion of environmental self-determination, by recognizing the right of IPs “to be secure in the enjoyment of their own means of subsistence and development” and the right to autonomy and self-government regarding the means of financing their autonomous functions.⁷⁸

Self-determination, therefore, has been articulated as the foundation for other rights, which gives it a certain rhetorical appeal, while at the same time binding it to rights exercised within the confines of the territorial state. Self-determination plays the role of the foundation for rights, but in doing so it also becomes inextricably tied to the obligations of the state in granting those rights, and not necessarily self-determination. Therefore, translated as part of a broader human rights discourse, self-determination loses its ability for radical renegotiation of arrangements with the territorial state. It becomes laden with serving identity, and, more specifically, culture. The next section teases out cultural rights in the context of IPs’ rights

⁷⁵ *Id.* at 140.

⁷⁶ Tsosie, *supra* note 36, at 1655. See also Klaus Bosselmann, *The Right to Self-Determination and International Environmental Law: An Integrative Approach*, 1 N.Z. J. ENVTL. L. 1 (1997); Rebecca Tsosie, *Climate Change, Sustainability and Globalization: Charting the Future of Indigenous Environmental Self-Determination*, 4 ENV’T & ENERGY L. & POL’Y J. 188 (2009).

⁷⁷ *Id.*

⁷⁸ UNDRIP, *supra* note 2, arts. 20 (1), 4 & 8, respectively.

adjudication.

Culture

In many respects, the right to culture is the key driver of international litigation on Indigenous rights, even though it is not articulated as such in most regional courts and other adjudicatory bodies. The right to culture is recognized as a substantive right in Article 15 of the ICESCR, and in Article 27 of the ICCPR. It is also read in the penumbra of the right to private and family life (Article 8) in the ECHR, and the rights to property (Article 21) and equality and non-discrimination (Article 1(1)) of the ACHR.

That culture is found in the penumbra of other rights has not been an obstacle for its enforcement, particularly in the IACtHR, much to the contrary: the need to accommodate cultural distinctiveness becomes a way of reading all human rights in the context of Indigenous peoples, as the IACtHR articulated with respect to Article 1(1) in *Yakye Axa*⁷⁹ and *López Álvarez*.⁸⁰ The connection to Article 1(1) is particularly relevant in that every violation in the Inter-American system is traditionally declared as being that of a specific right (for instance, the right to life) “in connection with” Article 1(1), as the key provision that directs states to protect the rights declared in the ACHR. Therefore, to connect culture to this provision means it effectively permeates the entire instrument. The effect of penumbra articulation thus is that it allows culture to play a central role in the adjudication of all human rights cases related to Indigenous peoples, but this pervasiveness can also weaken the possibilities of Indigenous rights.

Historically, though, the connection to culture, and culture’s

⁷⁹ *Yakye Axa Indigenous Community v. Paraguay*, Merits, Reparations and Costs, Inter-Am. Ct. H.R. (ser. C) No. 125, ¶151 (Jun. 12, 2005) [hereinafter *Yakye Axa*].

⁸⁰ *López Álvarez v. Honduras*, Merits, Reparations and Costs, Inter-Am. Ct. H.R. (ser. C) No. 141 (Feb. 1, 2006) [hereinafter *López Álvarez v. Honduras*] (engaging with para. 51 of the *Yakye Axa* judgment in the context of freedom of expression).

central role in interpreting Indigenous claims has not always been desirable. As indicated in the previous section, Indigenous claims were first made in the language of self-determination, and only started to be articulated as culture because self-determination failed (due to its collective aspects, seen as non-justiciable).⁸¹ And, prior to the United Nations era, culture was also not an advisable strategy. When Indigenous peoples brought claims to the League of Nations, for instance, they were articulated in the language of treatment of populations in territories subject to colonization, but not in the failure of accommodation of culture.⁸² The reason for culture not being a part of claims is that the League of Nations' relationship to non-European peoples was to measure their performance in relation to the Western-centric yardstick of the "standard of civilization."⁸³ Specifically, in order to prove themselves to be subjects of international law that could be emancipated and have standing to make claims as a people, Indigenous peoples had to prove they were sufficiently "civilized," or Westernized. To assert the distinctiveness of Indigenous culture would have underscored difference in relation to European civilization, and therefore the "inferiority" of Indigenous peoples and the need for them to remain under colonial control, which was the opposite of what they sought in their representations before the League of Nations, and in their political mobilization more generally. Therefore, even though representations before international bodies like the League were useful in creating alternative pathways of contesting the settler state, the system created incentives for Indigenous culture to be pushed aside.

⁸¹ On collective Indigenous rights and their adjudication by the Inter-American system, see Brunner, *supra* note 59, and Lucas Lixinski, *Rights of indigenous peoples - collective rights - recognition of legal personality - right to communal property - conflict between nature reserves and indigenous land - free, prior, and informed consultation - environmental impact - restitution and reparation*, 111 AM. J. INT'L L. 147 (2017) (discussing *Kaliña and Lokono Peoples v. Suriname*, *supra* note 60). See also Engle, *supra* note 9.

⁸² See generally SUSAN PEDERSEN, *THE GUARDIANS: THE LEAGUE OF NATIONS AND THE CRISIS OF EMPIRE* 92-4 (2015). See also Sophie Rigney, *Indigenous International Law at the League of Nations*, Presentation at the League of Nations Decentred: Law, Crises and Legacies (Jul. 17-19, 2019).

⁸³ For a critique, see ARNULF BECKER LORCA, *MESTIZO INTERNATIONAL LAW: A GLOBAL INTELLECTUAL HISTORY 1842-1933* (2015).

After the League of Nations was succeeded by the United Nations, though, the language of Indigenous claims shifted, notably towards human rights. After engaging (unsuccessfully) with self-determination, Indigenous advocates settled on the language of culture as a means of bringing Indigenous claims of violations of human rights before international bodies. Culture in some respects purports to bridge the gap between group claims of Indigenous peoples and the individualization that is required in human rights adjudication. After all, in spite of the language of (internationally enforceable) human rights being that of the rights of individuals, culture is necessarily created collectively. The IACtHR has recognized this relationship between culture and collectivities in a range of cases.⁸⁴

Culture, in the case law of the IACtHR, has come to mean cultural identity. It justifies and grounds the relationship between IPs and their lands and the environment and natural resources, and is in this respect largely amorphous, only tethered to the tangibility of land or nature. Cultural heritage, for instance, is only usually discussed in few cases, and as *obiter dicta*.⁸⁵ Culture is not a right, but rather a value in this case law. Culture thus fades into the factual matrix of the case, lacking sufficient legal value to trigger in itself a violation of a right protected under the ACHR.

Recognition of the relationship between culture and collectivities has been important as an entry point for Indigenous claims, but the adjudication of Indigenous rights on the basis of culture is still relatively fraught. The key reason is the overall subsidiarity of culture in human rights law, which often translates into deference to states. In the IACtHR context, though, the key issue seems to be one of consequences of anchoring Indigenous claims on culture, which constrains the scope of the claim and associated remedies, as discussed below.

Generally, bodies that have the right to culture, like the HRC via Article 27 of the ICCPR, have articulated claims in a fact-centric way that leaves a lot of room for state subsidiarity. Specifically, in cases involving whether the lack of accommodation of culture was a

⁸⁴ Wiessner, *supra* note 32, at 136-137.

⁸⁵ *See, e.g.,* Yakye Axa, *supra* note 79, ¶ 154.

violation of human rights, cases have often defaulted to the notion that the state was generally in a better position to make that call, as opposed to an international body in the exercise of supervisory authority.⁸⁶ In the ECtHR's cases, because claims are often based on the right to private and family life, Article 8(2) of the ECHR spells out a proportionality test, and states are given a considerable "margin of appreciation" (an ECtHR doctrine that has the same effects as subsidiarity) in making judgments involving minority culture.⁸⁷

The key test for whether a right to culture has been violated is therefore proportionality analysis, and subsidiarity (under different terminology, depending on the body) is the key defense available to potentially violating states. In the IACtHR context, because culture is read more pervasively across all rights, the test is far less clear. That the IACtHR is often seen as pro-victim and reluctant to engage with state arguments couched on subsidiarity⁸⁸ also means that the connection to culture plays a different discursive role. Rather than being a linchpin of the case that can make or break a claim (like in the HRC and ECtHR), in the IACtHR culture works to thicken a claim in underscoring vulnerability, with effects both in the merits and reparations of a case.

With respect to the merits of a case, the enhanced vulnerability of the potential victim means that the state is under special obligations of caring for its more vulnerable populations. In the cases involving Paraguayan Indigenous groups of the Enxet-Lengua people, the IACtHR stressed in particular the vulnerability of these populations and the extreme poverty they experienced.⁸⁹ That status is comparable

⁸⁶ *E.g.*, *Ángela Poma v. Peru*, Hum. Rts. Comm., Communication No. 1457/2006, U.N. Doc. CCPR/C/95/D/1457/2006 (2009); UNHRC, *Apirana Mahuika supra* note 48; and *Mrs. Anni Äärelä and Mr. Jouni Näkkäläjärvi v. Finland*, Hum. Rts. Comm., Communication No. 779/1997, U.N. Doc. CCPR/C/73/D/779/1997 (2000).

⁸⁷ *Chapman v. United Kingdom*, App. No. 27238/95 (Eur. Ct.H.R. Jan. 18, 2001).

⁸⁸ Jorge Contesse, *Contestation and Deference in the Inter-American Human Rights System*, 79 L. & CONTEMP. PROBS. 123 (2016); and Lucas Lixinski, *The Consensus Method of Interpretation by the Inter-American Court of Human Rights*, 3 CANADIAN J. COMP. & CONTEMP. L. 65 (2017).

⁸⁹ As discussed by Antoni Pigrau i Solé & Susana Borràs Pentinat, *Medio*

to the IACtHR's articulation of enhanced positive or duty of care-like obligations in relation to persons under the custody of the state, like prisons⁹⁰ or mental health facilities.⁹¹ The state is thus placed in a position of steward of general populations which, paradoxically, aids and hinders progress for Indigenous rights cases. The positive function is obvious, as increased state obligations lower the burden on victims to prove a violation. But this turn also ties with traditional thinking about Indigenous peoples as "wards" of the state and with reduced agency or legal capacity, given their state of vulnerability. To make Indigenous peoples wards of the state aligns with traditional views of indigeneity in Latin American constitutionalism, too;⁹² it seems thus that, while these views have largely been abandoned in legal texts, their effects are still perceived in the implementation of rights.

Thickening a claim through vulnerability also plays a role in reparations, at least inasmuch as the state is increasingly required to make reparations that promote systemic change, as opposed to benefitting only the immediate victims of a case. Therefore, the cultural reading, when it comes to reparations, can actually have broadening effects (by making reparations spillover to other Indigenous groups), rather than narrowing effects based on cultural specificity. Therefore, reparations can have systemic change effects for other Indigenous peoples in the same country, and arguably across the Americas. At play here may be that culture is still largely read in fairly essentialized ways by the IACtHR, in what Karen Engle has

Ambiente y Derechos de los Pueblos Indígenas en el Sistema Interamericano de Derechos Humanos, in PUEBLOS INDÍGENAS, DIVERSIDAD CULTURAL Y JUSTICIA AMBIENTAL: UN ESTUDIO DE LAS NUEVAS CONSTITUCIONES DE ECUADOR Y BOLIVIA 147, 170-1 (Antoni Pigrau i Solé ed., 2013). See Yakye Axa, *supra* note 79; Sawhoyamaxa Indigenous Community v. Paraguay, Merits, Reparations and Costs, Inter-Am. Ct. H.R. (ser. C) No. 146 (Mar. 29, 2006) [hereinafter Sawhoyamaxa Indigenous Community]; and Xákmok Kásek Indigenous Community v. Paraguay, Merits, Reparations and Costs, Inter-Am. Ct. H.R. (ser. C) No.214 (Aug. 24, 2010).

⁹⁰ López Álvarez v. Honduras, *supra* note 80.

⁹¹ Ximenes Lopes v. Brazil, Merits, Reparations and Cost, Inter-Am. Ct. H.R. (ser. C) No. 149 (Jul. 4, 2006).

⁹² Lucas Lixinski, *Constitutionalism and the Other: Multiculturalism and Indigeneity in Selected Latin American Countries*, 14 ANUARIO IBEROAMERICANO DE JUSTICIA CONSTITUCIONAL 235 (2010).

described as “strategic essentialism,” or the idea that cultures are essentialized so as to promote better adjudicatory outcomes, but with little regard to possible unintended consequences such as tying Indigenous rights to a desire to pursue a specific (pre-Columbian) way of life.⁹³ This aggressive performance of indigeneity for the purposes of satisfying the legal process (or at least a perception of the legal process) is very problematic, as highlighted by Indigenous legal scholars as well.⁹⁴

This ambivalent relationship to culture (as both particularizing Indigenous claims in relation to the world at large, but universalizing Indigenous identity across IPs) helps explain the limited extent to which Indigenous culture is articulated. That is not to say the case law portrays the connection between culture and land as a superficial connection; rather, we suggest the engagement with a central connection is rather superficial. In *Moiwana*, the IACtHR said that “[i]n order for the culture to maintain its integrity and identity, [community] members must have access to their homeland.”⁹⁵ This language engages the trope that culture and knowledge can be deeply embedded in land, and that land itself is a mechanism for the transmission of culture,⁹⁶ but it does not go much further than that in the way it is analyzed scholarly, where the more general statement is usually taken at face value.

Beyond a relationship to land and nature (the latter is further discussed below), however, there is little in terms of explaining the stakes of Indigenous culture in the case law,⁹⁷ translating into a fairly conservative view of cultural identity.⁹⁸ Part of the reason for that thin

⁹³ Engle, *supra* note 9, at 9-14.

⁹⁴ KATHLEEN BIRRELL, *INDIGENEITY: BEFORE AND BEYOND THE LAW* 81 (2016).

⁹⁵ Free translation from the Spanish original. *Moiwana Community v. Suriname*, Preliminary Objections, Merits, Reparations and Costs, Inter-Am. Ct. H.R. (ser. C) No. 124, ¶ 86.6 (Jun. 15, 2005).

⁹⁶ Johanna Gibson, *Community Rights to Culture: The UN Declaration on the Rights of Indigenous Peoples*, in *REFLECTIONS ON THE UN DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES* 433, 434 (Stephen Allen & Alexandra Xanthaki eds., 2011).

⁹⁷ Underscoring this “cultural script,” see Antkowiak, *supra* note 17.

⁹⁸ Paula Spieler, *The La Oroya Case: the Relationship Between Environmental*

engagement is a need to warp the facts to serve a right in the instrument (the violation of which is being sought), alongside the fact that the Indigenous voice is still somewhat limited in international adjudication because of the need to translate their claims into a legal system that is foreign to them, whilst the legal representatives often have little contact with the relevant Indigenous groups. But one of the effects is to perpetuate a passiveness of IPs in cases involving their own claims, reinforcing both essentialism and paternalism.

Culture, therefore, even if it is a linchpin in the majority of cases involving Indigenous peoples, has unintended consequences in the ways in which it is articulated. The emancipatory potential of culture as a trigger for accommodation and (weak) self-determination is largely lost in it serving the needs of IABs, translated in the test and defenses' deference to subsidiarity, or enhancement of victimhood. While available remedies in the Inter-American context are fairly broad, and many of them are grounded on culture and heritage, the record of compliance is mixed,⁹⁹ and the mandate to increasingly promote more systemic change through reparations dilutes the possibilities of reparations being used to advance culture in context-sensitive ways. The finding of violations of rights grounded on culture also helps contain the jurisprudence's more progressive features to cases involving only IPs, as attempts at decolonizing international human rights with respect to Indigenous peoples. One example is the recognition of group rights, which is appropriate and (relatively) uncontroversial in the Indigenous context, but could have destabilizing effects elsewhere.

Culture is closely connected to self-determination, inasmuch as cultural accommodation is a weaker form of self-determination. But the former can more easily be articulated in the language of international human rights adjudication, therefore being a preferable alternative from that strategic standpoint. Nonetheless, in the process of articulating what is possible, broader claims for autonomy fall by the wayside. Likewise, there is a tradeoff with the connection between

Degradation and Human Rights Violations, 18 HUMAN RIGHTS BRIEF 19 (2010).

⁹⁹ Darren Hawkins & Wade Jacoby, *Partial Compliance: A Comparison of the European and Inter-American Courts of Human Rights*, 6 J. INT'L L. & INT'L REL. 35 (2010).

Indigenous culture and the environment, in that the environment itself constrains Indigenous culture and helps keep it largely “traditional” and “sustainable,” thereby entrenching essentialized readings of Indigenous culture and claims. The connection to the environment is discussed in the next section.

Environment

The 1972 Stockholm Declaration on the Human Environment¹⁰⁰ provides the foundation for linking human rights and the environment, by recognizing that a life of dignity depends on an adequate environment.¹⁰¹ Later instruments, such as the 1982 World Charter for Nature, restate that our needs rely on the proper functioning of natural systems,¹⁰² while the 1992 Rio Declaration on Environment and Development¹⁰³ emphasizes the vital role that IPs play in environmental management due to their traditional knowledge and practices.¹⁰⁴ Environmental protection is also included as a right in IPs declarations, particularly the 2016 ADRIP and the 2007 UNDRIP.¹⁰⁵ This right has been incorporated in human rights treaties in the form of a *right to a healthy environment*, as enunciated by the 1988 Protocol of San Salvador.¹⁰⁶ Similarly, the 1981 African Charter on Human and Peoples’ Rights recognizes the right to a “satisfactory

¹⁰⁰ Declaration of the United Nations Conference on the Human Environment, U.N. Doc. A/CONF.48/14 (1972), principle 1 [hereinafter Stockholm Declaration].

¹⁰¹ Dinah Shelton, *Environmental Rights and Brazil’s Obligations in the Inter-American Human Rights System*, 40 GEO. WASH. INT’L L. REV. 733, 734 (2008).

¹⁰² World Charter for Nature, G.A. Res. 37/7, ¶ 6, U.N. Doc. A/RES/37/7 (Oct. 28, 1982).

¹⁰³ Rio Declaration on Environment and Development, U.N. ESCOR, 5th Sess., U.N. Doc. A/CN.17/1997/8 (1992) [hereinafter Rio Declaration].

¹⁰⁴ *Id.* principle 22.

¹⁰⁵ The 2007 United Nations Declaration on the Rights of Indigenous Peoples states that IPs have the right to the conservation and protection of the environment; *UNDRIP*, *supra* note 2, art. 29. The 2016 American Declaration on the Rights of Indigenous Peoples, states that IPs have the right to a healthy environment and the right to live in harmony with nature; *ADRIP*, *supra* note 3, art. 19.

¹⁰⁶ Protocol of San Salvador, *supra* note 15.)

environment.”¹⁰⁷

The link between human rights and the environment has been extensively discussed in academic literature and is often described in three ways: the environment being a precondition to the promotion of human rights; environmental protection as a human right in itself, and environmental protection as the result of the exercise of other human rights.¹⁰⁸ Underlying each of these iterations is the question of whether human rights serve the environment, or whether the environment serves human rights. Even though the IACtHR attempted to articulate this relationship as being one of equals in a non-Indigenous context,¹⁰⁹ the fact that it is a body charged with implementing a human rights treaty means its constitutional mandate will inevitably require it to put human rights concerns above other legal-normative ones.¹¹⁰

Historically, the environment is connected to Indigenous peoples' claims, through the lens of Article 21 of the ACHR (right to property). In reality, the jurisprudence of the IACtHR tells the story of encroachment and dispossession of IPs in the Americas. They have relied on the Inter-American system as a last resort to obtain legal recognition as peoples and native title rights, when these rights have been ignored or denied in national jurisdictions. In general, these cases are brought to the IACHR because States have failed to demarcate communal lands,¹¹¹ granted concessions without the assent of

¹⁰⁷ African Charter, *supra* note 7, art 24.

¹⁰⁸ Spieler, *supra* note 98, at 20. *See also* Dinah Shelton, *Human Rights, Environmental Rights, and the Right to Environment*, 28 STAN. J. INT'L L. 103 (1991); Alan Boyle, *Human Rights or Environmental Rights? A Reassessment*, 18 FORDHAM L. REV. 471 (2006).

¹⁰⁹ The Environment and Human Rights (State obligations in relation to the environment in the context of the protection and guarantee of the rights to life and to personal integrity – interpretation and scope of Articles 4(1) and 5(1) of the American Convention on Human Rights), Advisory Opinion OC-23/17, Inter-Am. Ct. H.R. (ser. A) No. 23 (Nov. 15, 2017).

¹¹⁰ For this discussion, see generally Lucas Lixinski, *Treaty interpretation by the Inter-American Court of Human Rights: Expansionism at the service of the unity of international law*, 21 EUR. J. INT'L L. 585 (2010).

¹¹¹ *Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, Merits, Reparations and Cost, Inter-Am. Ct. H.R. (ser. C) No. 79 (Aug. 31, 2001) [hereinafter *Mayagna (Sumo) Awas Tingni Community v. Nicaragua*]. Nicaragua had failed to demarcate communal lands and granted logging concessions without

Indigenous communities, caused their displacement and deprived them of the most basic rights.¹¹²

The distinctiveness of IPs as a group and their special connection with the territory are the common narrative in the IACtHR jurisprudence. This approach is also used in international treaties. The 1989 ILO Convention on Indigenous and Tribal Peoples Convention (No.169) defines the special relationship between IPs and the environment as “ecological harmony.”¹¹³ Likewise, UNDRIP sees Indigenous peoples as *distinct*,¹¹⁴ with distinctive customs, spirituality, traditions, procedures and practices.¹¹⁵ They should then have the right to maintain a “distinctive spiritual relationship with the lands they own or occupy.”¹¹⁶ These peoples are distinct precisely because they maintain forms of life and culture that set them apart from the rest of society.¹¹⁷

In the Inter-American system, the unique connection between IPs and their land is largely recognized and the IACtHR has consistently held that these close ties must be secured under Article 21 of the American Convention.¹¹⁸ The “very special relationship” that IPs have with their land and natural resources is asserted in the *Case of the Kaliña and Lokono Peoples v. Suriname*, as well as in other cases.¹¹⁹ As noted in the *Case of the of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, all anthropological, ethnographic studies, and all documentation presented by IPs in recent years

the assent of the community.

¹¹² *Saramaka People v. Suriname*, *supra* note 49. This case involved the displacement of the community due to mining concessions granted to foreign companies and the extension of a dam.

¹¹³ ILO Convention No. 169, *supra* note 19.

¹¹⁴ *UNDRIP*, *supra* note 2, arts. 5, 7(2), 8, 2(a).

¹¹⁵ *Id.* art. 34.

¹¹⁶ *Id.* art. 25.

¹¹⁷ *Mayagna (Sumo) Awas Tingni Community*, *supra* note 111, 23 (expert opinion of Rodolfo Stavenhagen Gruenbaum).

¹¹⁸ *Saramaka People v. Suriname*, *supra* note 49, ¶ 88; *Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, *supra* note 111, ¶ 148-149; *Yakye Axa*, *supra* note 79, ¶ 124, 131, 135-7, 154; *Sawhoyamaya Indigenous Community*, *supra* note 89, 118-21, 131.

¹¹⁹ *Kaliña and Lokono Peoples v. Suriname*, *supra* note 60, ¶ 33.

demonstrate that the connection they have with their lands is an essential tie, which Western societies no longer have.¹²⁰

The IACtHR has played a key role in defining and safeguarding communal property rights and resource rights of Indigenous communities in the Americas. The IACtHR was the first international tribunal to hold that a state must protect Indigenous peoples' collective rights to their traditional lands.¹²¹ Some scholars suggest that the Indigenous rights movement has used this framing, i.e. that IPs have a strong connection with the land and thus something to contribute to the struggle to save the environment, because this is an appealing way to raise international concern.¹²² The idea that IPs are guardians of the forests and have a special link with their territory has been criticized as being unrealistic, which will be later discussed.

Human rights adjudication is focused on individual rights and based on legal instruments safeguarding civil and political rights.¹²³ The *right to a healthy environment*, and the *right to the benefits of culture*, are part of the economic, social and cultural rights established under the Protocol of San Salvador (Articles 11 and 14). According to this Protocol, only two economic, social and cultural rights can give rise to individual legal petitions to the IACtHR against states for non-compliance, the right to education and trade union rights.¹²⁴ In relation to the other rights under the Protocol of San Salvador, the means of protection involves the duty of states to submit periodic reports on the progressive measures taken to ensure their due respect.¹²⁵ Therefore, the violation to the right to a healthy environment could only until

¹²⁰ *Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, *supra* note 111, expert opinion of Rodolfo Stavenhagen Gruenbaum, ¶24.

¹²¹ Lisl Brunner, *supra* note 59, referring to *Saramaka People v. Suriname*, *supra* note 49.

¹²² Rhiannon Morgan, *Advancing Indigenous Rights at the United Nations: Strategic Framing and its Impact on the Normative Development of International Law*, 13 *SOC. & LEGAL STUD.* 481, 496 (2004).

¹²³ The 1948 OAS Charter addresses civil, political, economic, social, and cultural rights, while the ACHR protects primarily civil and political rights. See Charter of the Organization of American States, Apr. 30, 1948, 2 U.S.T. 2394, 19 U.N.T.S. 3; ACHR, *supra* note 6.

¹²⁴ Protocol of San Salvador, *supra* note 15, art. 19.

¹²⁵ *Id.* art. 19.

recently be considered by the IACtHR if in connection with other civil and political rights safeguarded by the ACHR,¹²⁶ for example in situations where environmental degradation or pollution threatens human health, life or any other civil and political rights. Nevertheless, it is argued that these two categories of rights are not only fundamental, but also interrelated.¹²⁷

The IACtHR jurisprudence, as noted earlier, has focused on property and resource rights, rather than on a broader discussion on the right to a healthy environment. In particular, the Court has examined whether and to what extent states may grant concessions on indigenous lands allowing the use of natural resources (e.g. timber, minerals, water resources, etc.).¹²⁸

While the IACtHR recognizes that certain resources are essential for the (physical and cultural) survival of IPs, it also asserts that communal property rights may be subject to restrictions in certain circumstances and for legitimate objectives.¹²⁹ In the *Case of the Saramaka People v. Suriname*, the IACtHR established the parameters for testing whether the limits imposed on IPs to their use and enjoyment of natural resources are rightful and legitimate. In this case, the IACtHR introduced the “three safeguards,” which have been applied in subsequent cases. The safeguards include (1) community participation, (2) benefit-sharing, and (3) environmental and social

¹²⁶ Individuals still lack recourse to claim environmental violations in the regional and universal systems, Spieler, *supra* note 98. *See also* Christian Curtis, *Protecting the Environment through the Rights Enshrined in the American Convention*, in THE INTERAMERICAN ASSOCIATION FOR ENVIRONMENTAL DEFENCE, ENVIRONMENTAL DEFENSE GUIDE 67 (2010); and generally, in relation to economic and social rights, TARA MELISH, PROTECTING ECONOMIC, SOCIAL AND CULTURAL RIGHTS IN THE INTER-AMERICAN HUMAN RIGHTS SYSTEM (2002).

¹²⁷ ENVIRONMENTAL JUSTICE AND THE RIGHTS OF INDIGENOUS PEOPLES: INTERNATIONAL & DOMESTIC LEGAL PERSPECTIVES 4 (Laura Westra ed., 2007).

¹²⁸ *Saramaka People v. Suriname*, *supra* note 49, ¶ 124-54; *Kaliña and Lokono Peoples v. Suriname*, *supra* note 60, ¶ 199-230; *Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, *supra* note 111, ¶ 106-57.

¹²⁹ *Saramaka People v. Suriname*, *supra* note 49, ¶ 127. The State may restrict the use and enjoyment of the right to property where the restrictions are (a) previously established by law; (b) necessary; (c) proportional; and (d) with the aim of achieving a legitimate objective a democratic society.

impact assessment.¹³⁰ To test whether the State has rightfully restricted the use of natural resources on indigenous lands, for instance by granting concessions to third parties, the Court examines whether those three safeguards have been observed or not. In this case, the IACHR held that the timber and gold mining concessions granted in traditional Saramaka territory, without prior impact assessment, were highly destructive to the forests and affected natural resources traditionally used by the community, which were essential for their survival.¹³¹

Environmental protection, or the right to a healthy environment, has not been extensively discussed per se in the IACHR jurisprudence.¹³² There is no significant discussion on what the right to a healthy environment involves and what are the implications when this right is violated, for example in terms of Indigenous peoples' cultural identity or reparations for material and immaterial damages. In the IACtHR jurisprudence, there are three key themes that arise in connection to the environment, which are (1) the distinctiveness of IPs as a group, (2) their close ties to the land, and (3) the vital role that they play in maintaining the environment, given their special link with the land and traditional knowledge.¹³³ However, these themes are evoked essentially to justify Indigenous peoples' property rights.

As noted by Dinah Shelton, the IACtHR judgements reveal an overwhelming focus on the right to property as the pre-eminent juridical guarantee of the rights of IPs, while other rights (e.g. to culture, religion, political participation and self-determination) are generally held to be subsumed in, or, dependent on, the land and resource rights, if they are mentioned at all.¹³⁴ The strong emphasis on

¹³⁰ *Id.* ¶129.

¹³¹ *Id.* ¶ 154.

¹³² Yakye Axa, *supra* note 79, ¶ 163.

¹³³ Case of the Afro-Descendant Communities Displaced from the Cacarica River Basin (Operation Genesis) v. Colombia, Preliminary Objections, Merits, Reparations and Costs, Inter-Am. Ct. H.R. (ser. C) No. 270, ¶ 345-6 (Nov. 20, 2013); Mayagna (Sumo) Awas Tingni Community v. Nicaragua, *supra* note 110, ¶ 148-53, Kichwa Indigenous People of Sarayaku v. Ecuador, Preliminary Objections, Merits, Reparations and Costs, Inter-Am. Ct. H.R. (ser. C) No. 245 ¶ 145-55 (Jun. 27, 2012).

¹³⁴ Dinah Shelton, *The Inter-American Human Rights Law of Indigenous Peoples*, 35 U. HAWAII L. REV. 937, 968 (2013).

the right to property has also been criticized for failing to provide even basic protection for Indigenous lands, because (domestic and international) law grants states wide latitude to interfere with property.¹³⁵

According to the Protocol of San Salvador, everyone shall have the right to live in a healthy environment and states shall promote environmental protection (Article 11). The right to a healthy environment in the context of IPs would involve the right to maintain forests, rivers and freely decide on the use of natural resources, without persistent disturbances from external drivers or being dispossessed of traditional lands. However, environmental degradation, caused as a result of mining, logging or other extractive activities, is not sufficiently discussed in the IACtHR jurisprudence. In other words, in cases where there has been serious environmental damage, the Court has not considered whether the right to a healthy environment has been violated, and the implications of this recognition. One consequence of this is that environmental harm, and potential impacts on culture and other human rights, are either not taken into account or not adequately valued, in terms of reparations for damages suffered by indigenous communities. For example, the clearing of forests may cause material loss, including the depletion of timber and animal species used for hunting, but it may also cause the destruction of sacred natural sites or areas commonly used for traditional ceremonies and festivities. The scope and ramifications of environmental degradation to IPs could be considered more extensively in the IACtHR jurisprudence.

In the *Case of the Yakye Axa Indigenous Community v. Paraguay*, environmental degradation in the Loma Verde Estate is mentioned, including land clearing, building and excavation.¹³⁶ In this case, the Commission asked the Court to protect the land claimed by the community and ensure that its natural resources, specially its forests, are not destroyed.¹³⁷ In response, the Court ordered the State to delimit, demarcate, grant title and transfer the land to the

¹³⁵ Antkowiak, *supra* note 17, at 113.

¹³⁶ Yakye Axa, *supra* note 79, ¶ 50, 76.

¹³⁷ *Id.* ¶ 207.

community.¹³⁸ However, the damage already caused to the forests and ecosystems, and the option to potentially restore degraded areas, was not considered and not reflected in the reparations, as a source of pecuniary (or non-pecuniary) damages. The impacts of environmental destruction on the community's culture and traditional practices is not taken into account either as part of the reparations to the victims. In this case, pecuniary damages included the expenses incurred by the community to recover their lands.¹³⁹ Non-pecuniary damages considered the suffering, anguish and unworthy treatment of Yakye Axa members.¹⁴⁰ The environmental damage suffered, or measures to prevent environmental harm likely to occur until their lands are demarcated and granted, were not considered in the reparations due to the community. If the right to a healthy environment is included as a right under the Protocol of San Salvador, the related duty to protect the environment, and its connection with other rights, such as the right to life, humane treatment, and cultural rights, should be examined in more depth by the IACtHR.

Environmental rights in the IACtHR jurisprudence have an auxiliary role of justifying or helping ensure that more “urgent” rights, notably property rights, are safeguarded. It can be argued that land rights have been prioritized in the IACtHR jurisprudence for a good reason. In many cases brought to the IACtHR Indigenous peoples were displaced from their traditional lands and forced to live in exclusion and poverty, in situations of extreme vulnerability, for example alongside a road such as the Yakye Axa community,¹⁴¹ deprived of potable water, food, medical care, and under constant physical threats from settlers. Arguably, in such cases the right to property needs to be fulfilled first so that other rights can be achieved.

Nevertheless, some scholars suggest that it would be beneficial to foreground environmental rights, under an “ecological integrity model.”¹⁴² This model would be an alternative to the cultural integrity

¹³⁸ *Id.* ¶ 215.

¹³⁹ *Id.* ¶ 194.

¹⁴⁰ *Id.* ¶ 196.

¹⁴¹ Yakye Axa, *supra* note 79, ¶ 2.

¹⁴² ENVIRONMENTAL JUSTICE AND THE RIGHTS OF INDIGENOUS PEOPLES, *supra* note 127, at 9.

and self-determination models, proposed by Anaya and other academics.¹⁴³ The ecological integrity model supports that the ecological integrity of IPs' living environment, and their access to natural resources, are essential for individual and communities to thrive.¹⁴⁴

The IACtHR examined the alleged violation of the right to a healthy environment, in connection with the rights to food, water, and cultural identity in February 2020, in the *Case of Indigenous Communities Members of the Lhaka Honhat Association v. Argentina*.¹⁴⁵ The Court stated that the right to a healthy environment must be considered among the rights protected by Article 26 of the American Convention.¹⁴⁶ The interdependence among the rights to a healthy environment, adequate food, water and cultural identity, particularly in the context of Indigenous communities, was also explicitly recognized.¹⁴⁷ At the same time, the IACtHR recognizes the right to a healthy environment as a “fundamental” and “autonomous” right.¹⁴⁸ In terms of reparations, the Court ordered the state to present an action plan to address the infringement of those rights and required the establishment of a fund to compensate for pecuniary (and non-pecuniary) damages.¹⁴⁹ The interpretation of the right to a healthy environment as an “autonomous” right indicates its dissociation particularly from property rights, which may lead to more suitable forms of reparation for environmental damages, already suffered by Indigenous communities and likely to continue in the absence of state action and supervision by the IACtHR.

The key advantage of foregrounding the right to a healthy environment is to open the option for assessing more broadly the impacts of environmental damage, and forms of reparation due to affected communities, as observed in the *Lhaka Honhat Association*

¹⁴³ *Id.* at 7.

¹⁴⁴ *Id.*

¹⁴⁵ Indigenous Communities of the Lhaka Honhat Association (Our Land) v. Argentina, Merits, Reparations and Costs, Am. Ct. H.R. (ser. C) No. 400 (Feb. 6, 2020) [hereinafter *Lhaka Honhat Association v. Argentina*], ¶ 6.

¹⁴⁶ *Id.* ¶ 202.

¹⁴⁷ *Id.* ¶ 242.

¹⁴⁸ *Id.* ¶ 203.

¹⁴⁹ *Id.* ¶ 338.

v. Argentina case. For instance, the IACtHR recognized that the logging concessions issued by the state in the Upper Suriname River lands have damaged the environment and had a negative impact on lands and natural resources traditionally used by the Saramaka people.¹⁵⁰ The economic loss that resulted from the extraction of timber was included as part of the pecuniary compensation due to the Saramaka people. Nevertheless, the impacts of logging and gold mining concessions granted in Saramaka territory to the ecosystem as a whole, including harm to biodiversity and water resources, were not factored in for assessing material (and immaterial) damage. Also, the potential restoration of degraded areas, and related costs, were not adequately considered. International tribunals would benefit from additional expert advice to adequately assess and measure environmental damage and the financial compensation due for environmental harm that is required for restoring ecosystems.

The downside of prioritizing environmental rights, and an ecological integrity model, is to potentially reinforce the unrealistic idea that IPs live in perfect harmony with nature, and that environmental protection is their primary goal. If this often-idealized connection with nature no longer exists, they would no longer be considered “real Indians.”¹⁵¹ This approach may not adequately take into account that IPs have a dynamic culture and their own wants and needs as other people do. Most Indigenous lands also contain a wealth of natural resources. Should these communities have the right to freely decide what to do with their lands and resources, even if it departs from strict environmental conservation? As noted by Rafael Correa, President of Ecuador:¹⁵² “[T]here may be nice rhetoric . . . that indigenous leaders repeat. We cannot hold [those] extremist positions We cannot be beggars sitting on a bag of gold.”

The IACtHR asserts that the close ties between IPs and their land is the “fundamental basis for their culture, spiritual life, wholeness, economic survival, and preservation and transmission for

¹⁵⁰ *Saramaka People v. Suriname*, *supra* note 49, ¶ 154.

¹⁵¹ *Antkowiak*, *supra* note 17, 161.

¹⁵² *Id.* at 115.

future generations.”¹⁵³ Indigenous peoples have also voiced that their connection with the land is not merely a matter of possession and production but a material and spiritual link that they must fully enjoy, to preserve their cultural legacy and transmit it to future generations.¹⁵⁴ For IPs the relationship with the land is such that “severing that tie entails the certain risk of an irreparable ethnic and cultural loss, with the ensuing loss of diversity”¹⁵⁵ Their territory is sacred, for encompassing not only the members of the community who are alive, but also the mortal remains of their ancestors, as well as their divinities.¹⁵⁶ The loss of traditional lands represents a denial of their culture.¹⁵⁷ In connection with their milieu, IPs transmit their nonmaterial cultural heritage from one generation to the next.¹⁵⁸

The link that IPs have with their lands and their cultural identity is also recognized in international treaties. The ILO 169 Convention requires states to respect the special cultural importance and spiritual values embodied in Indigenous peoples’ relationship with their lands.¹⁵⁹ According to the 1981 African Charter, environmental rights are a means for preserving and honoring a people’s aboriginal identity.¹⁶⁰ In addition, because IPs have a historical connection with the land, it is often claimed that they play a vital role in promoting environmental conservation and sustainable use.¹⁶¹ The link between

¹⁵³ Yakye Axa, *supra* note 79, ¶ 131.

¹⁵⁴ Mayagna (Sumo) Awas Tingni Community v. Nicaragua, *supra* note 111,

¹⁵⁵ Yakye Axa, *supra* note 79, ¶ 216.

¹⁵⁶ Maya (Sumo) Awas Tingni Community v. Nicaragua, *supra* note 111, Separate Opinion of Judges A.A. Cançado Trindade, M. Pacheco Gómez and A. Abreu Burelli, ¶ 2.

¹⁵⁷ Yakye Axa, *supra* note 79, ¶ 20 (Bartomeu Melia i Lliteres, expert witness).

¹⁵⁸ Yakye Axa, *supra* note 79, ¶ 154.

¹⁵⁹ Jo M. Pasqualucci, *International Indigenous Land Rights: a Critique of the Jurisprudence of the Interamerican Court of Human Rights in Light of the United Nations Declaration on the Rights of Indigenous Peoples*, 27 *WIS. INT’L L. J.* 51, 56 (2009). ILO Convention No. 169, *supra* note 19, arts. 7, 13.

¹⁶⁰ Peter Manus, *Sovereignty, Self-Determination, and Environment-based Cultures: the Emerging Voice of Indigenous Peoples in International Law* 23 *WIS. INT’L L. J.* 553, 587 (2005).

¹⁶¹ The 1992 Rio Declaration recognizes that indigenous people play a “vital role” in environmental management due to their knowledge and traditional practices, Rio Declaration, *supra* note 102, principle 22; 2007 UNDRIP also recognizes that

territorial integrity and cultural identity is well-established both in the IAtCHR jurisprudence and international treaties.

An alternative broad right-to-life concept (*vida digna*) is also discussed in the IACtHR jurisprudence as a possible framework for an array of essential Indigenous norms, including cultural integrity, non-discrimination, lands and resources, social development, and self-government.¹⁶² The right to property would be subsumed by, and anchored to, a stronger configurative principle to defend Indigenous peoples' livelihoods, using the notion of *vida digna*.¹⁶³ This approach recognizes that the denial of communal property deprives IPs from basic rights, linked to obtaining food and access to clean water.¹⁶⁴ The right to a dignified life is discussed in further detail below, and in the context of thinking more broadly of Indigenous survival.

Indigenous Survival Beyond Culture: Bright and Dark Sides

The traditional frames of adjudication of Indigenous rights before IABs (self-determination, culture, environment) all have limitations, as discussed above. Chief among them is their failure to capture but limited aspects of Indigenous peoples' aspirations, and forcing Indigenous identity to be channeled through the language of specific rights that were conceived without IPs' input, or without having their interests specifically in mind.

A key question in this context is whether those three frames are as good as it gets, or if there are alternative ways of framing Indigenous claims for the purposes of human rights litigation. Even though bodies like the IACtHR have already engaged with instruments like the UNDRIP (and presumably will do the same with the ADRIP in due course), to whose development its own jurisprudence has contributed, the engagement has still been fairly limited to the pre-

indigenous peoples' are able to sustainably manage the environment due to their culture and traditional practices; *UNDRIP*, *supra* note 2, preamble.

¹⁶² Antkowiak, *supra* note 17, 121.

¹⁶³ *Id.*

¹⁶⁴ Yakyé Axa, *supra* note 78, ¶ 167.

existing ways of articulating Indigenous claims,¹⁶⁵ even if some call for an overhaul of case law on the basis of these specific instruments.¹⁶⁶

In thinking about alternatives, one must be aware of the limitations of this exercise, in that we are to a large extent trading one frame for another, and that the constraints of the IABs medium are still very much present. But that is not to say one must abandon the exploration of alternatives.

The right to life is a possible alternative way of thinking about Indigenous rights.¹⁶⁷ It is recognized in all major human rights instruments, ties with readings of “the good life” that emerge in Indigenous-driven new constitutionalism in the Americas,¹⁶⁸ and, because it is attached to different tests and evidentiary thresholds, it can also help break the stasis of status quo. That said, current interpretations of the right have borrowed certain elements familiar to adjudication of other rights, to which one must be attuned.

In a recent General Comment, the HRC has interpreted the right to life in the ICCPR to include the right to a dignified life (or *vida digna*, in the parlance of the Inter-American system). That construction had already appeared in certain IACtHR case law with respect to Indigenous peoples, too. With respect to the General Comment, it states that the right to life “should not be interpreted narrowly,” and that it includes the right to “enjoy a life with

¹⁶⁵ Fergus MacKay JD, *The Case of the Kaliña and Lokono Peoples v. Suriname and the UN Declaration on the Rights of Indigenous Peoples: Convergence, Divergence and Mutual Reinforcement*, 1 ERASMUS L. REV 31 (2018); and Clive Baldwin & Cynthia Morel, *Using the United Nations Declaration on the Rights of Indigenous Peoples in Litigation*, in REFLECTIONS ON THE UN DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES 121 (Stephen Allen & Alexandra Xanthaki eds., 2011).

¹⁶⁶ Elsa Stamatopoulou, *Taking Cultural Rights Seriously: The Vision of the UN Declaration on the Rights of Indigenous Peoples*, in REFLECTIONS, *supra* note 165, at 387.

¹⁶⁷ Also discussed in Antkowiak, *supra* note 17.

¹⁶⁸ Jordi Jaria i Manzano, *El “modo de vida” en las constituciones de Ecuador y Bolivia: perspectiva indígena, naturaleza y bienestar (un balance crítico)*, in PUEBLOS INDÍGENAS, *supra* note 89, at 285.

dignity.”¹⁶⁹ The right to life can be subject to limitations, as long as they are not arbitrary.¹⁷⁰ In this respect, arbitrariness is interpreted by taking into account elements of, among others, “reasonableness, necessity, and proportionality,”¹⁷¹ which echo the language of other restrictions to cultural and environmental rights found elsewhere in international human rights law. Indigenous peoples are considered to be particularly vulnerable in general with respect to their right to life¹⁷² (thus echoing the discussion above that the connection to culture has the effect of rendering IPs more vulnerable), and the idea of a dignified life is part of a state’s duty to protect life in the context of deprivation of land and resources of Indigenous peoples.¹⁷³ All of this language affirms the right to life in a more expansive manner,¹⁷⁴ but it is notable that, in discussing the interaction between the right to life and other international legal regimes, the HRC makes no mention of culture, or the connection between dignified life and other regimes.¹⁷⁵ Therefore, the idea of a dignified life, while declared in the General Comment as part of the right to life, still comes across as tentative, since the HRC fails to articulate it in relation to the other regimes where it appears more strongly.

The IACtHR has also accepted this broader construction of the right to life, at least in cases in which communities were particularly vulnerable. In the three Paraguayan cases¹⁷⁶ discussed above, the right to life was articulated as a precondition to all other rights, and therefore, it should not be interpreted restrictively. The right to a dignified life is thus a key component of the right to life itself, as protected in Article 4 ACHR. Importantly, the IACtHR sees it connected to the provision on the ACHR on economic, social, and

¹⁶⁹ General Comment No. 36, ¶ 3, UN Doc. CCPR/C/GC/36 (2018).

¹⁷⁰ *Id.* ¶ 10.

¹⁷¹ *Id.* ¶ 12.

¹⁷² *Id.* ¶ 23.

¹⁷³ *Id.* ¶ 26.

¹⁷⁴ For a commentary on this expansion, see Thomas M. Antkowiak, *A “Dignified Life” and the Resurgence of Social Rights*, 18 *Nw. J. HUM. RTS.* 1 (2020).

¹⁷⁵ General Comment No. 36, ¶ 52-70.

¹⁷⁶ See *supra* note 89.

cultural rights (Article 26), as well as several provisions of the San Salvador Protocol on Economic, Social and Cultural Rights,¹⁷⁷ including the right to participate in cultural life in Article 14.¹⁷⁸ But it is important to highlight that a key concern here is the economic impoverishment of the communities, and that the IACtHR articulates the connection to dignified life more in economic terms than cultural ones,¹⁷⁹ which also aligns with the constitutional readings in countries like Bolivia and Ecuador, for instance.¹⁸⁰ Therefore, the connection between culture and dignified life, as a matter of human rights adjudication, cannot be relied upon too extensively.

While the right to life has not been traditionally connected to Indigenous claims before human rights bodies (save for the exceptions above, which are themselves somewhat limited as discussed), it echoes important concerns with cultural survival and even the genocide of Indigenous peoples in many countries during colonization. This historical connection echoes long-standing claims in many countries,¹⁸¹ and thus offers the potential to address Indigenous claims connected to a more distant colonial past, at least from a rhetorical standpoint. Another advantage of adjudication via the right to life is that it curtails the room left for state subsidiarity. It also means more attention to the claim, from the perspective of advocacy strategy. From the perspective of environmental protection, other jurisprudence has connected the right to life to the environment,¹⁸² which would make the use of the right to life more

¹⁷⁷ Protocol of San Salvador, *supra* note 15.

¹⁷⁸ Solé & Pentinat, *supra* note 89, at 171. *See also* Yakye Axa, *supra* note 79, ¶ 163.

¹⁷⁹ Case of the Xákmok Kásek Indigenous Community. v. Paraguay, Merits, Reparations and Costs, Inter-Am. Ct. H.R. (ser. C) No. 214, ¶ 215 (Aug. 24, 2010). *See also* Solé & Pentinat, *supra* note 89.

¹⁸⁰ Manzano, *supra* note 168, at 330.

¹⁸¹ *See generally* ELAZAR BARKAN, *GUILT OF NATIONS: RESTITUTION AND NEGOTIATING HISTORICAL INJUSTICES* (2000).

¹⁸² Yakye Axa, *supra* note 79, ¶ 161-3. The Environment and Human Rights (State Obligations in Relation to the Environment in the Context of the Protection and Guarantee of the Rights to Life and to Personal Integrity – Interpretation and Scope of Articles 4(1) and 5(1) of the American Convention on Human Rights), Advisory Opinion, Inter-Am. Ct. H.R., (ser. A) No. 23 (Nov. 15, 2017).

effective as well here. With respect to self-determination, the right to life presents the disadvantage of being a very individualized right, whereas self-determination is a collective right. However, the right to life can be seen as a pre-condition for the exercise of any other rights, including self-determination. Ideally, the IACtHR should be able to assess the violation of multiple rights in IP claims - either civil and political or economic social and cultural - separately and more broadly. For example, the environment (or violations of environmental rights) has been examined within the confines of property rights (Article 21), while it should be considered in its own right. In any case, Article 19 of the Protocol of San Salvador sets the limits to the rights than can be brought before the IACtHR. Consequently, IP claims are historically placed under large frames and linked to particular civil and political rights, notably the right to property. In this light, we propose the right to life as an alternative frame, because this right is broad enough to encompass other rights (e.g. cultural, environmental rights, etc.) and allow a more extensive consideration of these rights by the Court.

One downside is that the right to life largely eliminates the collective dimensions of the case, in spite of attempts to read dignified life in a communal context, like in the cases against Paraguay discussed above. Over-individualization of cases can lead to an oversimplification or even erasure of Indigenous identity, except as noting the additional vulnerability of Indigenous victims (as discussed above in connection to culture). But reparations orders, particularly with respect to systemic change and guarantees of non-repetition, can connect the claims back to the community, with the added possibility of offering redress for long-standing historical claims, mentioned above.

The right to life, of course, is but one alternative. The connected right to physical integrity can be translated into a right to cultural integrity, for instance, or one can speak of procedural rights more broadly as a window into Indigenous claims before the state (at least those that can be judicialized domestically).

On the right to cultural integrity, it allows for a more holistic

engagement with Indigenous culture.¹⁸³ The right has been discussed by the Inter-American Commission¹⁸⁴ as well as the IACtHR.¹⁸⁵ Article 8(2)(a) of the UNDRIP and Article XIII of the ADRIP also articulate a collective right to integrity, which partly echoes the right to integrity as part of the right to humane treatment in Article 5(1) of the ACHR. This right could be a fruitful avenue to be pursued in litigation, and there is already some practice under it.¹⁸⁶ Importantly, it can be a means of addressing culture more centrally in litigation, if it is in fact to be a key tenet of litigation involving IPs.

Procedural rights can be a helpful window inasmuch as they are a blanket clause in an IAB context. The right of access to a remedy, translated as a right of access to justice,¹⁸⁷ means effectively that the state can be chastised for domestic failure to provide remedies to any claim by Indigenous peoples, thus doing away with many of the filtering or framing effects of other rights. Further, claims based on access to justice align themselves naturally with calls for systemic change via remedies. A significant downside, of course, is that this right requires that claims have been judicialized domestically to begin with, and their consideration is restricted to procedural justice claims. Therefore, IABs restrict their own purview of examination in focusing

¹⁸³ Jérémie Gilbert, *Indigenous Peoples, Human Rights, and Cultural Heritage: Towards a Right to Cultural Integrity*, in: *INDIGENOUS PEOPLES' CULTURAL HERITAGE: RIGHTS, DEBATES AND CHALLENGES* 20, 21 (Alexandra Xanthaki et al. eds., 2017).

¹⁸⁴ *Id.* at 25, citing INTER-AMERICAN COMMISSION OF HUMAN RIGHTS, *INDIGENOUS AND TRIBAL PEOPLES' RIGHTS OVER THEIR ANCESTRAL LANDS AND NATURAL RESOURCES: NORMS AND JURISPRUDENCE OF THE INTER-AMERICAN HUMAN RIGHTS SYSTEM* (2009).

¹⁸⁵ Yakye Axa, *supra* note 79, ¶ 51; Kuna Indigenous People of Madungandí and the Emberá Indigenous People of Bayano and their members v. Panama, Preliminary Objections, Merits, Reparations and Costs, Inter-Am. Ct. H.R. (ser. C) No. 284, ¶ 143 (Oct. 14, 2014) [hereinafter Kuna Indigenous People]; and Moiwana, *supra* note 95, ¶ 101-3.

¹⁸⁶ Yakye Axa, *supra* note 79, ¶ 51; Kuna Indigenous People, *supra* note 185, ¶ 143; Moiwana, *supra* note 95, ¶ 101-3; and Case of Kichwa Indigenous People of Sarayaku v. Ecuador, Merits and Reparations, Inter-Am. Ct. H.R., (ser. C) No. 245 ¶ 244-254 (Jun. 27, 2012).

¹⁸⁷ ANTÔNIO AUGUSTO CANÇADO TRINDADE, *THE ACCESS OF INDIVIDUALS TO INTERNATIONAL JUSTICE* (2011).

on procedural rights, since they cannot scrutinize the merits of the domestic litigation,¹⁸⁸ thus in effect deferring to subsidiarity that is problematic when the claim is based on the reluctance by the state of engaging IPs meaningfully in pathways to emancipation.

Finally, economic, social, and cultural rights can open renewed avenues for enforcement. In the *Lhaka Honhat Association v. Argentina* case,¹⁸⁹ the IACtHR breathed new life into the enforcement of the San Salvador Protocol, which, as discussed above, has limited direct enforceability in its own text.¹⁹⁰ In this case, however, the IACtHR tied a range of economic, social, and cultural rights in the San Salvador Protocol (the rights to food, water, a healthy environment, and cultural life) to Article 26 of the ACHR, and declared a violation of Article 26.¹⁹¹ Drawing on the recognition of each of these rights in multiple international instruments within and outside the Inter-American system, as well as national constitutions, the IACtHR shored up their validity. With respect to their enforceability, the Court sidestepped the issue of progressive realization that is common to these rights, and focused on the minimum content that is direct enforceable, as well as the responsibility of the state to prevent third (private) parties from violating those rights.¹⁹² Therefore, by shifting the focus away from actions of the state to actions of private parties, and focusing instead on the omission of the state, the Court could more easily leverage enforceability, and not get tangled into the defense of progressive realization that would require a detailed analysis of state policies, with odds favoring the state. This case opens a new and potentially useful avenue for the direct enforcement of Indigenous peoples' rights without the need for translation through a right in the ACHR, and holds great potential, but it is unclear how the key defense of progressive realization will play out in other contexts where private

¹⁸⁸ For a discussion of this case law in the Inter-American and European contexts, known as the “fourth instance” theory, see David Kosař & Lucas Lixinski, *Domestic Judicial Design by International Human Rights Courts*, 109 AM. J. INT’L L. 713 (2015).

¹⁸⁹ *Supra* note 145.

¹⁹⁰ *Supra* note 124 and accompanying text.

¹⁹¹ *Lhaka Honhat Association v. Argentina*, *supra* note 145, ¶ 289.

¹⁹² *Id.* ¶ 272.

parties are not involved.

In other words, while there are alternatives that can be explored, many of them fall in similar traps to the rights traditionally used in the Indigenous context. But furthering those alternative pathways can be to the advantage of Indigenous peoples in certain contexts, and particularly helpful in widening the presence and voice of Indigenous peoples in human rights law more generally, beyond non-Indigenous understandings of what is possible in relation to self-determination, culture, and the environment.

Concluding Remarks

The multiple, successive framing through which Indigenous human rights claims go in the international adjudicatory process have the effect of constraining the possibilities of Indigenous emancipation against the territorial state through fora designed to be avenues against the same territorial state. In some respects, in fact, international human rights edges Indigenous peoples towards accommodation within the existing structures of the nation-state. It also individualizes community claims at the expense of Indigenous peoples, and collective rights like environmental rights and self-determination are deemed non-justiciable unless translated into individualized rights, such as property rights, which still is the backbone of the Inter-American jurisprudence on Indigenous rights.

The rights to self-determination, culture, and the environment are the interests underlying the majority of IP claims in the Inter-American system, and avenues through which these claims are articulated. There is abundant jurisprudence under each of these rights, which attempts to elevate Indigenous peoples' status, but at the same time subordinates them to rather essentialized views of IPs: the right to self-determination constrains IP aspirations to more human rights by being only about accommodation within existing structures, rather than emancipation of Indigenous worldviews; the right to culture makes IP identities based solely on, and with the only objective of continuing, cultural survival; and the right to a healthy environment attempts to subordinate IPs' existence and worthiness to a caricatured relationship to the environment that is often at odds with the needs and

desires of IPs to seek their economic self-determination and development. Environmental rights in the IACtHR jurisprudence are also subsumed under other civil and political rights, particularly property rights. Nonetheless, the interpretation of the rights to a healthy environment and cultural life as autonomous rights, or economic, social, and cultural rights more broadly as an independent category, as seen in the *Lhaka Honhat Association v. Argentina* case, indicates a dissociation between Indigenous concerns and their distortion via property rights.

Other rights therefore emerge as possible underlying frames for the adjudication of Indigenous rights. They can more broadly serve Indigenous goals and break away from the path dependencies that have tied Indigeneity to essentialized culture. But, in doing so, they can also suffer from the lack of a reference point, and the right to a dignified life, for instance, can end up reverting to culture equating dignity. It is up to advocates to shore up arguments that convey that, while culture may be an important part of claims by many Indigenous peoples, that is not to be taken as an inevitable given, let alone a constricting frame to the language of international human rights law, which at its heart should be about advancing human emancipatory projects.