

Amicus Curiae Brief

*Case of the Indigenous Maya Q'eqchi' Agua Caliente Community v Guatemala*

## **I. Introduction**

1. In accordance with the conditions set by the Court, this submission is filed in connection with the *Case of the Indigenous Maya Q'eqchi' Agua Caliente Community v Guatemala*. The Inter-American system for the protection of human rights is one of the most important normative venues regarding the recognition and implementation of Indigenous peoples' rights. The reasoning adopted by the Court in this case will impact Indigenous peoples' across the globe. Because of the potential impact of this decision, we have decided to submit this *Amicus Curiae* brief. We are a group of international law academics, international lawyers, and human rights advocates with expertise in the rights of Indigenous peoples. We are members of the American Society of International Law's Rights of Indigenous Peoples Interest Group, though we have prepared this submission in a personal capacity. Our submission does not reflect the views of the American Society of International Law.
2. Our submission is divided into six parts. In the first two parts, we locate Indigenous peoples' right to self-determination. In Part II, we explain that Indigenous peoples have a right to self-determination under international law. In Part III, we situate this right in the text of the American Convention on Human Rights. As we acknowledge, while the American Convention does not include an express provision on self-determination, the right can be found within the Convention. We offer four paths for the Court to find as such.
3. The next two parts of our submission explore the scope and content of the right to self-determination in international law. In Part IV, we explain that this right entitles the Maya Q'eqchi' Agua Caliente Community to autonomy in relation to internal and local affairs. In Part V, we provide an overview of international law relating to Indigenous peoples' right to self-determination in relation to natural resources. As we argue, Indigenous peoples' right to self-determination encompasses a right to use, benefit from, manage and control natural resources in and on their traditional lands.
4. In the final two sections, we provide an update on developments in Canadian law on Aboriginal title and the African Human Rights System to inform the Court. This material is offered as the Court's landmark ruling in *Saramaka v Suriname* cited the Supreme Court of Canada's main Aboriginal title case at the time, *Delgamuukw v. British Columbia*.<sup>1</sup> As we outline, there have been several key developments in Canadian law since 1997 that are relevant to the present case. Important developments have also occurred in several African states under the impulse of the African [Banjul] Charter on Human and Peoples' Rights.<sup>2</sup>

## **II. Indigenous Peoples Possess a Right to Self-Determination at International Law**

5. The right to self-determination is a foundational international human right. Self-determination is guaranteed by Common Article 1 of the International Covenant on Civil and Political Rights (ICCPR)<sup>3</sup> and of the International Covenant on Economic, Social and Cultural Rights (ICESCR).<sup>4</sup> Common Article 1 provides:

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<sup>1</sup> *Delgamuukw v. British Columbia*, [1997] 3 SCR 1010 ('*Delamunkw*') cited in *Saramaka People v. Suriname (Preliminary Objections, Merits, Reparations, and Costs)* (Inter-American Court of Human Rights, Series C 172, 28 November 2007) para 120 ('*Saramaka*').

<sup>2</sup> *African [Banjul] Charter on Human and Peoples' Rights*, adopted June 27, 1981, OAU Doc. CAB/LEG/67/3 rev. 5, 21 ILM 58 (1982) (entered into force 21 October 1986) ('*African CHPR*').

<sup>3</sup> *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) ('*ICCPR*').

<sup>4</sup> *International Covenant on Economic, Social and Cultural Rights*, opened for signature 19 December 1966, 993 UNTS 3 (entered into force 3 January 1976) ('*ICESCR*').

All peoples have a right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

6. Common Article 1 further requires that state parties ‘shall promote the realization of the right of self-determination’,<sup>5</sup> making it a positive obligation for state parties to allow peoples to exercise the right of self-determination.
7. The right to self-determination is also recognized in a range of regional human rights instruments. For example, the Helsinki Final Act adopted by the Conference on Security and Cooperation in Europe,<sup>6</sup> as well as the African [Banjul] Charter on Human and Peoples’ Rights,<sup>7</sup> imply a universal application of self-determination. Furthermore, in the *East Timor Case (Portugal v. Australia)*, the International Court of Justice (ICJ) found the right to self-determination to be *erga omnes*—binding on the international community as a whole.<sup>8</sup>
8. The right to self-determination applies to *all* peoples, including Indigenous peoples. In General Comment 12, the Human Rights Committee (HRC) explained that self-determination is ‘an inalienable right of all peoples’.<sup>9</sup> In Concluding Observations, the HRC has asked States Parties to report on their progress in fulfilling Indigenous peoples’ right to self-determination under Article 1 of the ICCPR.<sup>10</sup> The Committee on Economic Social and Cultural Rights (CESCR) has adopted a similar practice.<sup>11</sup> The Committee on the Elimination of Racial Discrimination (CERD) has also emphasized that the link between self-determination and human rights and in particular the rights of ethnic groups to self-determination.<sup>12</sup>
9. The most definitive statement on the applicability of self-determination as a human right available to Indigenous peoples is the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP).<sup>13</sup> Article 3 of the UNDRIP reflects the language of Common Article 1. Article 3 provides:

Indigenous People have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

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<sup>5</sup> ICCPR, Art 1; ICESCR, Art. 1.

<sup>6</sup> See Helsinki Final Act as adopted by the conference on Security and Cooperation in Europe (1975) Principle VIII (noting that the right to self-determination applies to all peoples including peoples in independent states and not just the colonial context.)

<sup>7</sup> See African CHPR Art. 20 (All peoples have the right to existence. They shall have the unquestionable and inalienable right to self-determination. They shall freely determine their political status and freely pursue their economic and social development according to the policy they have freely chosen)

<sup>8</sup> *East Timor (Portugal v Australia) (Judgment)* [1995] ICJ Rep 90, 102. The *erga omnes* nature of self-determination was confirmed more recently by the ICJ in *The Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion)* [2004] ICJ Rep 136.

<sup>9</sup> Human Rights Committee, *General Comment No 12: Article 1 (Right to Self-determination) The Right to Self-determination of Peoples*, 21<sup>st</sup> sess, UN Doc HRI/GEN/1/Rev.9 (Vol. I) (13 March 1984) para 2 (‘HRC General Comment 12’).

<sup>10</sup> See e.g., Human Rights Committee, ‘Concluding Observations: Norway’, UN Doc CCPR/C/79/Add112 (1 November 1999) para 17.

<sup>11</sup> See e.g., Committee on Economic, Social and Cultural Rights, ‘Consideration of Reports Submitted by States Parties under Articles 16 and 17 of the Covenant: Russian Federation’, UN Doc E/C12/1/Add/94 (12 December 2003) para 11.

<sup>12</sup> Committee on the Elimination of Racial Discrimination, *General Recommendation 21, The right to self-determination*, U.N. Doc. A/51/18, annex VIII at 125 (8 March 1996) para 5 (‘CERD General Recommendation 21’).

<sup>13</sup> United Nations Declaration of the Rights of Indigenous Peoples, GA Res. 61/295, UN GAOR, 61<sup>st</sup> sess 107<sup>th</sup> plen mtg, U.N. Doc. A/Res/61/295 (13 September 2007) (‘UNDRIP’).

10. As a General Assembly Declaration, the UNDRIP is not legally binding. However, several UN treaty bodies and this Court have taken it into account in interpreting the rights of Indigenous peoples. In the *Case of the Saramaka People v Suriname*,<sup>14</sup> the Inter-American Court of Human Rights (IACtHR) referred to Article 32 of the UNDRIP when examining the right of Indigenous peoples to participate in development initiatives on their lands. As the Court explained, safeguards set out in international law, including those in Article 32 of the UNDRIP, ‘are intended to preserve, protect and guarantee the special relationship that the members of the Saramaka community have with their territory, which in turn ensures their survival as a tribal people’.<sup>15</sup> Similarly, in the *Case of the Kichwa Indigenous People of Sarayaku v. Ecuador*,<sup>16</sup> the Court expressly cited multiple provisions of the UNDRIP in considering the rights of Indigenous peoples to consultation, communal property and cultural identity and the obligation of the signatories to achieve the ends of the Declaration enshrined under Article 38 of the Declaration.
11. Several UN treaty bodies have also considered the UNDRIP in determining the rights of Indigenous peoples. For example, the CERD has recommended that the provisions in the UNDRIP should be used as a guide to interpret the obligations under the International Convention on Elimination of All Forms of Racial Discrimination (ICERD) relating to Indigenous peoples.<sup>17</sup> The CESCR has also considered the UNDRIP. When interpreting the right to take part in cultural life enshrined under Article 15 of the ICESCR, the CESCR in General Comment 21 referred to the UNDRIP.<sup>18</sup> The HRC has also cited several provisions on the UNDRIP when considering the right to self-determination.<sup>19</sup> The use of the UNDRIP by this Court and by UN treaty bodies indicates that even if the Declaration itself is not legally binding, its provisions, including those concerning the right to self-determination, reflect international law. The practice of many states also recognizes Indigenous peoples’ right to self-determination.
12. Guatemala is a state party to the ICCPR<sup>20</sup> and the ICESCR,<sup>21</sup> which means that Guatemala has obligations to fulfill the provisions of both covenants. Regarding obligations related to self-determination, in General Comment 12 the HRC explains that states ‘should describe the constitutional and political processes which in practice allow exercise of this right’<sup>22</sup> and ‘take positive action to facilitate realization of and respect for the right of peoples to self-determination’.<sup>23</sup> A similar injunction is outlined in Art 2(1) of the ICCPR. Article 2(1) provides that Guatemala must ‘respect’ and ‘ensure’ all people within its territory and subject to its jurisdiction enjoy these rights. As the HRC has explained, this means that Guatemala must refrain from taking any measures that would violate the rights within the instrument, must take action to ensure that those rights are not inhibited by third parties, and must ‘adopt legislative, judicial, administrative, educative and other appropriate measures in order to fulfill their legal obligations’.<sup>24</sup> Guatemala must therefore fulfill the Maya Q’eqchi’ Agua Caliente community’s right to self-determination.

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<sup>14</sup> *Saramaka* (n 1) para 131.

<sup>15</sup> *Ibid* para 129.

<sup>16</sup> *Kichwa Indigenous People of Sarayaku v. Ecuador (Merits and Reparations)* (Inter-American Court of Human Rights, Series C No. 245, 27 June 2012) paras 133, 160, 166, 167, 180, 185, 187, 201, 215, 217, 231 (*‘Kichwa’*).

<sup>17</sup> Committee on the Elimination of Racial Discrimination, ‘Concluding Observation on the USA’, UN Doc CERD/C/USA/CO/6 (8 May 2008) para 29.

<sup>18</sup> Committee on Economic, Social and Cultural Rights, *General Comment No. 21, Right of Everyone to Take Part in Cultural Life*, UN Doc. E/C.12/GC/21 (21 December 2009) para 7 (*‘General Comment 21’*).

<sup>19</sup> See, e.g., *Tiina Sanila-Aikio v Finland*, CCPR/C/124/D/2668/2015 (20 March 2019) para 6.6.

<sup>20</sup> Accession: 5 May 1992.

<sup>21</sup> Accession: 13 May 1988.

<sup>22</sup> HRC General Comment 12 (n 9) para 4.

<sup>23</sup> *Ibid* para 6

<sup>24</sup> Human Rights Committee, *General Comment No 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, 80<sup>th</sup> sess, UN Doc CCPR/C/21/Rev.1/Add.13 (26 May 2004) para 7.

### **III. Self-Determination Can be Construed within the American Convention on Human Rights**

13. The American Convention on Human Rights (ACHR) does not include an express provision on self-determination. The lack of express language, however, should not preclude the Court from finding the right to self-determination within rights protected by the Convention. It is well within the established competence and jurisprudence of the Court, in its *pro homine* interpretation, to expand upon the meaning of the rights protected by the Convention to ensure they are fit for purpose to protect the rights of individuals and groups in the Americas.
14. The Court has linked self-determination to certain aspects of the rights protected by the Convention in its jurisprudence, often as a precondition for the exercise of the right to property under Article 21. However, the Court is yet to clearly declare the right to self-determination as being within one of the rights protected by the Convention.
15. In its extensive and ground-breaking jurisprudence on the right to property of Indigenous communities, the Court has made it clear that the right to property is not sufficient to enliven all aspects of self-determination. In *Saramaka*, the Court was clear that the state must guarantee to Indigenous peoples the ‘right[s] to effectively control their territory without outside interference. The Court has previously held that, rather than a privilege to use the land...members of indigenous and tribal peoples must obtain title to their territory in order to guarantee its permanent use and enjoyment’.<sup>25</sup> The Court has thus long recognized that a property title itself is only a limited solution, and that the key issue at stake is control, which is best expressed in the language of self-determination. In other words, the threat to Indigenous communities, in the present case and in many others, is not only to their territory, but also to the effective control of their territory and of their social organisation. The right to property is useful, but due to its scope it cannot remain the only avenue to redress the violations of Indigenous peoples’ rights.
16. It is therefore imperative that the Court clarify the footing of self-determination within the American Convention, beyond the right to property. We present what we see as three viable possibilities in what follows, before returning to the right to property. We discuss each in turn, in the order of what we suggest goes from fullest to narrowest recognition of self-determination within the Convention.
17. We note that neither the representatives of the victims nor the Inter-American Commission on Human Rights (IACHR) presented arguments in relation to many of these rights in their submission. However, by virtue of the principle of *iura novit curia*, the Court should, if it so wishes, consider these rights in its judgment as meaningful pathways to better integrate self-determination in the American Convention and its own case law, ensuring the of Indigenous peoples’ rights in the Americas and giving the American Convention its *effet utile*.
18. Finally, we note that, perhaps, none of these rights provide, in isolation, the full answer to the issue of self-determination in the American Convention, and that several of its articles provide, as a whole, a foundation for Indigenous peoples’ right to self-determination. As the IACHR recently noted, international standards used to establish the right to self-determination ‘should not be understood as predetermined elements, and even less as ones that further uniformity, since this could have a counterproductive effect on the exercise of self-determination’.<sup>26</sup> With this in mind, a plural approach that centers Indigenous people’s own voices, is most appropriate.

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<sup>25</sup> *Saramaka* (n 1) para 115.

<sup>26</sup> Inter-American Commission on Human Rights, ‘Derecho a la libre determinación de los Pueblos Indígenas y Tribales’, OEA/Ser.L/V/II Doc.413/21, 28 de diciembre de 2021, para. 90. Translation by the authors.

a. **Article 26 of the American Convention Contains the Right to Self-Determination**

19. Article 26 of the Convention establishes that:

The States Parties undertake to adopt measures, both internally and through international cooperation, especially those of an economic and technical nature, with a view to achieving progressively, by legislation or other appropriate means, the full realization of the rights implicit in the economic, social, educational, scientific, and cultural standards set forth in the Charter of the Organization of American States as amended by the Protocol of Buenos Aires.

20. The Court has decided in favor of the justiciability of economic, social, and cultural (and more recently, environmental) rights (ESCKER) under Article 26 of the Convention in several cases.<sup>27</sup> The Court has indicated that ESCER derive from the Charter of the Organization of American States (OAS Charter) and should be interpreted according to the principles established in Article 29 of the ACHR, notably its *pro persona* principle.<sup>28</sup> This means that once a right under Article 26 ACHR and the OAS Charter is identified, its scope must be established ‘in light of the corresponding international *corpus iuris*’.<sup>29</sup> Accordingly, based on Article 29 ACHR, the Court has relied upon other international legal instruments to provide an up to date (grounded on the evolutionary principle of human rights) focused (as opposed to the general character of the American Convention and other Inter-American instruments) and more protective to the victims of a specific case (grounded on the *pro persona* principle) scope to ESCER. According to the Court:

Under Article 29(b) of the Convention, in order to interpret and apply the provisions of the Convention more specifically to determine the scope of the State’s obligations in relation to the facts of this case, the Court takes into account the significant evolution of the principles and regulation of international refugee law, based also on the directives, criteria and other authorised rulings of agencies such as UNHCR. Thus, even though the obligations contained in Articles 1(1) and 2 of the Convention ultimately constitute the grounds for determining the international responsibility of a State for violations of this instrument, the Convention itself makes explicit reference to the norms of international law for its interpretation and application. Thus, when determining the compatibility of the acts and omissions of the State, or of its norms, with the Convention or other treaties

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<sup>27</sup> *Case of Lagos del Campo v. Peru (Preliminary Objections, Merits, Reparations and Costs)* (Inter-American Court of Human Rights, Series C No 340, 31 August 2017) para 142; *Case of the Dismissed Employees of PetroPeru et al. v. Peru (Preliminary Objections, Merits, Reparations and Costs)* (Inter-American Court of Human Rights, Series C No 344, 23 November 2017) para 192; *Case of San Miguel Sosa et al. v. Venezuela (Merits, Reparations and Costs)* (Inter-American Court of Human Rights, Series C No 348, 8 February 2018) para 220; *Case of Poblete Vilches et al. v. Chile (Merits, Reparations and Costs)* (Inter-American Court of Human Rights, Series C No 349, 8 March 2018) para 100; *Case of Cuscul Pivaral et al. v. Guatemala (Preliminary Objection, Merits, Reparations and Costs)* (Inter-American Court of Human Rights, Series C No 359, 23 August 2018) para 97 *Case of Muelle Flores v. Peru (Preliminary Objections, Merits, Reparations and Costs)* (Inter-American Court of Human Rights, Series C No 375, 6 March 2019) paras 170-208 (‘Muelle Flores’); *Case of the National Association of Discharged and Retired Employees of the National Tax Administration Superintendence (ANCEJUB-SUNAT) v. Peru (Preliminary Objections, Merits, Reparations and Costs)* (Inter-American Court of Human Rights, Series C No 394, 21 November 2019) para 155; *Case of Hernández v. Argentina (Preliminary Objection, Merits, Reparations and Costs)* (Inter-American Court of Human Rights, Series C No 395, 22 November 2019) para 54 (‘Hernández’).

<sup>28</sup> *Case of the Indigenous Communities of the Lhaka Honhat (Our Land) Association v. Argentina (Merits, Reparations and Costs)* (Inter-American Court of Human Rights, Series C No 400, 6 February 2020) para 195 (‘Lhaka Honhat’). On the *pro persona* principle, see *Case of the Pacheco Tineo family v. Bolivia (Preliminary Objections, Merits, Reparations and Costs)* (Inter-American Court of Human Rights, Series C No 272, 25 November 2013) para 143 (‘Pacheco Tineo Family’); *Muelle Flores* (n 27) para 176; and *Hernández* (n 27) para 65.

<sup>29</sup> *Lhaka Honhat* (n 28) para 196.

over which it has competence, the Court may interpret the obligations and rights contained in them in light of other pertinent treaties and norms. Thus, by using the sources, principles and criteria of international refugee law as a special applicable to situations concerning the determination of the refugee status of a person and their corresponding rights in a way that is complementary to the provisions of the Convention, the Court is not assuming a ranking between norms.<sup>30</sup>

21. The IACHR has recognised that the right of Indigenous peoples to self-determination has an ESCER dimension.<sup>31</sup> This recognition triggers Article 26 ACHR and the OAS Charter following the same rationale that the Court applied in determining the ‘rights to a healthy environment, to adequate food, to water and to take part in cultural life’ in the *Lhaka Honbat* case.<sup>32</sup> As such, the Court must provide an interpretation of the ESCER dimension of Indigenous peoples’ right to self-determination that updates ‘the meaning of the rights derived from the Charter that are recognised in Article 26 of the Convention’,<sup>33</sup> by relying upon the international *corpus iuris*.
22. In the case of the ESCER dimension of Indigenous peoples’ right to self-determination, the Court has acknowledged that the OAS Charter recognises the obligation of states to ensure the right to ‘integral development for their peoples’ as provided for by Articles 30, 31, 33 and 34 of the Charter.<sup>34</sup> According to Article 30 OAS Charter, ‘[i]ntegral development encompasses the economic, social, educational, cultural, scientific, and technological fields (...)’ and requires ‘the full participation of their peoples in decisions relating to their own development’ (Article 34).
23. As in *Awás Tingni*, where the Court adapted its interpretation of property rights (Article 21) to the specificities of Indigenous culture<sup>35</sup> and customary law,<sup>36</sup> the Court should also adapt the rights of Indigenous peoples to an integral development and to determine their own development, as enshrined in Articles 30 and 34 OAS Charter (and triggered by Article 26 ACHR’s ESCER’s dimension of self-determination), to a more protective, up-to-date, and culturally adequate interpretation. This interpretation should consider that ‘Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development’ (Article 3 UNDRIP). This means that the Court should also consider Articles 20(1) and 23 of the UNDRIP; and Articles III and XXIX of the American Declaration of the Rights of Indigenous Peoples (ADRIP), in order to recognise and protect the ESCER dimension of the Indigenous Maya Q’eqchi’ Agua Caliente community’s right to self-determination.
24. Further, Article 3e of the OAS Charter, as one of the principles of the Organization, also protects the rights of peoples to ‘choose, without external interference, [their] political, economic, and social system and to organize’ themselves however they deem fit, an integral part of the right to self-determination. If it is a central principle of the OAS that peoples should self-determine, the Court, in interpreting a

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<sup>30</sup> *Pacheco Tineo Family* (n 28) para 143.

<sup>31</sup> Inter-American Commission on Human Rights, ‘Derecho a la libre determinación de los Pueblos Indígenas y Tribales’, (n 26) paras 192-194.

<sup>32</sup> *Lhaka Honbat* (n 28) para 201.

<sup>33</sup> *Lhaka Honbat* (n 28) para 199.

<sup>34</sup> *Lhaka Honbat* (n 28) para 202.

<sup>35</sup> The Court Argued that ‘Indigenous people, due to their very existence, have the right to live freely on their own territories; the close relationship that indigenous people have with the land should be recognized and understood as the very foundation of their cultures, their spiritual life, their integrity, and their economic survival’: *Case of the Mayagna (Sumo) Awás Tingni Community v. Nicaragua (Merits, Reparations and Costs)* (Inter-American Court of Human Rights, Series C No 79, 31 August 2001) para 149 (*‘Awás Tingni’*).

<sup>36</sup> ‘Indigenous peoples’ customary law must be especially taken into account for the purpose of this analysis. As a result of customary practices, possession of the land should suffice for indigenous communities lacking real title to property of the land to obtain official recognition of that property, and for consequent registration’: *Awás Tingni* (n 35) para 151.

provision of the Convention that invokes the ‘rights implicit [...] in the Charter of the Organization of American States’, must also recognize the right to self-determination within Article 26 of the Convention.

**b. Article 1(1) of the American Convention Contains the Right to Self-Determination**

25. Article 1(1) of the Convention states that:

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

26. Article 1(1) imposes an obligation upon states to accommodate cultural differences and promote the substantive equality of Indigenous peoples.<sup>37</sup> Because Article 1(1) permeates the interpretation of every single provision of the Convention, it is also an optimal provision in which to locate the right to self-determination, particularly to the extent that the full content of self-determination can only be expressed by Indigenous peoples themselves, as the Commission has recently argued.<sup>38</sup> In other words, an obligation of accommodating the special interests of Indigenous peoples, found in the Court’s case law on Article 1(1), is consistent with the mandate to interpret self-determination in the way that Indigenous peoples themselves articulate it, which may not necessarily prioritize a terminology of property rights.

27. Based on Article 1(1), this Court has previously held that members of Indigenous communities require special measures to guarantee the full exercise of their rights, especially pertaining to the enjoyment of property rights in order to safeguard physical and cultural survival.<sup>39</sup> Multiple sources of international law have also noted that states have obligations to adopt special measures.<sup>40</sup> The Court has been clear that Indigenous peoples have a ‘right to effectively control their territory’, which is not reducible to a property right even if it is articulated as interrelated or connected to property rights.<sup>41</sup> While the Court has previously read Article 1(1) in ‘conjunction’ with Article 21 and constructed safeguards to ensure

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<sup>37</sup> *Case of the Yakye Axa Indigenous Community v. Paraguay (Merits, Reparations and Costs)* (Inter-American Court of Human Rights, Series C No 125, 17 June 2005) para 51 (*‘Yakye Axa Indigenous Community’*).

<sup>38</sup> Inter-American Commission on Human Rights, ‘Derecho a la libre determinación de los Pueblos Indígenas y Tribales’, (n 26) para 90.

<sup>39</sup> *Avas Tingni* (n 35) paras 148-149, 151; *Case of the Indigenous Community Sawhoyamaxa v. Paraguay (Merits, Reparations and Costs)* (Inter-American Court of Human Rights, Series C No 146, 29 March 2006) paras 118-121, 131 (*‘Sawhoyamaxa’*); *Yakye Axa Indigenous Community* (n 37) paras 124, 131, 135-137 and 154; *Saramaka* (n 1) para 85; see also: Inter-American Commission on Human Rights, *Indigenous and Tribal Peoples’ Rights over their Ancestral Lands and Natural Resources: Norms and Jurisprudence of the Inter-American Human Rights System*, OEA/Ser.L/V/II. Doc. 56/09 (30 September 2009) paras 37-38.

<sup>40</sup> *Saramaka* (n 1) para 93: ‘The Committee on Economic, Social, and Cultural Rights, which is the body of independent experts that supervises State parties’ implementation of the ICESCR, has interpreted common Article 1 of said instruments as being applicable to Indigenous peoples. Accordingly, by virtue of the right of indigenous peoples to self-determination recognized under said Article 1, they may “freely pursue their economic, social and cultural development”, and may “freely dispose of their natural wealth and resources” so as not to be “deprived of [their] own means of subsistence”. Pursuant to Article 29(b) of the American Convention, this Court may not interpret the provisions of Article 21 of the American Convention in a manner that restricts its enjoyment and exercise to a lesser degree than what is recognized in said covenants’ (internal citations omitted). The Court also cited the Human Rights Committee, which has stated that under Article 27 of the ICCPR, ‘minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, [which] may consist in a way of life which is closely associated with territory and use of its resources. This may particularly be true of members of indigenous communities constituting a minority’: *Saramaka* (n 1) para 94.

<sup>41</sup> *Saramaka* (n 1) para 115.



that states do not intrude upon Indigenous peoples territory,<sup>42</sup> the issue is not a right to property. The main issue is how to ensure that Indigenous peoples maintain effective control in a way that safeguards their physical, social and cultural survival as they determine. The Court's willingness to recognize rights to property for Indigenous peoples is a consequence of their self-determination as peoples capable of owning and governing their territories, rather than a determination that property rights can enable or protect self-determination.

28. The case law of the Inter-American system interprets the American Convention in a context according to developments in the field of international human rights law.<sup>43</sup> As we have noted above, Guatemala has acceded to the ICCPR and the ICESCR. Common Article 1 of both Covenants recognize that 'All peoples have the right of self-determination'. Many sources of international law, including this Court's judgments, have recognized that Indigenous peoples possess the right to self-determination.<sup>44</sup> Where international law recognizes Indigenous peoples' self-determination, the correlative obligation is on states to adopt special measures that guarantee the exercise of this right. In this case, states' compliance with this obligation under Article 1(1) of the American Convention requires that Indigenous peoples' themselves articulate their way of governing their territory.

**c. Article 3 of the American Convention Contains the Right to Self-Determination**

29. Article 3 of the Convention states that:

Every person has the right to recognition as a person before the law.

30. The IACtHR has already recognized the collective exercise of the right to juridical personality, prescribed in Article 3 of the ACHR, by Indigenous peoples.<sup>45</sup> The Court acknowledged that such a right, exercised collectively, 'is one of the special measures that should be granted to the indigenous and tribal groups',<sup>46</sup> which can be done 'by means of consultation [...] in order to ensure them the use and enjoyment of their territory in accordance with their system of communal ownership'.<sup>47</sup> Further, it provides Indigenous peoples with the necessary legal standing to enjoy their rights,<sup>48</sup> hold property titles as a collective,<sup>49</sup> and protect 'their territories and natural resources'.<sup>50</sup> The IACHR reiterates the Court's position by affirming that the State 'has a duty to provide the means and legal conditions in general, so that the right to personality before the law may be exercised by its holders', which requires the State to consider the collective way in which a community uses and benefits from their lands according to their ancestral traditions.<sup>51</sup>
31. The recognition of Indigenous peoples' juridical personality is tantamount to recognizing their capacity for self-determination. Article IX of the ADRIP complements ACHR's Article 3 and provides that 'States shall recognize fully the juridical personality of indigenous peoples, respecting indigenous forms

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<sup>42</sup> *Case of the Kaliña and Lokono Peoples v Suriname (Merits, Reparations and Costs)* (Inter-American Court of Human Rights, Series C No 309, 25 November 2015) paras 125-129, 131 ('*Kaliña and Lokono*').

<sup>43</sup> *Saramaka* (n 1) para 175; *Kaliña and Lokono* (n 42) para 80.

<sup>44</sup> *Saramaka* (n 1) para 93.

<sup>45</sup> *Saramaka* (n 1) para 175; *Kaliña and Lokono* (n 42) para 114.

<sup>46</sup> *Saramaka* (n 1) para 172.

<sup>47</sup> *Saramaka* (n 1) paras 168, 174; *Kaliña and Lokono* (n 42) para 107.

<sup>48</sup> *Saramaka* (n 1) para 174.

<sup>49</sup> *Kaliña and Lokono* (n 42) paras 107, 112, 114.

<sup>50</sup> *Kaliña and Lokono* (n 42) para 111.

<sup>51</sup> Inter-American Commission on Human Rights, 'Derecho a la libre determinación de los Pueblos Indígenas y Tribales', (n 26) para 102.

of organization and promoting the full exercise of the rights recognized in this Declaration'.<sup>52</sup> Thus, States' duty to recognize Indigenous peoples' juridical personality, respecting their forms of organization, and considering such recognition as necessary for the latter's legal standing and ability to protect and enjoy their rights as a collective, according to their traditions, can thus be attached to Indigenous peoples' right to self-determination to 'freely determine their political status and freely pursue their economic, social, and cultural development',<sup>53</sup> as prescribed in Article III of the ADRIP. That is, the ADRIP provision asks states to recognize Indigenous peoples' juridical personality while respecting the different ways in which they may choose to organize themselves. This, in turn, represents an exercise of self-determination.

32. In the *Lbaka Honbat* judgment, although the Court found no violation of Article 3 ACHR arguing that the state did not prevent the collective action of all interested Indigenous communities,<sup>54</sup> the Court reinforced the need to recognize Indigenous peoples' collective legal personality in view of the international legal recognition of Indigenous peoples as collective rights-holders and subjects of international law.<sup>55</sup> Article VI of the ADRIP complements Article IX and contributes to this recognition by establishing States' obligation to recognize 'the right of indigenous peoples to their collective action'.<sup>56</sup> The Court associated this recognition of Indigenous peoples' collective status and right to collective action with Indigenous peoples' 'right to self-determination in relation to the ability to "freely dispose [...] of their natural resources and wealth", which is necessary to ensure that they are not deprived of "their inherent means of subsistence".<sup>57</sup> Such a connection builds upon a need for collective legal personality as a mechanism to materialize the right to communal property, which guarantees 'the control by the indigenous peoples of the natural resources on the territory, and also their way of life', which underlie self-determination.<sup>58</sup>
33. Ultimately, to fully exercise their right to self-determination, Indigenous peoples may require recognition of their juridical personality as a collective, respecting the particular ways each community chooses to group, so that they can utilize collective action/legal standing in their pursuit of their economic, social and cultural development. The IACHR confirms this interconnectedness between juridical personality and self-determination by asserting that disrespect for Indigenous forms of social and political organization<sup>59</sup> entails the denial of the communities' self-determination.<sup>60</sup> The Commission adds that the lack of recognition of Indigenous peoples' formal legal status and juridical personality as 'peoples' or 'nations', where states treat them solely as 'ethnic groups', disrespects the right to self-determination attached to their status as *peoples*.<sup>61</sup> Accordingly, the Commission has affirmed that 'failing to recognize legal personality amounts to a grave limitation of their free determination'.<sup>62</sup> This assertion confirms the right to a collective exercise of juridical personality and

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<sup>52</sup> OAS, *American Declaration on the Rights of Indigenous Peoples*, OEA/Ser.P AG/RES.2888 (XLVI-O/16), 15 June 2016, Article IX (ADRIP).

<sup>53</sup> ADRIP, Article III.

<sup>54</sup> *Lbaka Honbat* (n 28) para 156.

<sup>55</sup> *Lbaka Honbat* (n 28) para 154.

<sup>56</sup> ADRIP, Article VI.

<sup>57</sup> *Lbaka Honbat* (n 28) para 154.

<sup>58</sup> *Lbaka Honbat* (n 28).

<sup>59</sup> Inter-American Commission on Human Rights, 'Derechos de los pueblos indígenas y tribales sobre sus tierras ancestrales y recursos naturales. Normas y jurisprudencia del Sistema Interamericano de Derechos Humanos', OEA/Ser.L/V/II.Doc.56/09, 30 de diciembre de 2009, para 375.

<sup>60</sup> Inter-American Commission on Human Rights, 'Derecho a la libre determinación de los Pueblos Indígenas y Tribales', (n 26) para 98.

<sup>61</sup> Inter-American Commission on Human Rights, 'Derecho a la libre determinación de los Pueblos Indígenas y Tribales', (n 26) para 96.

<sup>62</sup> Inter-American Commission on Human Rights, 'Derecho a la libre determinación de los Pueblos Indígenas y Tribales', (n 26) para 102. Translation by the authors.

emphasizes its fundamental attachment to Indigenous peoples' self-determination, which the Court must consider in assessing the Indigenous Maya Q'eqchi' Agua Caliente community's entitlement to control, use and benefit from their lands and natural resources.

**d. Article 21(1) of the American Convention Contains the Right to Self-Determination**

34. Article 21(1) of the Convention states that:

Everyone has the right to the use and enjoyment of his property.

35. As indicated above, the right to property is where most of the protections of Indigenous rights have manifested in the Court's case law. However, as also indicated above, the right to property can be somewhat limiting, in that it does not acknowledge the full range of Indigenous interests and rights. In our view, other rights in the Convention are better avenues for the expression of the right to self-determination. However, should the Court choose to rely on its more settled jurisprudence on Article 21, it will find extensive elements in its precedents that link the protection of property rights to self-determination, as identified extensively by the IACHR in December 2021.<sup>63</sup> In doing so, we ask the Court to refine its jurisprudence to more clearly state that the right to self-determination is found within Article 21 of the Convention.

36. The IACtHR has dealt with different cases of violations of Indigenous peoples' rights, including their right to property and the consequences thereof.<sup>64</sup> In its case law, the IACtHR has acknowledged Indigenous peoples' collective understanding of the concepts of property and possession within Article 21 of the American Convention.<sup>65</sup> As such, the IACtHR considered land not only as a means of survival, but also as a central element of Indigenous peoples' worldview, religiosity and cultural identity,<sup>66</sup> opening the space for the right to self-determination within the right to property. Taking into account Convention No 169 of the International Labour Organization (ILO),<sup>67</sup> the evolution of the international human rights system as well as that of the Inter-American system of human rights, the IACtHR has 'considered that the close ties the members of indigenous communities have with their traditional lands and the natural resources associated with their culture thereof, as well as the incorporeal elements deriving therefrom, must be secured under Article 21 of the American Convention'.<sup>68</sup>

37. Within its case law, the understanding that 'the members of indigenous peoples who have unwillingly lost possession of their lands, when those lands have been lawfully transferred to [...] third parties, are entitled to restitution thereof or to obtain other lands of equal extension and quality' is particularly relevant to this case.<sup>69</sup> The Maya Q'echi' Agua Caliente community has, in accordance with the procedure established by the state, demanded the restitution of its lands and the registration of their

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<sup>63</sup> Inter-American Commission on Human Rights, 'Derecho a la libre determinación de los Pueblos Indígenas y Tribales', (n 26) paras 123-148.

<sup>64</sup> The situations brought before the IACtHR varied from cases in which indigenous communities did not have possession of the land, as they left due to the acts of violence perpetrated against them to cases in which indigenous communities possessed the land, but lacked real title to property as well as the means to pursue it. Cf. *Case of the Moiwana Community (Preliminary Objections, Merits, Reparations and Costs)* (Inter-American Court of Human Rights, Series C No 124, 15 June 2004); *Yakye Axa Indigenous Community* (n 37).

<sup>65</sup> See, the summary provided by the IACtHR in the *Case of the Xucuru Indigenous People and its members v Brazil (Preliminary Objections, Merits, Reparations and Costs)* (Inter-American Court of Human Rights, Series C No 346, 5 February 2018) para 117.

<sup>66</sup> See *Yakye Axa Indigenous Community* (n 37) para 135.

<sup>67</sup> Ratified by Guatemala on 5 June 1996.

<sup>68</sup> Cf. *Yakye Axa Indigenous Community* (n 37) para 137.

<sup>69</sup> See *Sawboyamaxa* (n 39) para 128.

property title since 1985. Nonetheless, until now title has not been granted, showing the state's failure to conform to the principle of reasonable delays.<sup>70</sup> The loss of essential documentation by the state further compromises the Maya Q'echi's access to effective justice in relation to their rights. These procedural failures violate Indigenous peoples' right to property and, as this brief argues, their right to self-determination. In this case, the lack of a collective property title has enabled the exploitation of the community's lands without their consent.

38. From a structural perspective, the non-recognition within the domestic legal system of legal personality as well as collective Indigenous peoples' property rights have been reproduced in the legislation concerning mineral exploitation, which fails to refer to Indigenous peoples' properties and their right to self-determination. As such, the current legal system in Guatemala facilitates the granting by the state of exploration and exploitation licenses in Indigenous lands, enabling private activities to take place without respect for Indigenous peoples' right to effectively control their territory.<sup>71</sup> As a result, this case illustrates a violation of the state's obligation to 'refrain from taking actions that could result in agents of the State itself, or third parties acting with its acquiescence or tolerance, adversely affecting the existence, value, use or enjoyment of their territory'<sup>72</sup> as well as the obligation of states 'to ensure the right of the indigenous peoples to control effectively and be owners of their territory without any type of external interference by third parties'.<sup>73</sup>

#### **e. Conclusion**

39. In sum, the right to self-determination can be found within the scope of multiple provisions of the American Convention. It is an essential component to the realization of the rights of Indigenous peoples. It needs to be articulated more clearly within the Inter-American case law. The Convention offers multiple pathways to doing so, and to further advance the rights of Indigenous peoples consistently with the Court's commitment to a *pro persona* interpretation of the treaty, for the benefit of all the peoples of the Americas.

#### **IV. The Right to Self-Determination Entitles the Maya Q'echi' Agua Caliente Community to Autonomy in Relation to their Internal and Local Affairs**

40. Self-determination has both an external and internal dimension. In the leading Canadian case *Reference Re Secession of Quebec*,<sup>74</sup> the Supreme Court of Canada was asked whether there was a right of self-determination under international law that would give Quebec the right to secede from Canada unilaterally. The court answered this question with great care and in doing so detailed the ways self-determination could be exercised. Specifically, it asserted that while external self-determination takes the form of independence and thereby is associated with the context of decolonization, the right to self-determination can also be exercised in a number of internal ways without secession occurring. The court noted that:

[t]he recognized sources of international law established that the right to self-determination of a people is normally fulfilled through internal self-determination – a people's pursuit of its political, economic, social and cultural development within the framework of an existing state.<sup>75</sup>

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<sup>70</sup> See *Samboyamaxa* (n 39) para 98; *Awas Tingni* (n 35) para 149.

<sup>71</sup> As acknowledged, among others, in *Kichwa* (n 16) para 146, and *Kaliña and Lokono* (n 42) para 132.

<sup>72</sup> Cf. *Awas Tingni* (n 35) para 164, and *Kaliña and Lokono* (n 42) para 132.

<sup>73</sup> *Saramaka* (n 1) para 115, and *Kaliña and Lokono* (n 42) para 132.

<sup>74</sup> See generally *Reference Re Secession of Quebec* (1998) 2 SCR 217.

<sup>75</sup> *Reference Re Secession of Quebec* (1998) 2 SCR 217, para 126.

41. The internal aspect of self-determination has two limbs. It encompasses the right for all citizens to participate freely without discrimination in the public affairs of the state. It is thus linked to several provisions of the ICCPR and ICESCR, including those that guarantee the right to participate in political life on a non-discriminatory basis.<sup>76</sup> The internal aspect of self-determination has another limb in the case of Indigenous peoples like the Maya Q'eqchi' Agua Caliente community. Under international law, the internal aspect of the right to self-determination entitles Indigenous peoples both to participate in the political life of the state and to 'preserve and develop their own distinct societies, to exist side-by-side with the majority society'.<sup>77</sup>
42. This limb is further set out in the UNDRIP. As noted, the UNDRIP provides at Article 3 that Indigenous peoples may 'freely determine their political status and freely pursue their economic, social and cultural development'. This broad entitlement is particularized by Articles 4 and 5, which guarantee Indigenous peoples the 'right to autonomy or self-government' in relation to 'internal and local affairs', as well as the right to maintain their distinct political, legal, economic, social and cultural institutions. Consistent with this right, Indigenous peoples are entitled to 'belong to an indigenous community or nation, in accordance with the traditions and customs of the community or nation concerned'<sup>78</sup> as well as the right to maintain and manifest their traditions, languages, customs, histories and cultures.<sup>79</sup> Implementing a right to autonomy or self-government is the most appropriate way to protect and promote Indigenous peoples' rights to maintain and manifest their traditions, languages, customs, histories and cultures.
43. General Recommendation 21 issued by the CERD provides more detail regarding internal self-determination. It notes:

Governments should be sensitive towards the rights of persons belonging to ethnic groups, particularly their right to lead lives of dignity, to preserve their culture, to share equitably in the fruits of national growth and to play their part in the government of the country of which they are citizens. Also, governments should consider ... vesting persons belonging to ethnic or linguistic groups ... with the right to engage in activities which are particularly relevant to the preservation of the identity of such persons or groups.<sup>80</sup>

44. In fleshing out the contours of internal self-determination, the focus is on participation in the democratic process, autonomy and self-government within the existing state. Consequently, even those states with historical opposition to recognizing the existence of an all-encompassing right to Indigenous self-determination have come to recognize their right to internal self-determination.<sup>81</sup> As we will see below, it also includes a right to control resources within Indigenous peoples' traditional lands.

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<sup>76</sup> ICCPR, Art 25, 26; ICESCR, Art 2.

<sup>77</sup> Mattias Åhrén, *Indigenous Peoples' Status in the International Legal System* (Oxford University Press, 2016) 132; *Tiina Sanila-Aikio v Finland*, CCPR/C/124/D/2668/2015 (20 March 2019); CCPR/C/FIN/CO/7 (1 April 2021) [43].

<sup>78</sup> UNDRIP, Art 9.

<sup>79</sup> UNDRIP, Arts 11-16.

<sup>80</sup> CERD General Recommendation 21 (n 12) para 10.

<sup>81</sup> Alexandra Xanthaki, *Indigenous Rights and United Nations Standards* (Cambridge University Press, 2009) 162.

**V. Indigenous Peoples' Right to Self-Determination Encompasses a Right to Use, Benefit From, Manage and Control Natural Resources in and on their Traditional Lands**

45. The right to self-determination in Article 1 of the ICCPR encompasses the right of peoples to 'freely pursue their economic, social, and cultural development'.<sup>82</sup> In General Comment 12, the HRC states that such a right includes the right of peoples to 'dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic cooperation...in no case may a people be deprived of its own means of subsistence'.<sup>83</sup> The HRC adds that such language creates a corresponding duty upon states.<sup>84</sup> As a result, Guatemala is required by the ICCPR to protect the means of subsistence of the Maya Q'eqchi Agua Caliente community from the impacts of the "Fenix" mining project. In addition, General Comment 12 asserts that states 'should indicate any factors or difficulties which prevent the free disposal of their natural wealth and resources...and to what extent that affects the enjoyment of other rights set forth in the Covenant'.<sup>85</sup> Such language means that Guatemala should disclose the impact of subsurface mining projects upon the rights of the Maya Q'eqchi Agua Caliente community to their natural resources and their other rights under the ICCPR. Those rights include the right of minorities to their culture<sup>86</sup> and the right of all people to enjoy their natural wealth and resources.<sup>87</sup>
46. The ICESCR does not specify rights of Indigenous peoples or minority rights, but declares that state parties must guarantee the rights under the ICESCR without discrimination based on factors that include Indigenous peoples.<sup>88</sup> As a result, Guatemala is required by the ICESCR to guarantee the right of self-determination for the Maya Q'eqchi Agua Caliente community, including self-determination and their rights over their natural resources and wealth. The matching language of Article 1 in both the ICESCR and ICCPR means that economic projects cannot interfere with the means of subsistence of the Maya Q'eqchi Agua Caliente community. In addition, Article 25 of the ICESCR matches the language of Article 47 of the ICCPR, with both stating 'Nothing in the present Covenant shall be interpreted as impairing the inherent right of all peoples to enjoy and utilize fully and freely their natural wealth and resources'.<sup>89</sup> Such language means that even if the right to self-determination allows for economic projects, those projects cannot interfere with the rights of the Maya Q'eqchi Agua Caliente community to enjoy and use their natural resources.
47. Indigenous peoples' right to natural resources is further guaranteed by ILO Convention 169. ILO Convention 169 is the 'international human rights instrument most relevant to the protection of indigenous rights'.<sup>90</sup> Guatemala is a state party to ILO Convention 169 and therefore has duties to implement its terms. Article 15(1) of ILO Convention 169 provides that states must 'specially safeguard' Indigenous peoples' rights to 'the natural resources pertaining to their lands'. Article 15(1) notes further that such rights include, but are not limited to, the right to 'participate in the use, management and conservation of these resources'.
48. The relationship between self-determination and control over natural resources is recognized in the African Charter on Human and Peoples Rights (Banjul Charter). Article 21(1) of the Banjul Charter provides that:

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<sup>82</sup> ICCPR, Art. 1.

<sup>83</sup> HRC General Comment 12 (n 9) para 5.

<sup>84</sup> See also *Ilmari Lämsman et al. v Finland* (1994) Communication No 511/1992) UN Doc CCPR/C/52/D/511/1992.

<sup>85</sup> HRC General Comment 12 (n 9) para 5.

<sup>86</sup> ICCPR, Art 27.

<sup>87</sup> ICCPR, Art 47.

<sup>88</sup> ICESCR, Art 2.

<sup>89</sup> ICCPR, Art 47; ICESCR, Art 25.

<sup>90</sup> Inter-American Commission on Human Rights, *Indigenous and Tribal Peoples' Rights over their Ancestral Lands and Natural Resources* (n 39) para 12.

[a]ll peoples shall freely dispose of their wealth and natural resources. This right shall be exercised in the exclusive interest of the people. In no case shall a people be deprived of it.

49. In the recent judgment of *African Commission on Human and Peoples' Rights v. Kenya* with respect to the right of the Indigenous group of the Ogieks in Kenya, the African Court of Human and Peoples' Rights determined that the term 'peoples' in the Banjul Charter applies to 'sub-state ethnic groups and communities', including Indigenous communities.<sup>91</sup> The judgment makes it clear that the resource dimension of the right to self-determination prohibits the eviction of Indigenous peoples from their traditional land.
50. The American Convention does not specifically address the issue of Indigenous peoples' control over natural resources. However, as noted above, it is well within the established competence and jurisprudence of the Court, in its *pro homine* interpretation, to expand upon the meaning of the rights protected by the Convention to ensure they are fit for purpose to protect the rights of individuals and groups in the Americas. Indeed, there is strong jurisprudence that establishes a connection between self-determination and natural resources as part of Indigenous rights. This Court has been particularly active in this area. In the case of *Saramaka*, this Court explained that 'property must be interpreted so as not to restrict the right to self-determination, by virtue of which indigenous peoples may 'freely pursue their economic, social and cultural development' and may 'freely dispose of their natural wealth and resources'.<sup>92</sup> In *Kaliña and Lokono Peoples v Suriname*, this Court noted:

The right to property protected by Article 21 of the American Convention, and interpreted in light of the rights recognized in Article 1 common to the two Covenants, and Article 27 of the ICCPR which cannot be restricted when interpreting the American Convention in this case, confer on the members of the Kaliña and Lokono Peoples the right to the enjoyment of their property in keeping with their community-based traditions.<sup>93</sup>

51. UN treaty bodies have also confirmed this link between self-determination and control over natural resources. In its Concluding Observations on Canada, the HRC noted that 'self-determination requires, *inter alia*, that all peoples must be able to freely dispose of their natural resources and that they may not be deprived of their own means of subsistence'.<sup>94</sup>
52. Aside from its links with self-determination, UN treaty bodies have explored the scope of Indigenous peoples' right to natural resources within their lands. For example, in General Recommendation XXIII, the CERD called on all states to 'recognize and protect the rights of indigenous peoples to own, develop, control and use their communal lands, territories and resources'.<sup>95</sup> The CESCR has made a similar point. In General Comment 21, the CESCR explained that:

The strong communal dimension of indigenous peoples' cultural life is indispensable to their existence, well-being and full development, and includes the right to the lands,

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<sup>91</sup> *African Commission on Human and Peoples Rights v. Kenya*, African Court on Human and Peoples' Rights (AfCtHPR) (Application No. 006/2012, 26 May 2017) para. 198.

<sup>92</sup> *Saramaka* (n 1) para 93.

<sup>93</sup> *Kaliña and Lokono* (n 42) para 124

<sup>94</sup> Human Rights Committee, 'Concluding Observations, Canada', U.N. Doc. CCPR/C/79/Add.105 (7 April 1999) para 8.

<sup>95</sup> CERD General Recommendation XXIII (1997) para 5.

territories and resources which they have traditionally owned, occupied or otherwise used or acquired.<sup>96</sup>

53. This formulation appears to limit Indigenous peoples' right to control resources on their lands to those resources that they have 'traditionally' used or acquired. However, as this Court has recognized, Indigenous peoples' 'relations to the land are not merely a matter of possession and production but a material and spiritual element which they must fully enjoy, even to preserve their cultural legacy and transmit it to future generations'.<sup>97</sup> Resource extraction projects that damage Indigenous peoples' lands thereby violate Indigenous peoples' cultural rights. As Mattias Ahren has noted, the CESCR clarifies that 'natural resources need not be culturally significant for the right of the people to offer or withhold consent to those that seek access to the territory to apply'.<sup>98</sup> In effect, even if Guatemala owns the natural resources beneath the lands of the Maya Q'eqchi Agua Caliente community, the community can withhold its consent to resource extraction and development projects.<sup>99</sup>
54. The foregoing affirms Indigenous peoples' right to use, benefit from, manage and control natural resources in and on their traditional lands. Overall, the link between Indigenous peoples' self-determination and their right to control the natural resources situated within their territories is an important development in international law that is ripe for affirmation by the Court.

## **VI. Developments in Canadian Law on Aboriginal Title**

55. In its landmark ruling of *Saramaka*, the IACtHR reaffirmed that 'the cultural and economic survival of indigenous and tribal peoples, and their members, depend on their access and use of the natural resources in their territory "that are related to their culture and are found therein", and that Article 21 protects their right to such natural resources'.<sup>100</sup> In a footnote supporting this view, this Court took judicial notice of the Supreme Court of Canada's main Aboriginal title case at the time, *Delgamuukw v. British Columbia*.<sup>101</sup> In this section, we wish to inform this Court of developments in Canadian law since 1997 that are relevant to the application of Article 21 and other articles of the American Convention in the present case. Because the word 'Aboriginal' continues to be used in reference to Canadian law that deals with the rights of Indigenous peoples, we use it when referring to these developments despite the increased use of 'Indigenous' internationally. It should also be highlighted that many of these developments are the object of vigorous critiques by Indigenous scholars and leaders across Canada. These critiques are valid, and we wish to acknowledge and affirm that much remains to be done to fulfill Indigenous peoples' inherent right to self-determination in that country.

### **a. The Source of Aboriginal Title is the Prior Occupation of Canada by Aboriginal Peoples**

56. While *Delgamuukw* was not the first Canadian case about Aboriginal title, it set a major precedent. The Supreme Court clarified Aboriginal title to be a '*sui generis*' legal concept, defined as 'a collective right

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<sup>96</sup> Committee on Economic, Social and Cultural Rights, *General Comment No. 21* (n 18) para 36.

<sup>97</sup> *Avas Tingni* (n 350) para 149.

<sup>98</sup> Ahren (n 77) 176-177.

<sup>99</sup> Human Rights Committee, Report of the Special Rapporteur on the Rights of Indigenous Peoples, S James Anaya: 'Extractive Industries and Indigenous Peoples', UN Doc A/HRC/24/41 (1 July 2013) para 9. Noting that 'even where the State claims ownership of subsurface or other resources under domestic law, indigenous peoples have the right to pursue their own initiatives for extraction and development of natural resources within their territories, at least under the terms generally permitted by the State for others'

<sup>100</sup> *Saramaka* (n 1) para 120.

<sup>101</sup> *Delgamuukw v British Columbia* [1997] 3 SCR 1010.



to land held by all members of an aboriginal nation'. As a result, Aboriginal title is inalienable to anyone except the Crown in representation of the Canadian state.<sup>102</sup>

57. One of the Supreme Court's most important findings in *Delgamuukw* was that the source of Aboriginal title is the prior occupation of Canada by Aboriginal peoples, with both *de facto* and *de jure* consequences to this day:

[A]boriginal title arises from the prior occupation of Canada by aboriginal peoples. That prior occupation is relevant in two different ways: first, because of the physical fact of occupation, and second, because aboriginal title originates in part from pre-existing systems of aboriginal law. However, the law of aboriginal title does not only seek to determine the historic rights of aboriginal peoples to land; it also seeks to afford legal protection to prior occupation in the present-day. Implicit in the protection of historic patterns of occupation is a recognition of the importance of the continuity of the relationship of an aboriginal community to its land over time.<sup>103</sup>

58. The *Constitution Act, 1982* 'recognized and affirmed' existing Aboriginal and treaty rights, thereby giving Aboriginal title constitutional protection.<sup>104</sup>

**b. Proof of Aboriginal Title Must Consider an Aboriginal Perspective**

59. The *Delgamuukw* case clarified the three criteria applicable for an Aboriginal people to obtain recognition of their land title by Canadian law. These are (i) Aboriginal peoples must have occupied the land claimed prior to the British Crown's affirmation of sovereignty, (ii) there must be continuity between pre-sovereignty occupation and present occupation of the claimed land, and (iii) at the moment of British affirmation of sovereignty, the Aboriginal people's occupation must have been exclusive.

60. In applying all three criteria, the Supreme Court stressed the importance of considering an Aboriginal perspective, including oral evidence as well as Aboriginal peoples' laws and forms of government:

[T]he reconciliation of the prior occupation of North America by aboriginal peoples with the assertion of Crown sovereignty required that account be taken of the 'aboriginal perspective while at the same time taking into account the perspective of the common law' and that '[t]rue reconciliation will, equally, place weight on each'. [...] [T]he aboriginal perspective on the occupation of their lands can be gleaned, in part, but not exclusively, from their traditional laws, because those laws were elements of the practices, customs and traditions of aboriginal peoples [...]. [I]f, at the time of sovereignty, an aboriginal society had laws in relation to land, those laws would be relevant to establishing the occupation of lands which are the subject of a claim for aboriginal title. Relevant laws might include, but are not limited to, a land tenure system or laws governing land use.<sup>105</sup>

61. Absent proof of exclusive occupation at the time of British affirmation of sovereignty, an Aboriginal people may also obtain a declaration of a non-exclusive Aboriginal right in the land based on its ancestral use, described by the Supreme Court as 'usufructory Aboriginal rights'.<sup>106</sup>

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<sup>102</sup> *Delgamuukw v British Columbia* [1997] 3 SCR 1010 para. 112-115.

<sup>103</sup> *Delgamuukw v British Columbia* [1997] 3 SCR 1010 para 126.

<sup>104</sup> *Canada Act 1982*, 1982, c. 11 (U.K.), April 17, 1982, Schedule B, s. 35(1).

<sup>105</sup> *Delgamuukw v British Columbia* [1997] 3 SCR 1010 para 148.

<sup>106</sup> *Delgamuukw v British Columbia* [1997] 3 SCR 1010 para 47.

62. The Supreme Court recognized that litigating claims of Aboriginal title is long and expensive for all parties involved, and urged the government to settle such cases through good faith negotiations. It also affirmed the ultimate objective of reconciliation between Aboriginal and settler societies:

[T]he Crown is under a moral, if not a legal, duty to enter into and conduct those negotiations in good faith. Ultimately, it is through negotiated settlements, with good faith and give and take on all sides, reinforced by the judgments of this Court, that we will achieve [...] a basic purpose of s. 35(1) [of the Constitution] -- 'the reconciliation of the pre-existence of aboriginal societies with the sovereignty of the Crown'. Let us face it, we are all here to stay.<sup>107</sup>

**c. Although Many Claims Remain Unsettled, Several Agreements Have been Concluded since the Delgamuukw Case**

63. In 1999 and on the basis of the *Delgamuukw* case, the Nisga'a Nation signed the *Nisga'a Final Agreement* with the Governments of Canada and British Columbia regarding an area of 1,992 square kilometers.<sup>108</sup> The agreement purports to modify and continue 'the aboriginal title of the Nisga'a Nation anywhere that it existed in Canada' as fee simple title to this area (Chapter 2). The agreement also affirms the Nisga'a Nation's right to self-government (Chapter 11) and contains provisions on the administration of justice by the Nisga'a Lisims Government (Chapter 12). Self-government applies to forestry (Chapter 5), fisheries (Chapter 8), wildlife and migratory birds (Chapter 9), and environmental protection (Chapter 10). For example, Chapter 5 affirms that 'the Nisga'a Nation owns all forest resources on Nisga'a Lands' and that the 'Nisga'a Lisims Government will make laws in respect of the management of timber resources on Nisga'a Lands'.
64. Several other agreements have been reached since the *Nisga'a Final Agreement*, although many land claims across Canada remain unsettled. A more recent example is the *Eeyou Marine Region Land Claims Agreement*, which was concluded in 2010 between the Crees of Eeyou Istchee and the Governments of Canada and Nunavut.<sup>109</sup> The agreement covers an extensive offshore area of approximately 61,270 square kilometers, including approximately 1,650 square kilometers of land mass. Taking a more culturally sensitive approach to Aboriginal title, the agreement defines the land rights of the Crees as 'Cree Title' and specifies that these "shall not be construed as having the effect of extinguishing or affecting any rights recognized and affirmed by section 35 of the *Constitution Act, 1982*" of the Crees (Chapter 5). Cree Title includes lands, tidelands, seabed, lakes, rivers, riverbeds, mines and minerals. The agreement establishes an Eeyou Marine Region Planning Commission with a mandate to develop land use plans (Chapter 8) and covers wildlife management (Part III), economic opportunities, including impact and benefit agreements (Chapter 19) government resource royalty sharing (Chapter 23), taxation (Chapter 24), and Cree ethnographic heritage (Part VI).
65. Other agreements have focused on implementing Aboriginal people's inherent right of self-government protected by s. 35 of the *Constitution Act, 1982*, without prejudice to eventual title claims to areas outside these agreements. For example, the *Westbank First Nation Self-Government Agreement*<sup>110</sup> was concluded in 2003 with the Government of Canada regarding an area of approximately 21 square kilometers. The agreement affirms that 'Westbank First Nation has legal capacity to govern itself in accordance with this Agreement' (Part IV) and recognizes its jurisdiction over renewable resources including hunting and forestry (Part XII, s. 135), non-renewable resources including oil, gas, coal and bitumen (Part XII, s. 138), agriculture (Part XII), environment protection (Part XIV), culture and language (Part XV), education (Part XVI), the practice of traditional Okanagan medicine (Part XVII),

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<sup>107</sup> *Delgamuukw v British Columbia* [1997] 3 SCR 1010 para 186.

<sup>108</sup> *Nisga'a Final Agreement*, April 27, 1999.

<sup>109</sup> *Agreement Between The Crees of Eeyou Istchee and Her Majesty the Queen in Right of Canada Concerning the Eeyou Marine Region*, July 7, 2010.

<sup>110</sup> *Agreement between Her Majesty the Queen in Right of Canada and Westbank First Nation*, October 3, 2003.

law enforcement, including penalties punishable by imprisonment or fine (Part XVIII), the regulation of businesses (Part XIX), and public order (Part XXII).<sup>111</sup>

**d. The Tsilhqot'in Case Considerably Expanded Canadian Law on Aboriginal Title**

66. In 2014, the Supreme Court set another major precedent in *Tsilhqot'in Nation v. British Columbia*, the first case to make an Aboriginal title declaration (as opposed to recognition through negotiated treaties) over an area of approximately 4,400 square kilometers.<sup>112</sup> While taking issue with several aspects of the judgment, one of Canada's most respected Indigenous law scholars, Professor John Borrows (Canada Research Chair in Indigenous Law), wrote:

[...] Canadian law took an important step towards repairing its relationships with Indigenous peoples with the *Tsilhqot'in Nation* decision. It is an exceedingly strong decision. It demonstrates the intelligence, wisdom, honesty, humility, and humanity of an extraordinary group of jurists. It illustrates the Constitution's recognition of Canada's pre-existing legal systems in Canada, which generate present-day rights through the doctrine of continuity. The case is very significant; it contains ground-shifting implications. Canada is a better place as a result of its 153 paragraphs. It sets a new world standard.<sup>113</sup>

67. The following aspects of *Tsilhqot'in* appear those most relevant to inform this Court for the resolution of the present case and the evolution of its interpretation of the *American Convention*.

**i. The Doctrine of Terra Nullius Never Applied in Canada**

68. While maintaining the doctrine of the Crown's 'radical or underlying title' to the Canadian territory, the Supreme Court affirmed for the first time that the doctrine of *terra nullius* never applied in Canada:

At the time of assertion of European sovereignty, the Crown acquired radical or underlying title to all the land in the province. This Crown title, however, was burdened by the pre-existing legal rights of Aboriginal people who occupied and used the land prior to European arrival. The doctrine of terra nullius (that no one owned the land prior to European assertion of sovereignty) never applied in Canada, as confirmed by the Royal Proclamation of 1763. The Aboriginal interest in land that burdens the Crown's underlying title is an independent legal interest, which gives rise to a fiduciary duty on the part of the Crown.<sup>114</sup>

**ii. Proof of Aboriginal Title must be Approached in a Culturally Sensitive Way**

69. The Supreme Court clarified the criteria of sufficiency, continuity and exclusivity of occupation to establish Aboriginal title. These criteria do not favor village sites and farms to the exclusion of nomadic or semi-nomadic forms of occupation, and must rely on Aboriginal peoples' perspective in a culturally sensitive way:

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<sup>111</sup> See generally: Government of Canada, Implementation of Modern Treaties and Self-Government Agreements July 2015 – March 2018, online: [https://www.rcaanc-cirnac.gc.ca/DAM/DAM-CIRNAC-RCAANC/DAM-TAG/STAGING/texte-text/treaties-agreements\\_prov-annual-report-2015-2018\\_1573224351034\\_eng.pdf](https://www.rcaanc-cirnac.gc.ca/DAM/DAM-CIRNAC-RCAANC/DAM-TAG/STAGING/texte-text/treaties-agreements_prov-annual-report-2015-2018_1573224351034_eng.pdf).

<sup>112</sup> *Tsilhqot'in Nation v. British Columbia* 2014 SCC 44.

<sup>113</sup> John Borrows, 'The Durability of Terra Nullius: *Tsilhqot'in Nation v. British Columbia*' (2015) 48(3) *University of British Columbia Law Review* 701, 703.

<sup>114</sup> *Tsilhqot'in Nation v. British Columbia* (n 112) para. 69. Emphasis added. For a critique of this approach, see Borrows (n 113) 723. See also: Val Napoleon, 'Tsilhqot'in Law of Consent' (2015) 48(3) *University of British Columbia Law Review* 873, Felix Hoehn, 'Back to the Future - Reconciliation and Indigenous Sovereignty after 'Tsilhqot'in'' (2016) 67 *University of New Brunswick Law Journal* 109 and Joshua Nichols, *A Reconciliation without Recollection?: An Investigation of the Foundations of Aboriginal Law in Canada* (University of Toronto Press, 2020) 268.

What is required is a culturally sensitive approach to sufficiency of occupation based on the dual perspectives of the Aboriginal group in question — its laws, practices, size, technological ability and the character of the land claimed — and the common law notion of possession as a basis for title. It is not possible to list every indicia of occupation that might apply in a particular case. The common law test for possession — which requires an intention to occupy or hold land for the purposes of the occupant — must be considered alongside the perspective of the Aboriginal group which, depending on its size and manner of living, might conceive of possession of land in a somewhat different manner than did the common law.<sup>115</sup>

iii. The Content of Aboriginal Title must be Construed Broadly

70. Expanding on *Delgamuukw* and other precedents, the Supreme Court took a liberal approach to defining the content of Aboriginal title as including the right to the economic benefits of the land:

Aboriginal title confers ownership rights similar to those associated with fee simple, including: the right to decide how the land will be used; the right of enjoyment and occupancy of the land; the right to possess the land; the right to the economic benefits of the land; and the right to proactively use and manage the land.<sup>116</sup>

71. The Crown, the Court added, ‘does not retain a beneficial interest in Aboriginal title land’.<sup>117</sup> Moreover, continuity of occupation between pre-colonization and present times must be understood dynamically:

Aboriginal title post-sovereignty reflects the fact of Aboriginal occupancy pre-sovereignty, with all the pre-sovereignty incidents of use and enjoyment that were part of the collective title enjoyed by the ancestors of the claimant group — most notably the right to control how the land is used. However, these uses are not confined to the uses and customs of pre-sovereignty times; like other landowners, Aboriginal title holders of modern times can use their land in modern ways, if that is their choice.<sup>118</sup>

iv. Infringement of Aboriginal Title is only Justified in Narrow Circumstances

72. The Supreme Court reaffirmed the narrow conditions for the Government to infringe Aboriginal title without an Aboriginal people’s consent. This framework also applies before Aboriginal title is recognized through treaty-making or by a court, as soon as ‘the Crown has real or constructive knowledge of the potential or actual existence of Aboriginal title’, although the duty to consult and accommodate will vary depending on the strength of the claim. It wrote:

To justify overriding the Aboriginal title-holding group’s wishes on the basis of the broader public good, the government must show: (1) that it discharged its procedural duty to consult and accommodate; (2) that its actions were backed by a compelling and substantial objective; and (3) that the governmental action is consistent with the Crown’s fiduciary obligation to the group [...].<sup>119</sup>

73. The Court emphasized that economic development cannot continue and that laws cannot be applied in cases where the Crown has not fulfilled these three conditions:

Once title is established, it may be necessary for the Crown to reassess prior conduct in light of the new reality in order to faithfully discharge its fiduciary duty to the title-holding group going forward. For example, if the Crown begins a project without consent prior to Aboriginal title being

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<sup>115</sup> *Tsilhqot’in Nation v. British Columbia* (n 112) para 41.

<sup>116</sup> *Tsilhqot’in Nation v. British Columbia* (n 112) para 75.

<sup>117</sup> *Tsilhqot’in Nation v. British Columbia* (n 112) para 70.

<sup>118</sup> *Tsilhqot’in Nation v. British Columbia* (n 112) para 75.

<sup>119</sup> *Tsilhqot’in Nation v. British Columbia* (n 112) paras 77-78.

established, it may be required to cancel the project upon establishment of the title if continuation of the project would be unjustifiably infringing. Similarly, if legislation was validly enacted before title was established, such legislation may be rendered inapplicable going forward to the extent that it unjustifiably infringes Aboriginal title.<sup>120</sup>

74. Indeed, in 2017, the Federal Court of Canada ruled in favor of the Government of Canada's refusal to grant a license for an open pit gold and copper mine within the Tsilhqot'in traditional territory (although outside the area where they hold Aboriginal title).<sup>121</sup> Among others, the project proponent argued that it suffered breaches of procedural fairness in the review of its license application.

v. Reconciliation is a Governing Ethos in Resolving Land Claims

75. The Supreme Court reaffirmed the principle of reconciliation as used in its *Delgamuukw* case, namely the 'reconciliation of the prior occupation of North America by aboriginal peoples with the assertion of Crown sovereignty'. It also referred to reconciliation in a more general way, as an ethical principle applicable to the Government's legal duty to negotiate in good faith to resolve land claims: 'The governing ethos is not one of competing interests but of reconciliation'.<sup>122</sup>
76. This last affirmation by the Supreme Court continues to elevate the importance of reconciliation as a Constitutional principle in Canada, building on a recent precedent where reconciliation was defined as establishing mutually respectful long-term relationships between Aboriginal peoples and settlers:

The reconciliation of Aboriginal and non-Aboriginal Canadians in a mutually respectful long-term relationship is the grand purpose of s. 35 of the *Constitution Act, 1982*. The modern treaties, including those at issue here, attempt to further the objective of reconciliation not only by addressing grievances over the land claims but by creating the legal basis to foster a positive long-term relationship between Aboriginal and non-Aboriginal communities. [...] The treaty is as much about building relationships as it is about the settlement of ancient grievances. The future is more important than the past. A canoeist who hopes to make progress faces forwards, not backwards.<sup>123</sup>

e. Conclusion

77. To conclude this section, the *Tsilhqot'in* case and other developments in Canada offer useful principles for the IACtHRs development of its case law on Indigenous peoples' rights to self-determination, their ancestral lands, and the enjoyment of its natural resources in the present case. These include that 1) the doctrine of *terra nullius* never applied in Canada, 2) that the source of Aboriginal title is the pre-existence of Aboriginal societies and that, as such, the laws and practice of Aboriginal peoples are an element of proof to be considered in culturally sensitive way, 3) that Aboriginal title includes the right to pro-actively use and manage the land and to enjoy its economic benefits, 4) that the Government of Canada has a legal duty to negotiate treaties in good faith to resolve Aboriginal title and rights claims and to implement Aboriginal people's inherent right of self-government, and that, in this context, 5) the concept of reconciliation, understood as the establishment of a mutually respectful long-term relationship between Aboriginal peoples and settlers, is nothing less than a governing ethos.

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<sup>120</sup> *Tsilhqot'in Nation v. British Columbia* (n 112) para 92.

<sup>121</sup> *Taseko Mines Limited v. Canada (Environment)*, 2017 FC 1100. Affirmed by the Federal Court of Appeal in 2019 FCA 320. Leave to appeal at the Supreme Court of Canada denied.

<sup>122</sup> *Tsilhqot'in Nation v. British Columbia* (n 112) para 17.

<sup>123</sup> *Beckman v. Little Salmon/Carmacks First Nation*, 2010 SCC 53, para. 10.

## **VII. Developments in the African Human Rights System**

78. Three main rights have been recognized within the Banjul system and African States such as Namibia, South Africa or Tanzania. These three rights must be underlined in order to implement Indigenous peoples' right to use, manage, develop and benefit from natural resources situated in their traditional territories.
79. First, the right to ownership of land implies that sacred lands that have been ancestrally owned by Indigenous peoples, shall be protected and cannot be taken away without consent. Second, Indigenous peoples have a right to the *usus* and the *fructus* of their lands, a natural consequence of the right to free disposal of wealth and natural resources. Hence, no entity shall use these natural resources unless a sufficient justification is given in light of the general interest criteria, and proper compensation is offered. Third, use of natural resources by a people, whether religious or economic, is supported by the right to economic, social, and cultural development.
80. These three rights are articulated within the African continent with an aim to build a general system of protection for Indigenous peoples' lands. For these protections to apply, African Indigenous peoples must be recognized as such.
81. In this regard, the African Commission on Human and Peoples' Rights (ACHPR) has adopted<sup>124</sup> four<sup>125</sup> standards for identifying an 'indigenous people', namely: 'occupying and using a specific territory, voluntarily perpetuating their cultural particularities, self-identifying as a well-defined collectivity and having the recognition of other groups, and experiencing subjugation, marginalization, eviction, exclusion or discrimination'. In Africa, the expression 'Indigenous peoples' is mainly applied to pastoralists and hunter-gatherers for whom access to their traditional lands and natural resources is the basis of their subsistence.<sup>126</sup>
82. The failure of the Guatemalan State to recognize the Mayan community of Agua Caliente as Indigenous is similarly one of the most important obstacles to their claim to communal land ownership.<sup>127</sup> Recognition of the ethnic and cultural pre-existence of Indigenous peoples is a precondition to being afforded rights reserved for Indigenous peoples.

### **a. Indigenous Communities' Right to Own Land is Recognized in the African Charter on Human and People's Rights**

83. Article 14 of the African Charter on Human and Peoples' Rights recognizes the right to property for all individuals, including Indigenous peoples. Interpreting this article in relation to Article 26 of the UNDRIP, the African Court on Human and Peoples' Rights (AfCHPR) affirms that Indigenous

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<sup>124</sup> Report of the Working Group of Experts of the ACHPR on Indigenous Populations/Communities adopted by the ACHPR at its 28<sup>th</sup> ordinary session (2005) 104.

<sup>125</sup> *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya* (African Commission on Human and Peoples Rights, Communication No 276/2003, 4 February 2010) para 150 ('*Endorois Welfare Council*').

<sup>126</sup> *Endorois Welfare Council* (n 125) para 150.

<sup>127</sup> This is evidenced in the title issued by the national government called '*Provisional Title for the Endowment of Family Property*' in which they are considered individually as farmers. Voir: Indian Law Research Center. Case of the Maya Q'eqchi' Agua Caliente Indigenous community Guatemala. Brief of Requests, Arguments and Evidence. 14 November 2020, para. 63.

peoples have the right to the *usus* and *fructus* of their traditional lands;<sup>128</sup> i.e., ‘ownership, control, use and enjoyment of their ancestral lands, territories and resources’.<sup>129</sup>

84. Put simply, the ACHPR considers that the ancestral possession of land grants the same benefit as a property title from the State. This benefit extends to Indigenous peoples who have had to leave their land involuntarily, and who lack official title.<sup>130</sup> Even in a situation where a third party obtained the land legally, Indigenous peoples are still entitled to restitution of the land.<sup>131</sup>

#### **b. Indigenous Communities’ Right to Own Land in the Domestic Laws of African Countries**

85. Several African countries provide legal instruments formalizing common property systems for pastoralists. For example, in Ethiopia, the 2005 Land Administration Law includes the right to free land for grazing and cultivation for pastoralists, as well as the right not to be dispossessed of their land.<sup>132</sup> In Chad, Law No. 4 of 31 October of 1959 on ‘the regulation of transhumance on the territory of the Republic of Chad’<sup>133</sup> allows Indigenous peoples to enforce their traditional transhumance areas. Other countries similarly have a domestic legal code dedicated to the regulation of pastoralism, as in Niger.<sup>134</sup> Several countries have also made advances in recognizing property rights for Indigenous communities. For example, the Kenyan Constitution contains provisions recognizing the lands owned by specific communities, including ‘ancestral lands and lands traditionally occupied by hunter-gatherer communities’.<sup>135</sup>
86. Evolving case law protects African Indigenous peoples’ right to property by setting limits on the protection of the public interest.<sup>136</sup> As an example, the South African Constitution<sup>137</sup> states two relevant principles: the restitution of stolen property and the provision of a compensatory mechanism applying to situations of expropriation which considers the historical use of property. In Tanzania, the High Court has issued judgments recognizing Indigenous peoples’ ‘customary land right’,<sup>138</sup> and ruled that alternative land should be provided to the communities in cases of expulsions.<sup>139</sup> Finally, Namibia entitles Indigenous communities access to natural resources in its Constitution<sup>140</sup> and its Communal

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<sup>128</sup> *African Commission on Human and Peoples Rights v. Kenya* (n 91) para 122.

<sup>129</sup> Treva Braun, Luvy Mulvagh, ‘The African Human Rights System: A Guide for Indigenous Peoples’ (Forest Peoples Programme, October 2008) 7.

<sup>130</sup> *Endorois Welfare Council* (n 125) para 209.

<sup>131</sup> *Endorois Welfare Council* (n 125) para 209.

<sup>132</sup> Proclamation No. 456, section two the right to hold and use rural land, article 5. Available her: <https://www.fao.org/faolex/results/details/en/c/LEX-FAOC095459/>

<sup>133</sup> Law No. 4 of 31 October 1959 regulating nomadism of the Republic of Chad. Available here: <http://extwprlegs1.fao.org/docs/pdf/cha150921.pdf>

<sup>134</sup> The rights of pastoralists are stipulated in the Pastoral Code adopted in 2010. Available here: [https://reca-niger.org/IMG/pdf/Niger\\_Ordonnance\\_No2010-29\\_du\\_20\\_Mai\\_2010\\_relative\\_au\\_pastoralisme.pdf](https://reca-niger.org/IMG/pdf/Niger_Ordonnance_No2010-29_du_20_Mai_2010_relative_au_pastoralisme.pdf)

<sup>135</sup> *Constitution of Kenya*, 6 May 2010, Article 63.

<sup>136</sup> Environment and Land Court at Meru in Kenya, *Mohamud Iltarakwa Kochale v Lake Turkana Wind Power Ltd; Aaron Iltele Lesiantam*, 19 October 2021.

<sup>137</sup> *Constitution of the Republic of South Africa*, 18 December 1996.

<sup>138</sup> High Court of Tanzania, *Mulbadaw Village Council v. National Agricultural and Food Corporation (NAFCO)*, HC – Arusha, 10/1981, 3 December 1984.

<sup>139</sup> High Court of Tanzania, *Lekengere Faru Parutu Kamunyu v. the Minister for Tourism, Natural Resources and Environment*, HC – Moshi, CV#33/1994, 1994.

<sup>140</sup> *Constitution of the Republic of Namibia*, 9 February 1990, Art 16: ‘all persons shall have the right in any part of Namibia to acquire, own and dispose of all forms of immovable and movable property individually or in association with others’.

Land Reform Act.<sup>141</sup> The government has additionally worked to rectify loss of land through a group resettlement model<sup>142</sup>

**c. The African Human Rights System Recognizes the Right to Freely Dispose of Wealth and Natural Resources**

87. Article 21 of the Charter protects the right of groups to freely dispose of wealth and natural resources within their ancestral lands. This article also provides a right to compensation or recovery by the State. The ACHPR has held that there should be a link between the community and the resources; for a State to use natural resources that vest in an Indigenous community, the state must demonstrate that doing so is in the public interest.<sup>143</sup> The AfCHPR has read Article 21 through the lens of Article 14 on the right to property and recognized a right to *usus* and *fructus* of the ancestral lands by Indigenous peoples.<sup>144</sup> This implies a right to dispose of wealth and natural resources;<sup>145</sup> a position confirmed by the ACHPR.<sup>146</sup> The South African Supreme Court of Appeal has found the same. In *Richtersveld Community v. Alexkor Ltd*, the Court held that the unlawful appropriation of a community's land and its economical exploitation shall be declared void and its *usus* and *fructus* restituted.<sup>147</sup> The decision was subsequently upheld by the Constitutional Court.<sup>148</sup>

**d. The Right to Economic, Social and Cultural Development Implies the Protection of Community-owned Lands**

88. The right to economic, social and cultural development is strongly connected to the ownership and disposal of ancestral lands. Indeed, a community's land is *de facto* related to the activities -whether economical or cultural- developed by the community itself.<sup>149</sup> Article 22 of the Charter contains a right to economic, social and cultural development which includes the necessity of a 'due regard to [the Peoples'] freedom and identity'.<sup>150</sup> Moreover, the Charter adds the right to an environment that satisfies the necessity of development of peoples. Notably, the Cairo Declaration by the Organization of Islamic Cooperation underlines the right to development as one of the most fundamental rights, not only for the State, but also for peoples.<sup>151</sup>

89. The ACHPR, when assessing the case of the Endorois Indigenous community in Kenya, found that denying access to their sacred lake situated in their ancestral land constitutes a restriction on their freedom to practice their religion that cannot be justified on grounds of public safety or economic development,<sup>152</sup> confirming that access to and protection of ancestral lands are important elements in the exercise of the cultural rights of Indigenous communities.

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<sup>141</sup> *Communal Land Reform Act 2002*, Art 17: 'all communal land areas vest in the State in trust for the benefit of the traditional communities residing in those areas'.

<sup>142</sup> Cultural Survival, 'The State of Indigenous Human Rights in Namibia Prepared for Committee on Economic, Social, and Cultural Rights (CESCR) Prepared for 57th Session 22 February- 4 March 2016'. Available here: <https://www.culturalsurvival.org/sites/default/files/media/namibiacescr2016.pdf>

<sup>143</sup> *Endorois Welfare Council* (n 125) para 267.

<sup>144</sup> *African Commission on Human and Peoples Rights v. Kenya* (n 91) para 122.

<sup>145</sup> *African Commission on Human and Peoples Rights v. Kenya* (n 91) para 201.

<sup>146</sup> *Social and Economic Rights Action Center (SERAC) and Center for Economic and Social Rights (CESR) / Nigeria* (African Commission on Human and People's Rights, Communication No 155/96, 27 May 2002), para 55 ('Ogoni').

<sup>147</sup> Supreme Court of Appeal of South Africa, *Richtersveld Community v. Alexkor Ltd* 2003 (6) BCLR 583.

<sup>148</sup> Constitutional Court of South Africa, *Alexkor Ltd and Government of South Africa v. Richtersveld Community* 2003 (12) BCLR 1301.

<sup>149</sup> Report of the Working Group of Experts of the ACHPR on Indigenous Populations/Communities (n 124) 107.

<sup>150</sup> African CHPR, Art 22.

<sup>151</sup> Cairo Declaration on Human Rights in Islam, Cairo, 5 August 1980, Preamble.

<sup>152</sup> *Endorois Welfare Council* (n 125) para 156.



90. Several local policies and domestic courts refer to economic, social and cultural rights as protecting the right to property of Indigenous peoples. For example, in 2013 the Environment and Land Court of Kenya<sup>153</sup> protected an Indigenous community's land that had suffered the destruction of a considerable amount of trees. In Botswana, both the Court of Appeal,<sup>154</sup> and the High Court,<sup>155</sup> found that any rights that were lost as a result of the relocation were lost wrongfully and unlawfully. It also declared that the communities – respectively the Basawara and the Bakgalagadi ('Bushmen') Indigenous communities – when wrongfully evicted, have a right to utilize existing boreholes and drill new ones for water for domestic use. Without this ability, the right to occupy the land would essentially be meaningless.

**d. The Protection of the Communities' lands through Free, Prior and Informed Consent of Indigenous Peoples**

91. Free, prior and informed consent requires states to consult with the goal of obtaining consent. Consultations must take place without coercion, intimidation or manipulation.<sup>156</sup> In *Ogoni v. Nigeria*, it was alleged that the Nigerian military government had been directly involved in oil exploitation in the Ogoni region, which caused environmental degradation and forced evictions. In this regard, the ACHPR stated that failure to comply with the obligations to consult and to obtain consent, or to compensate, ultimately amounted to a violation of the right to property.<sup>157</sup> The ACHPR stated that the socio-environmental impact studies must be shared with the communities, in their language. The State must provide meaningful opportunities for Indigenous peoples to be heard and to participate.<sup>158</sup> The AfCHPR adds requirements for this consultation: it shall be fair and adequate, *i.e.* taking into accounts the consequences for the group<sup>159</sup>. In the aforementioned case, the ACHPR also considered that the right to health and the right to a healthy environment – Articles 16 and 24 of the African Charter – are intrinsically related insofar as the environment affects a person's quality of life and safety.<sup>160</sup>

**VIII. Conclusion**

92. The international legal obligations of the Republic of Guatemala include the recognition and implementation of the right to self-determination of Indigenous peoples including the Maya Q'eqchi'. The right to self-determination encompasses a right to use, benefit from, control and manage natural resources located on or in Indigenous peoples' traditional lands.

93. Guatemala has recognized these fundamental human rights as one of the main participants in the drafting and adoption of the ADRIP. Guatemala is also a state party to the ICCPR, ICESCR and ILO Convention 169 and voted in favor of the UNDRIP. Despite the Republic of Guatemala's international legal and moral commitments to respect and implement the rights of Indigenous peoples, some Guatemalan laws are contrary to its international legal obligations including to guarantee the right to self-determination and to collective property of Indigenous peoples. This is seen in the *Ley de*

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<sup>153</sup> Environment and Land Court at Eldoret in Kenya, *Joseph Leboo v Director Kenya Forest Services* [2013], 1 October 2013.

<sup>154</sup> High Court of the Republic of Botswana, *Sesana v. The Attorney General* (52/2002) [2006] BWHC 1 (13 December 2006). Also known as the Central Kalahari Game Reserve (CKGR), 13 December 2006.

<sup>155</sup> Court of Appeal of the Republic of Botswana, *Mosethanyane v. Attorney General of Botswana* Civil Appeal No. CACLB-074-10, 27 January 2011.

<sup>156</sup> ILO, Report of the Committee of Experts on the Application of Conventions and Recommendations, Report III (1 A) General Report and observations concerning certain countries (online), 100th Session, 2011, Doc.ILC.100/III/1A,2011.

<sup>157</sup> *Ogoni* (n 146) para 226.

<sup>158</sup> *Ogoni* (n 146) para 53.

<sup>159</sup> *African Commission on Human and Peoples Rights v. Kenya* (n 91) para 122: 'equitable, non-discriminatory, participatory, accountable and transparent, with equity and choice as important, over-arching themes in the right to development'.

<sup>160</sup> *African Commission on Human and Peoples Rights v. Kenya* (n 91) para 51.

*Transformación Agraria*, and the *Ley del Fondo de Tierras y Ley de Minería*. Contrary to the views of the Guatemalan state, the Maya Q'eqchi' Agua Caliente people is not a private agricultural corporation, and the concept of individual property rights is not applicable in this case. What it is at stake is the implementation of the collective rights of Indigenous peoples including the right to internal self-determination and the right to use, benefit from, control and manage natural resources.

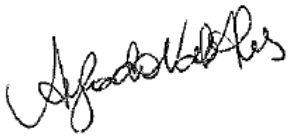
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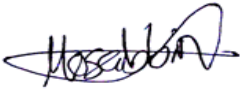
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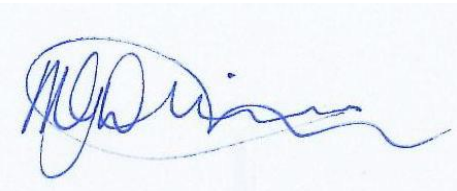
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