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HUMAN RIGHTS QUARTERLY

The Interplay Between Global and Regional Human Rights Systems in the Construction of the Indigenous Rights Regime

*Mauro Barelli**

ABSTRACT

The emergence of indigenous peoples' rights represents one of the most significant developments in the recent history of international human rights. The difficult and complex process that ultimately led to the recognition of these rights in international law has demonstrated that global and regional systems can increasingly interplay in the context of human rights development. By considering the parallel normative and political developments that have taken place at the global and regional levels, this article submits that the Inter-American, African, and European human rights systems made important contributions to the construction and consolidation of the global regime of indigenous rights.

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I. INTRODUCTION

Current international lawmaking is a complex and dynamic process in which a variety of actors participate and instruments of diverse nature are involved.[1] The growing need for coordinated action in response to global challenges has determined a significant expansion of the role played by supranational institutions, of both global and regional scope. Similarly, representatives of civil society, especially nongovernmental organizations (NGOs), have regularly been allowed to participate in the formation of certain areas of international law. On a different level, soft law has become an important and valuable alternative to hard law, as confirmed by the significant increase in the use of non-legally binding instruments.[2]

These innovations have become especially visible in the area of international human rights, where the recently emerged regime of indigenous peoples' rights aptly confirms this trend. Established as a result of the interaction between states, supranational institutions, and civil society, this regime derives its legal significance precisely from the interplay between hard and soft law. Among other things, the multi-faceted process that ultimately led to the establishment of a universal and comprehensive regime of indigenous rights has demonstrated the increasingly crucial role that regional systems can play in the construction and consolidation of global human rights regimes. Whereas it is normally recognized that regional human rights systems importantly contribute to promote and protect universal human rights,[3] less attention is paid to their potential contribution with regard to the two abovementioned processes. Considering the current "diversified forms and levels of [international] law-making,"[4] this sort of contribution should be increasingly looked at.

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1. *See, e.g.*, Alan Boyle & Christine Chinkin, The Making of International Law (2007); Christine Chinkin, *Normative Development in the International Legal System, in* Commitment and Compliance: The Role of Non-Binding Norms in the International Legal System 21 (Dinah Shelton ed., 2000); Andrew Hurrell, *International Law and the Changing Constitution of International Society*, *in* The Role of Law in International Politics: Essays in International Relations and International Law 327 (Michael Byers ed., 2001).
2. Contrary to hard law instruments, soft law instruments are not legally binding. The category of soft law includes, among others, interstate conference declarations, UN General Assembly resolutions, codes of conduct, guidelines, and the recommendations of international organizations. Crucially, various soft law instruments will have different legal significance, as well as different degree of effectiveness. On soft law generally, see Christine M. Chinkin, *The Challenge of Soft Law: Development and Change in International Law*, 38 INT'L & COMP. L.Q. 850 (1989).
3. *See* Rhona K.M. Smith, International Human Rights 80–82 (3d ed. 2007); Henry Steiner & Philip Alston, International Human Rights in Context: Law Politics Morals 779–85 (2d ed. 2008).
4. Chinkin, *Normative Development*, *supra* note 1, at 22.

This article submits that the Inter-American, African, and European human rights systems have contributed to the emergence of the global regime of indigenous peoples' rights in two main respects. First, they supported and, in turn, strengthened the global *political* process aimed towards the recognition of these rights. Second, they have contributed significantly to the *legal* process of clarification and interpretation of some of the most controversial provisions of the regime. Section II of this article will describe the main stages of the emergence of indigenous peoples' rights in international law. Following that, Sections III and IV will discuss the political and normative developments that have taken place within the Inter-American, African, and European systems in the sphere of indigenous peoples' rights. These latter sections will highlight the important implications that these developments have had for the definitive affirmation of the indigenous rights regime at the global level.

II. THE EMERGENCE OF INDIGENOUS PEOPLES' RIGHTS: AN OVERVIEW

The interaction between international and regional institutions in the context of indigenous peoples' rights must be discussed in conjunction with an analysis of the evolution of indigenous rights in international law. Whereas it took more than two decades for the claims of indigenous peoples to be addressed seriously within the UN framework, the UN human rights machinery has increasingly and intensively focused on the issue, ultimately creating a *sui generis* regime of indigenous rights.[5] The following analysis identifies and describes the three key stages of the global political process that led to the recognition of indigenous peoples' rights: first, the opening up of the UN system to the claims of indigenous peoples; second, the broad identification of the normative framework related to indigenous rights; and third, the specification of the actual content of the regime and its final affirmation on a global scale.

The first significant event within the United Nations took place in the early 1970s, when the Sub-Commission on Prevention of Discrimination and Protection of Minorities (Sub-Commission) appointed Special Rapporteur José Martínez Cobo to undertake a comprehensive study on the situation

5. *See* Elsa Stamatopoulou, *Indigenous Peoples and the United Nations: Human Rights as a Developing Dynamic*, 16 Hum. Rts. Q. 58 (1994); Asbjørn Eide, *Rights of Indigenous Peoples: Achievement in International Law During the Last Quarter of a Century*, 37 Neth. Y.B. Int'l L. 155 (2006).

of indigenous peoples.[6] This initiative marked a watershed moment in the relationship between indigenous peoples and international law in that for the first time since its establishment the UN resolved to address the "indigenous question," reversing a tradition of injustice and discrimination against indigenous peoples. The following establishment, in 1982, of the Working Group on Indigenous Populations (WGIP), notably a subsidiary body of the Sub-Commission, represented the first visible sign of the new era.[7] The WGIP was composed of five independent experts whose mandate was to "review developments pertaining to the promotion and protection of the human rights and fundamental freedoms of indigenous populations,"[8] giving special attention to the evolution of standards concerning those rights. Shortly after its establishment, unique arrangements were made to allow indigenous organizations without consultative status with the Economic and Social Council (ECOSOC) to participate in the WGIP sessions, a circumstance that represents a distinctive feature of the drafting history of the UN Declaration on the Rights of Indigenous Peoples (UNDRIP).[9] Importantly, the WGIP successfully pushed indigenous issues onto the UN human rights agenda, laying the groundwork for future crucial developments. With the establishment of the WGIP, indigenous peoples not only entered the international arena, but also came to be recognized as a distinguished category within international law.

The second stage of the recognition process consisted of the broad identification of the normative framework within which indigenous rights would develop. Two events characterized this intense period of development: the WGIP's initiative of drafting a declaration on the rights of indigenous peoples,[10] and the International Labour Organization (ILO) decision to produce a new, modern instrument for the protection of indigenous peoples' rights, repudiating the depreciable, assimilative approach that guided its previous action in this field.[11] As a result, in 1989 the organization adopted

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6. Study of the Problem of Discrimination Against Indigenous Populations, Volume V Conclusions, Proposals and Recommendations, by Jose' R. Martinez Cobo, Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities, United Nations, U.N. Doc. E/CN.4/Sub.2/1986/7/Add.4. http://www.un.org/esa/socdev/unpfii/en/spdaip.html
7. *Study of the Problem of Discrimination Against Indigenous Populations, adopted* 7 May 1982, ECOSOC Res. 1982/34, U.N. ESCOR, at 26, U.N. Doc. E/1982/82 (1982).
8. *Id.*
9. Declaration on the Rights of Indigenous Peoples, *adopted* 13 Sept. 2007, G.A. Res. 61/295, U.N. GAOR, 61st Sess., U.N. Doc. A/RES/61/295 (2007) [hereinafter UNDRIP].
10. Sub-Commission on Prevention of Discrimination and Protection of Minorities Resolution 1985/22, *adopted* 29 Aug. 1985, U.N. ESCOR, Comm'n on Hum. Rts., Sub-Comm'n on Prev. of Discrim. & Protect. of Min., 38th Sess.
11. The first ILO instrument dealing with indigenous peoples' rights was the Convention Concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries (ILO No. 107), *adopted* 26 June 1957, 328 U.N.T.S.

ILO Convention No. 169,[12] which remains the only internationally binding instrument specifically designed to protect the rights of indigenous peoples.[13] A few years later, in 1993, the WGIP completed its draft declaration and sent it to the Sub-Commission for approval.[14] By that time, the ILO Convention No. 169 and the UN draft declaration had largely defined the normative framework of indigenous rights. This framework was increasingly supported by the practice of the UN Human Rights Committee (HRC) and Committee on the Elimination of Racial Discrimination (CERD), each of which made important contributions to the elaboration of international legal standards applicable to indigenous peoples.[15]

Nevertheless, while the normative content of the indigenous rights regime had been broadly defined, the creation of an effective regime was far from complete. On the one hand, the poor ratification record had inevitably undermined the global impact of ILO No. 169.[16] Further shortcomings derived from the convention's failure to recognize indigenous peoples as "peoples" proper,[17] to confer on them the right to self-determination, and to address

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247 (*entered into force* 2 June 1959) [hereinafter ILO No. 107]. On the assimilationist character of ILO No. 107, see S. James Anaya, Indigenous Peoples in International Law 54-56 (2d ed. 2004). The official decision to revise ILO No. 107 was taken in September 1986 during the Meeting of Experts on the Revision of Convention No. 107. *See* Luis Rodrígues-Piñero, Indigenous Peoples, Postcolonialism, and International Law: The ILO Regime (1919–1989), at 284 (2005).

12. Convention Concerning Indigenous and Tribal Peoples in Independent Countries (ILO No. 169), *adopted* 27 June 1989, 1650 U.N.T.S. 383 (*entered into force* 5 Sept. 1991) [hereinafter ILO No. 169].
13. ILO No. 107 is no longer open to ratification but remains valid for those states that, having previously ratified it, decided not to become parties to ILO No. 169.
14. *Draft Declaration on the Rights of Indigenous Peoples, As Agreed upon by Members of the Working Group on Indigenous Populations at its Eleventh Session*, U.N. ESCOR, Comm'n on Hum. Rts., Sub-Comm'n on Prev. of Discrim. & Protect. of Min., 45th Sess., at 50, U.N. Doc. E/CN.4/Sub.2/1993/29 (1993).
15. The HRC did so by promoting a progressive interpretation of the right to culture included in Article 27 of the International Covenant on Civil and Political Rights. In particular, it recognized that "culture manifests itself in many forms, including a particular way of life associated with the use of land resources, especially in the case of indigenous peoples." *General Comment No. 23 (art. 27), adopted* 6 Apr. 1994, U.N. GAOR, Hum. Rts. Comm., 50th Sess., 1314th mtg., ¶ 7, U.N. Doc. CCPR/C/21/Rev.1/Add.5 (1994). CERD, instead, focused more prominently on the issue of land rights, regularly requesting that States Parties "recognize and protect the rights of indigenous peoples to own, develop, control and use their communal lands, territories and resources." *General Recommendation XXIII on Indigenous Peoples, adopted* 18 Aug. 1997, U.N. GAOR, Comm. on Elim. of Racial Discrim., 51st Sess., at 122, U.N. Doc A/52/18 (1998).
16. ILO No. 169, *supra* note 12, has been ratified by twenty states as of July 2010, leaving the majority of indigenous peoples unable to rely on its legal framework.
17. *Id.* art. 1(3), specifies that "the use of the term peoples in this Convention shall not be construed as having any implications as regards the rights which may attach to the term under international law."

contemporary issues such as indigenous intellectual property rights.[18] On the other hand, despite their important role in promoting indigenous rights at the international level, the HRC and CERD could only partially address the full range of claims legitimately advanced by indigenous peoples. In addition, the issue of coherence became increasingly relevant. The growth of international bodies dealing either specifically or incidentally with indigenous rights highlighted the need for coordinated action in the field. Against this background, the necessity to produce a *universal* and *comprehensive* instrument designed to protect and promote the rights of all the world's indigenous peoples became plainly manifest. Such an instrument was also necessary in order to harmonize the actions of the growing number of international organizations dealing with indigenous peoples' rights. As became clear that the then UN draft declaration could achieve all of the abovementioned goals, increasing attention converged on this document.

Accordingly, the third and crucial stage of the process aimed for the adoption of a UN Declaration on the Rights of Indigenous Peoples. As noted above, the first draft of the document was completed by the WGIP in 1993. A year later it was adopted by the Sub-Commission and sent to the Commission on Human Rights.[19] The fundamental point to stress here is that the draft declaration was essentially a product of indigenous peoples' representatives and the five experts of the WGIP. As aptly observed by Robert Tickner, then the Australian Minister for Aboriginal Affairs, most states did not actively participate in the sessions of the WGIP because they had "reserved their position for UN forums further up the hierarchy, where indigenous voices were not expected to be heard with such strength and determination and where governments had in the past dictated the agenda free of non-governmental . . . interference."[20]

Accordingly, when the draft declaration did reach the Commission on Human Rights, several states expressed their concerns about its radical content. In particular, it should be emphasized that the inclusion in the text of critical rights such as the right to self-determination and to collectively own ancestral lands seriously challenged the principle of state sovereignty, and potentially conflicted with the pursuit of states' primary interests. Equally important, the insistence on the collective dimension of indigenous rights clashed with the Western individualistic conception of human rights that has

18. *See generally* Mpazi Sinjela & Robin Ramcharan, *Protecting Traditional Knowledge and Traditional Medicine of Indigenous Peoples through Intellectual Property Rights: Issues, Challenges and Strategies*, 12 Int'l J. Minority & Group Rts. 1 (2005).
19. *Draft United Nations Declaration on the Rights of Indigenous Peoples*, *adopted* 26 Aug. 1994, Sub-Commission Res. 1994/45, U.N. ESCOR, Comm'n on Hum. Rts., Sub-Comm'n on Prev. of Discrim. & Protect. of Min., 46th Sess., U.N. Doc. E/CN.4/1995/2 (1994).
20. Robert Tickner, Taking a Stand: Land Rights to Reconciliation 303 (2001).

come to dominate the current human rights system. Given these premises, the Commission on Human Rights decided to set up a subsidiary organ, the Working Group on the Draft Declaration (WGDD), for the sole purpose of further elaboration of the text of the draft declaration.[21] Not surprisingly considering the conflicting opinions, this body took more than ten years before agreeing on a final text of the draft and submitting it to the newly created Human Rights Council. After the adoption by the Human Rights Council during its first session in June 2006,[22] the text reached the General Assembly, where it was ultimately adopted in September 2007.[23] Despite being a soft law document, and thus lacking legally-binding force, the UNDRIP has become the key instrument of the indigenous rights regime, confirming the crucial interplay between hard and soft law in the context of indigenous peoples' rights.[24]

In order to better appreciate the importance of the regional initiatives discussed in the second part of the article, the following sections will briefly consider some of the most controversial issues that emerged throughout the discussions at the United Nations.

A. The Issue of Definition

The sessions of both the WGIP and WGDD were characterized by fervent discussions in relation to the issue of definition.[25] On the one hand, states'

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21. The working group was established in 1995 in accordance with Commission on Human Rights Resolution 1995/32 and Economic and Social Council Resolution 1995/32. *Establishment of a Working Group of the Commission on Human Rights To Elaborate a Draft Declaration in Accordance with Paragraph 5 of General Assembly Resolution 49/214 of 23 December 1994, adopted* 3 Mar. 1995, C.H.R. Res. 1995/32, U.N. ESCOR, Comm'n on Hum. Rts., 51st Sess., at 19, U.N. Doc. E/1995/23 (1995); *Establishment of a Working Group of the Commission on Human Rights To Elaborate a Draft Declaration in Accordance with Paragraph 5 of General Assembly Resolution 49/214, adopted* 25 July 1995, ECOSOC Res. 1995/32, U.N. ESCOR, 1995 Substantive Sess., at 44, U.N. Doc. E/1995/95 (1996). It should be emphasized that indigenous organizations were allowed to participate in the sessions of the WGDD regardless of their consultative status with the Economic and Social Council, thus confirming the decision taken with regard to the WGIP.
22. *Draft Declaration on the Rights of Indigenous Peoples, adopted* 29 June 2006, H.R.C. Res. 2006/2, U.N. GAOR, Hum. Rts. Council, 1st Sess., U.N. Doc. A/HRC/1/2 (2006).
23. UNDRIP, *supra* note 9.
24. Mauro Barelli, *The Role of Soft Law in the International Legal System: The Case of the United Nations Declaration on the Rights of Indigenous Peoples*, 58 Int'l & Comp. L.Q. 957 (2009).
25. *See, e.g.*, *Report of the Working Group on Indigenous Populations on Its Second Session*, U.N. ESCOR, Comm'n on Hum. Rts., Sub-Comm'n on Prev. of Discrim. & Protect. of Min., 36th Sess., ¶ ¶ 109–19, U.N. Doc. E/CN.4/Sub.2/1983/22 (1983); *Report of the Working Group on the Draft Declaration*, U.N. ESCOR, Comm'n on Hum. Rts., 52d Sess., ¶ 28, U.N. Doc. E/CN.4/1996/84 (1996).

and indigenous peoples' representatives disagreed as to the eventuality of including a definition of "indigenous peoples" in the text of the declaration. In this regard, whereas indigenous peoples consistently objected to any such attempt,[26] several states emphasized the necessity of creating and including a definition in the document.[27] On the other hand, important uncertainties surrounded the very concept of "indigenous peoples." In particular, a number of Asian and African states adamantly stressed that the concept of indigenous peoples did not apply to their regions. While several Asian governmental representatives expressed such a view openly,[28] the position of African states could be inferred from two main elements. First, their limited participation to the sessions of the two working groups suggested per se a certain disengagement with the issue.[29] Second, and more evidently, a 2006 Resolution of the African Union (AU) Assembly of Head of State and Government, while welcoming the decision of the UN General Assembly to defer the adoption of the UNDRIP, noted that the vast majority of the peoples of Africa are indigenous to the African continent, advancing important reservations with regard to the concept's applicability to the region.[30] Obviously, the emergence of an agreed and inclusive understanding of the concept of indigenous peoples was necessary for the construction of a truly universal

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26. *Working Paper on the Concept of "Indigenous People," by Mrs. Erica-Irene A. Daes*, U.N. ESCOR, Comm'n on Hum. Rts., Sub-Comm'n on Prev. of Discrim. & Protect. of Min., Working Grp. on Indigeous Populations, 14th Sess., ¶ ¶ 35–38, U.N. Doc. E/CN.4/Sub.2/AC.4/1996/2 (1996).
27. According to Kingsbury, these states employed a positivist approach to the issue, namely one that:

    > treats "indigenous peoples" as a legal category requiring precise definition, so that for particular operational purposes it should be possible to determine, on the basis of that definition, exactly who does or does not have a particular status, enjoy a particular right, or assume a particular responsibility.

    Benedict Kingsbury, *"Indigenous Peoples" in International Law: A Constructivist Approach to the Asian Controversy*, 92 Am. J. Int'l L. 414 (1998).
28. For example, India contended that the tribes living in its territory could not be regarded as indigenous given that, among other things, it was not possible to establish whether they actually came before other neighboring communities. Similarly, Bangladesh maintained that:

    > the definition of indigenous peoples should be viewed within the framework of the historical experience of countries in the Western Hemisphere and in Australasia where a colonizing racially distinct people from oversees established settlements and entered into a situation of conflict with the autochthonous population of those countries.

    Report of the Working Group on Indigenous Populations on its Second Session, *supra* note 25, ¶ ¶ 112, 115.
29. Representatives of African indigenous peoples have on more than one occasion expressed their regret at the limited participation of African States. *See, e.g.*, *Report of the Working Group on the Draft Declaration*, U.N. ESCOR, Comm'n on Hum. Rts., 57th Sess., ¶ 20, U.N. Doc. E/CN.4/2001/85 (2001).
30. Decision on the United Nations Declaration on the Rights of Indigenous Peoples, Assembly/AU/Dec.141 (VII), 8th Sess., Jan. 2007, *available at* http://www2.ohchr.org/english/issues/indigenous/declaration.htm.

regime. It was against this background, as will be discussed below, that the pronouncements of two key regional players—the African Commission on Human and Peoples' Rights (African Commission) and the Inter-American Court of Human Rights (IACHR)—importantly contributed to disentangle the concept of indigenous peoples from ideas of colonial subjugation and priority in time with respect to the occupation and use of a specific territory.

B. The Right to Self-determination

Turning to the second issue, it should be noted that the UNDRIP is the first international human rights instrument to expressly recognize the right to self-determination to a sub-state group. Understandably, states expressed a certain discomfort with having such a far-reaching provision included in the document. In particular, several states fully objected to the recognition of an unqualified right to self-determination to indigenous peoples, fearing that their sovereignty and territorial integrity would be seriously undermined.[31] In contrast, indigenous peoples repeatedly stressed that they would not accept any limitation to their right to self-determination, as this would constitute a violation of one of the central principles of the UNDRIP—the principle of equality of peoples. A solution could only be achieved by emphasizing the internal aspect of the right to self-determination, and ruling out the possibility that indigenous self-determination would include, absent special circumstances, a right to secession. Although a number of states were ready to accept such a compromise, others continued to oppose it, considering it an unduly and even potentially harmful concession. As will be discussed in Section IV, the disagreement as to the meaning of indigenous self-determination was to characterize the global debate on indigenous rights, and nearly prevented the adoption of the UNDRIP. In light of these concerns, it was crucial that all the parties involved in the discussion come to an agreement on the meaning and implications of this right.

C. Land Rights

Land rights represented another controversial issue in relation to the emerging indigenous rights regime. Throughout the drafting process, indigenous peoples maintained that control of their lands was vital for the exercise of their right to self-determination as well as their very survival. States, on

31. *See, e.g., Report of the Working Group on the Draft Declaration, supra* note 25, ¶ 47.

their part, were concerned by the potential implications stemming from too extensive a recognition of such rights. In their view, the rights of indigenous peoples to their traditional lands could only be recognized if "the need for Governments to own or regulate resources in the interests of all their citizens"[32] was also acknowledged. Further concerns arose with regard to Article 28 of the UNDRIP establishing a right to restitution or compensation for traditional lands taken from indigenous peoples without their free, prior, and informed consent. States anticipated that this provision would result in an uncontrollable escalation of conflicts between indigenous peoples and third parties that currently owned or occupied the disputed lands.[33] A system so designed, they argued, would simply be unworkable. Given such premises, it comes as no surprise that the divergences on land rights came to represent another important obstacle on the road towards the adoption of the UNDRIP and threatened to undermine its future effectiveness.

III. THE CONTRIBUTION TO THE GLOBAL POLITICAL PROCESS

As noted in Section I, it is normally recognized that regional human rights systems importantly contribute to promote and protect universal human rights. As is evident in the case of the African Charter of Human and Peoples' Rights,[34] regional human rights systems may establish regional human rights instruments which—despite deriving from and operating within the framework of universal human rights—manage to take into account the cultural and political traditions of the concerned region, offering a tailored and constructive response to the human rights problems arising within their geographical area of activity. As a consequence, regional systems tend to be seen as genuine representatives of the region's values and, therefore, may be rewarded with a higher degree of trust by constituent states and peoples.

Without denying the importance of the abovementioned circumstance, regional systems' capacity to contribute to the very construction and consolidation of global human rights regimes should also be acknowledged. In the case of indigenous peoples' rights, for example, it is undoubted that

32. *Report of the Working Group on the Draft Declaration*, U.N. ESCOR, Comm'n on Hum. Rts., 56th Sess., ¶ 93, U.N. Doc. E/CN.4/2000/84 (1999).
33. For example, Australia noted that the land rights regime envisaged in the document was "arbitrary and impossible to implement," and, furthermore, that it did not take into account the fact that "ownership of land might lawfully vest in others." *General Assembly Adopts Declaration on Rights of Indigenous Peoples: "Major Step Forward" Towards Human Rights for All, Says President* (7 Sept. 2007), *available at* http://www.un.org/News/Press/docs/2007/ga10612.doc.htm.
34. African Charter on Human and Peoples' Rights, *adopted* 27 June 1981, O.A.U. Doc. CAB/LEG/67/3 Rev.5, 1520 U.N.T.S. 217 (*entered into force* 21 Oct. 1986).

regional systems will play an important role in promoting and protecting the concerned rights.[35] Nevertheless, the value of certain earlier actions should also be discussed and appreciated. In particular, regional systems both strengthened the global *political* process of recognition of indigenous rights and contributed to the *legal* process of clarification and interpretation of the relative normative content. The following sections will consider the former kind of contribution, whereas Section IV will deal with the latter.

As noted in Section II, the global political process of recognition of indigenous rights began to take shape in the early 1980s. As discussed above, this process gained momentum in the late 1990s, when international efforts converged to produce a universal instrument for the protection of indigenous rights. At the same time, however, important differences with regard to the scope and content of the relevant legal regime emerged both between states and indigenous peoples and among states themselves. Such contrasts were so serious that doubts were cast on more than one occasion as to whether this global project would ever reach a positive conclusion. It is precisely this uncertainty that the gradual engagement of regional human rights systems with indigenous rights should be considered. By promptly responding to the political and normative developments occurring at the international level, regional systems sent an important message to both states and the other international actors involved in this global process, namely that parallel processes of recognition of indigenous peoples' rights were taking place in various parts of the world. By doing so, they were able to exert significant influence on both discussions between governments' and indigenous peoples' representatives and the agenda of those international players dealing with indigenous issues. The crucial point here is that the regional initiatives occurred before the global project of recognition of indigenous rights came to a successful conclusion. Thus, it would be rather difficult to argue that the regional initiatives (which will be discussed below) had no significant effect on the course of the ongoing debates. As will be demonstrated, the Organization of American States (OAS) was not only the first system to intervene, but also the one that most successfully promoted a regional system for the protection of indigenous peoples' rights. This said, the contributions of African and European bodies were also important and should be recognized.

35. For example, it should be noted that the UNDRIP recognizes that "the situation of indigenous peoples varies from region to region and from country to country and that the significance of national and regional particularities and various historical and cultural backgrounds should be taken into consideration." UNDRIP, *supra* note 9, pmbl., ¶ 23.

A. The Inter-American System

Of the regional systems, the OAS has historically been at the forefront in the protection of indigenous rights. In fact, the existence of an "indigenous question" was acknowledged by the Inter-American system at its very establishment in 1948,[36] whereas resolutions dealing specifically with indigenous peoples have been issued by the Inter-American Commission on Human Rights (Inter-American Commission) since the early 1970s.[37]

However, a systematic approach to indigenous rights was not developed until the late 1980s. Inspired by the developments occurring at the global level, the Inter-American Commission increasingly began to address indigenous peoples' rights in a more comprehensive manner. Its 1985 decision on the *Yanomami* case[38] was the first sign of a forthcoming change. Although the Inter-American Commission did not go as far as recognizing specific rights attributable to indigenous peoples, it created the basis for further developments by highlighting that Brazil's failure to take timely and effective measures on behalf of the Yanomami Indians ultimately led to the violation of, inter alia, their rights to life, liberty, and personal security. This important decision was followed by another historic recognition, namely that the legal framework in force at the time was inadequate to address the "special and unique problems faced by the aboriginal populations of the Americas in the area of human rights."[39] As a result of this, in 1989 the Inter-American Commission was entrusted by the OAS General Assembly with the task of preparing "a juridical instrument relative to the rights of

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36. For example, Article 39 of the 1948 Inter-American Charter of Social Guarantees provides that:

> In those countries where the problem of native population exists, the necessary measures shall be taken to provide the Indian protection and assistance, protecting his life, liberty, and property, and defending him from extermination, and safeguarding him from oppression and exploitation, protecting him from poverty, and providing adequate education.

In a less paternalistic way, the same article goes on requesting that specific institutions should be created "to ensure respect for their lands, to legalize their possession by them, and to prevent the invasion of such lands by outsiders." Inter-American Charter of Social Guarantees, *adopted* by the Ninth International Conference of American States, Final Act, Resolution XXXIX, 29 (1948).

37. For example, a 1972 resolution affirmed that "special protection for indigenous populations constitutes a scared commitment of the [American] states." *Resolution Entitled Special Protection for Indigenous Populations, Action to Combat Racism and Racial Discrimination, adopted* 14 Mar. 1973, O.A.S. Doc. OEA/Ser.P.A.G/doc.305/72, rev.1.
38. Inter-American Commission on Human Rights, Resolution No. 12/85 (5 Mar. 1985), Case No. 7615.
39. Preparatory Documents for the Draft American Declaration of the Indigenous Peoples, Justification and Recommendation to the General Assembly of the OAS on the Preparation of an Inter-American Instrument on This Matter (Mar. 1989). Included in Situation of the Human Rights of Indigenous Persons and Peoples in the American, Inter-Am Comm'n on Hum. Rts., O.A.S. Doc. OEA/Ser.L/V/II.108 Doc. 62 (20 Oct. 2000).

the Indian peoples."[40] This step followed by only a few years the decision of the UN WGIP to draft a universal declaration on the rights of indigenous peoples. Interestingly, parallel developments at the United Nations and OAS continued in the following years, demonstrating an important symbiosis between the regional and global dimensions. In 1990 the Inter-American Commission created the Office of the Special Rapporteur on the Rights of Indigenous Peoples.[41] A decade later, a similar initiative was taken by the UN Commission of Human Rights, which appointed a UN Special Rapportuer on the Fundamental Rights and Freedoms of Indigenous People.[42] More importantly, in 1997 the Inter-American Commission would vote and approve the text of the Proposed American Declaration on the Rights of Indigenous Peoples.[43] As discussed in Section II, a few years earlier in 1994, the WGIP had adopted the text of the UN draft declaration. Finally, following the example set by the UN Commission on Human Rights, which in 1995 had created the WGDD to further discuss the content of the UN draft declaration, the OAS General Assembly established a Permanent Council Working Group in 1999 for the purpose of continuing the consideration of the text of the Proposed American Declaration.[44]

In light of the above, it is clear that while developing a regional system for the protection of indigenous rights, the OAS was inspired by and, in turn, inspired the simultaneous process taking place at the global level. From a global perspective, the historic significance of the indigenous question in the region made all the above-mentioned developments even more valuable.[45] As will be discussed later, the OAS engagement with indigenous rights would become even more significant when the Inter American Court of Human Rights began to directly address the issue of indigenous peoples' land rights.

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40. OAS General Assembly Resolution No. 1022/89, *adopted* 18 Nov. 1989.
41. *See* Presentation by Dr. Julio Prado Vallejo, Special Rapporteur of the Inter-American Commission on Human Rights in the process of Preparing the Draft Declaration, O.A.S. Doc. OEA/Ser.K/XVIGT/DADIN/doc.103/02 (13 Nov. 2002).
42. *Human Rights and Indigenous Issues, adopted* 24 Apr. 2001, C.H.R. Res. 2001/57, U.N. ESCOR, Comm'n on Hum. Rts., 57th Sess., 76th mtg., U.N. Doc. E/CN.4/RES/2001/57 (2001).
43. As of today, the only version of the instrument voted on by the Inter-American Commission is the 1997 Proposed American Declaration on the Rights of Indigenous Peoples, approved 26 Feb. 1997, Inter-Am. Comm'n on Hum. Rts., 95th Regular Sess., O.A.S. Doc. OEA/Ser/L/V/.II.95, Doc.6.
44. Proposed American Declaration on the Rights of Indigenous Populations, *adopted* 7 June 1999, O.A.S. Doc. OEA/Ser.P, AG/RES. 1610 (XXIX-O/99).
45. *See, e.g.*, Bartolomé de las Casas, A Short Account of the Destruction of the Indies (2004).

B. The African System

The African and European human rights systems responded to the changes occurring at the global level at a later stage than did the OAS. Nevertheless, they provided important contributions to the developing process. The African delay is partially explained by the region's late engagement with human rights in general. Indeed, human rights became an integral part of the regional legal framework only in 1981 with the adoption of the African Charter on Human and Peoples' Rights. However, historic and sociopolitical circumstances also importantly account for the late action with respect to indigenous peoples' rights. As explained by Frans Viljoen, African post-colonial states had the tendency to associate nation-building with the identification of one privileged ethnic group, with the consequence that several other groups ended up in a vulnerable and marginalized position.[46] It follows that initiatives that aim to recognize significant rights for selected groups might have destabilizing effects on the larger society.[47]

Against this background, it is even more remarkable that an important process of recognition and promotion of indigenous peoples' rights has actually taken place in the region. The first sign of a new approach appeared only a decade or so ago, when the global process of recognition of indigenous rights had entered the third and crucial stage of its evolution. Despite the delayed action, the mechanism progressed speedily and significantly. The gradual involvement of the African human rights system with indigenous issues was certainly inspired by the developments taking place at the global level,[48] yet Africa's involvement in turn would importantly contribute to the realization of the global project for the recognition of indigenous rights. In particular, the opening up of the region to indigenous rights had vital implications for the affirmation of the universal character of the indigenous rights regime.

The turning point in the region was the decision of the African Commission in 2000 to establish the Working Group on Indigenous Populations/Communities in Africa (WGIPC).[49] The initial mandate of the WGIPC

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46. Frans Viljoen, International Human Rights Law in Africa 280 (2007).
47. Indeed, as Viljoen put it, the African traditional denial of the existence of indigenous peoples derives from the fear that this "will expose the fragility of the artifice of the African nation state." *Id.* at 279.
48. It has been aptly observed that the gradual involvement of African human rights institutions in indigenous issues was "largely a regional manifestation of the developments taking place at [sic] international law." Kealeboga N. Bojosi & George Mukundi Wachira, *Protecting Indigenous Peoples in Africa: An Analysis of the Approach of the African Commission on Human and Peoples' Rights*, 6 Afr. Hum. Rts. L.J. 382, 382 (2006).
49. *Resolution on the Rights of Indigenous Peoples' Communities in Africa*, *adopted* 6 Nov. 2000, ACHPR/Res. 51(XXVIII)00, *available at* http://www.achpr.org/english/_doc_target/documentation.html?../resolutions/resolution56_en.html.

was not particularly ambitious, as the body was tasked only to conduct a preliminary investigation on the issue of indigenous peoples' rights in the African region.[50] Yet the study had critical implications for the African approach to the "indigenous question." With this historic step, the African Commission had opened the door to further important developments, which did not take very long indeed to manifest. Since 2001, representatives of indigenous peoples/communities have attended the sessions of the African Commission testifying on their desperate situations and the human rights violations to which they are victim.[51] Contextually, the African Commission has begun to regularly question states' representatives on the situation of the indigenous peoples living within their territory, paying increasing attention to the issue of indigenous rights in its Concluding Observations on state reports.[52] Another important sign of the change affecting the African approach to indigenous rights is the increasingly significant role assigned to the WGIPC. As noted above, this body was initially entrusted with the task of conducting a preliminary investigation on the applicability of the concept of indigenous rights in the region. As a result of its findings, however, the mandate of the body was reformulated and renewed.[53] The functions of the

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50. The WGIPC had to carry out three distinctive investigations: first, examining the concept of indigenous populations/communities in Africa; second, studying the implications of the African Charter on the well being of indigenous populations/communities; and third, considering appropriate recommendations for the monitoring and protection of the rights of indigenous populations/communities in the region. *Id.*
51. Report of the African Commission's Working Group of Experts on Indigenous Populations/Communities 8 (2005), *available at* http://www.iwgia.org/sw2186.asp.
52. In 2005, for example, commenting on the state report produced by Cameroon, the African Commission expressed its concern with regard to the situation "of vulnerable groups in general, [and] in particular that of street children, of indigenous populations/communities and human rights defenders." Concluding Observations on the Periodic Report of Cameroon, Afr. Comm'n on Hum. & Peoples' Rts., 39th Ordinary Sess., 2005, ¶ 14. On another occasion, it took note of the positive steps taken by South Africa with regard to the recognition of the rights of indigenous populations. Concluding Observations and Recommendations on the First Periodic Report of the Republic of South Africa, 38th Ordinary Sess., 2005, ¶ 34. Finally, while commenting on the state report prepared by Uganda in 2006, the African Commission expressed its concern with "the exploitation, the discrimination and the marginalization of indigenous populations." Accordingly, it recommended that Uganda "ensure that the rights of indigenous people and socially disadvantaged are respected." Concluding Observation on the Second Periodic Report of the Republic of Uganda, Afr. Comm'n on Hum. & Peoples' Rts., 40th Ordinary Sess., 2006, ¶¶ 23, 34. *See* International Work Group for Indigenous Affairs, *available at* http://www.iwgia.org/sw25311.asp.
53. The first mandate following the adoption of the report was included in: *Resolution on the Adoption of the "Report of the African Commission's Working Group on Indigenous Populations/Communities," adopted* 20 Nov. 2003, Afr. Comm'n on Hum. & Peoples' Rts., 34th Ordinary Sess. Later, the mandate was renewed on two occasions: in 2005 and 2007. All the pertinent resolutions can be found at International Work Group for Indigenous Affairs, Resolutions & Official Documents, *available at* http://www.iwgia.org/sw8774.asp.

WGIPC now include: gathering information and communications on violations of indigenous populations' human rights and fundamental freedoms, undertaking country visits to study the human rights situation of indigenous populations/communities, and formulating recommendations and proposals on appropriate measures and activities to prevent and remedy violations of the human rights and fundamental freedoms of indigenous populations/communities. Another important development is that the WGIPC is now requested to "Co-operate when relevant and feasible with other international and regional human rights mechanisms, institutions and organizations."[54] In addition, factual evidence shows that the body has been rather active after being invested with a wider mandate. Apart from conducting a number of country visits and missions,[55] it has met and cooperated with several UN bodies, including the Permanent Forum on Indigenous Issues and the Special Rapporteur on the Rights and Freedoms of Indigenous People. The WGIPC has also launched a common project with the ILO on the "Promotion of Indigenous Peoples' Rights through the implementation of the principles of ILO Convention No. 169 and the African Charter on Human and Peoples' Rights."[56]

The emergence of a genuine political willingness to develop a comprehensive approach to indigenous peoples' rights in Africa has had important consequences on the global level. The openness of a region traditionally hostile to minority rights discourses in general provided important support to the ongoing global efforts to establish a universal regime of indigenous rights. The African Commission's commitment to the indigenous cause is not expected to wane in the coming years, either. Indeed, after the adoption of the UNDRIP by the UN General Assembly, the African Commission welcomed the instrument, confidant that it would "become a very valuable tool and a point of reference for its efforts to ensure the promotion and protection of indigenous rights in the African continent."[57]

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54. *Id.*
55. For instance, it conducted several "research and information country visits," notably in Burundi, Libya, and the Republic of Congo in 2005, the Central African Republic and Uganda in 2006, and the Republic of Gabon in 2007. See the various Progress Reports for the ACHPR Working Group on Indigenous Populations/Communities, *available at* http://www.iwgia.org/sw2073.asp.
56. Progress Report for the ACHPR Working Group on Indigenous Populations/Communities, Inter-sessional period between the 39th and 40th ordinary sessions of the ACHPR.
57. *Resolution on the United Nations Declaration on the Rights of Indigenous Peoples*, *adopted* 28 Nov. 2007, ACHPR/Res.121 (XXXXII)07, *available at* http://www.achpr.org/english/resolutions/resolution121_en.htm.

C. The European System

The Inter-American and African regions share two crucial characteristics with respect to the "indigenous question:" first, they both have a large number of indigenous peoples living in their territories,[58] and, second, they both lacked a system of protection of minority rights that could be relied on by indigenous peoples before the establishment of specific mechanisms aimed to recognize and protect their rights. The European region, in contrast, significantly differs in these two respects. First, a far smaller number of indigenous peoples live in the region. The best known of these groups are the Inuit of Greenland and the Sámi, whose living areas are spread across parts of Norway, Sweden, Finland, and Russia's Kola Peninsula.[59] The second difference is that there has been an international treaty aimed to protect the rights of national minorities in the region since 1995: the Council of Europe's Framework Convention on the Protection of National Minorities (FCNM). These two circumstances discouraged the creation of regional mechanisms or bodies designed specifically to protect the rights of indigenous peoples. However, as we shall see, this did not prevent a number of European bodies from following the international normative trend towards the recognition of indigenous rights and, in turn, contributing to its final consolidation.

First, the case of the Framework Convention on the Protection of National Minorities should be considered. The FCNM is designed to protect the rights of national minorities living within the territory of state parties. Accordingly, explicit references to indigenous peoples are found nowhere in its text. However, since minority and indigenous rights belong to the same broad legal area, a number of principles and provisions apply indistinctively to both sub-state groups.[60] Indeed, the Advisory Committee, the independent expert committee responsible for evaluating the implementation of the FCNM,[61] has repeatedly stressed that "recognizing a group of persons as an

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58. *See* International Workgroup for Indigenous Affairs (IGWA), The Indigenous World 2008 (2008).
59. One should also mention the small number of indigenous populations of Russia and other groups living in Eastern Europe such as the Tartars of Ukraine, who might be recognized as indigenous in the near future. In this regard, it should be noted that some authors have argued that "perhaps it is time that 'Europe' elaborated a treaty on indigenous rights: especially in view of the considerable enlargement of the number of indigenous and 'tribal' groups in the Council's sphere as a result of the accession of the Russian Federation and other states of the CIS." Patrick Thornberry & María Amor Martín Estébanez, Minority Rights in Europe 656 (2004).
60. As was discussed above, for example, the UN Human Rights Committee has regularly promoted a dynamic reading of ICCPR Article 27 so that, despite being expressed in terms of minority rights, the article has been regularly invoked to protect the rights of indigenous peoples.
61. The Advisory Committee produces country-specific opinions adopted following a monitoring procedure. This procedure involves the examination of state reports and other

indigenous people does not exclude persons belonging to that group from the protection afforded by the FCNM, since the fact that a group of persons may be entitled to a different form of protection cannot by itself justify their exclusion from other forms of protection."[62]

As noted in Section II, the early 2000s saw disagreements on particular provisions of the draft declaration, which mired the discussions at the United Nations. Against this background, the Advisory Committee began to issue opinions in line with the emergent global regime of indigenous rights, providing additional support to the final acceptance and consolidation of the regime. In particular, the Advisory Committee promoted a dynamic interpretation of Article 5 of the FCNM with a view to extending its applicability to the specific case of indigenous peoples. Article 5 establishes that "the Parties undertake to promote the conditions necessary for persons belonging to national minorities to maintain and develop their culture, and to preserve the essential elements of their identity, namely religion, language, traditions and cultural heritage." Following the practice of the UN Human Rights Committee with respect to Article 27 of the ICCPR, the Advisory Committee regarded the special relationship with their ancestral lands as part of the culture of indigenous peoples. Accordingly, it noted on more than one occasion that the issue of land rights and the use of territory in general was of central relevance to the protection of indigenous cultures and identities.[63] The issue of land rights becomes also relevant in the context of Article 15 of the FCNM, which states "the Parties shall create the conditions necessary for the effective participation of persons belonging to national minorities in cultural, social and economic life and in public affairs, in particular those

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sources of information as well as meetings on the spot with governmental interlocutors, national minority representatives, and other relevant actors. These are then sent to the Committee of Ministers, which will issue its recommendations.

62. *See, e.g.*, Advisory Committee on the Framework Convention for the Protection of National Minorities: Opinion on Finland, ACFC/INF/OP/I(2001)002, 2000, ¶ ¶ 21–29; Advisory Committee on the Framework Convention for the Protection of National Minorities: Opinion on Norway, ACFC/INF/OP/I (2003)003, 2002, ¶ ¶ 9, 19; Advisory Committee on the Framework Convention for the Protection of National Minorities: Opinion on Russia, ACFC/INF/OP/I (2003)005, 2002, ¶ 26; Advisory Committee on the Framework Convention for the Protection of National Minorities: Opinion on Sweden, ACFC/INF/OP/I(2003)006, 2003, ¶ 18.

63. Advisory Committee on the Framework Convention for the Protection of National Minorities: Opinion on Sweden, *supra* note 62, ¶ 30; Advisory Committee on the Framework Convention for the Protection of National Minorities: Second Opinion on Sweden, ACFC/OP/II(2007)006, ¶ 68; Advisory Committee on the Framework Convention for the Protection of National Minorities: Opinion on Finland, *supra* note 62, ¶ 22; Advisory Committee on the Framework Convention for the Protection of National Minorities, Second Opinion on Finland, ACFC/OP/II(2006)003, ¶ 49; Advisory Committee on the Framework Convention for the Protection of National Minorities, Opinion on Russia, *supra* note 62, ¶ 49; Advisory Committee on the Framework Convention for the Protection of National Minorities, Second Opinion on the Russian Federation, *adopted* 11 May 2006, ACFC/OP/II(2006)004, ¶ ¶ 96–106.

affecting them." Indeed, the Advisory Committee recognized that effective participation is of essential importance for indigenous peoples in relation to the use and control of their lands.[64]

A second point should be stressed with regard to the European contribution. As mentioned above, no specific mechanism or body for the protection and promotion of indigenous rights has been created within the European human right system. However, it should be noted that the European Union (EU) has developed a specific policy with regard to indigenous peoples. Despite not being a human rights institution as such, the EU is committed to maintain a strong link between its foreign policy and the promotion of human rights and democracy, and is therefore worth considering.[65] For the purpose of this article, it is of special relevance that in 1998 a Council resolution established the EU guideline principles for engagement with indigenous peoples.[66] The EU's approach to indigenous rights is based on the following points: first, the recognition and protection of the right of indigenous peoples to determine their own social, economic, and cultural development; second, the guarantee of their effective participation in projects which may affect their livelihood and lands; and third, the recognition of the special role played by indigenous peoples in the conservation and sustainability of the environment and natural resources.[67]

These guidelines have been taken into consideration in a number of initiatives in the area of human rights. For example, in 2001 the European Commission adopted a communication stressing the need to adopt a more strategic approach to the European Initiative for Democracy and Human

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64. Advisory Committee on the Framework Convention for the Protection of National Minorities, Opinion on Sweden, *supra* note 62, ¶ 63.
65. In particular, title V of the EU Treaty (Consolidated Version 2002) refers to the establishment of the European Common Foreign and Security Policy (CFSP). More specifically, Article 11 affirms that the objectives of the CFSP shall be: developing and consolidating democracy and the rule of law, and respect for human rights and fundamental freedoms. In addition, Article 177 of the EC Treaty (Article 130u of the EU Treaty) establishes the three priority areas for development cooperation of the European Community. These are sustainable economic and social development of the developing countries; their smooth and gradual integration into the world economy; and the fight against poverty. Generally, community policy in this area is also expected to contribute to the general objectives of developing and consolidating democracy and the rule of law, and respecting human rights and fundamental freedoms. For an account of the ethical dimension of the Foreign Policy of the EU see Urfan Khaliq, Ethical Dimensions of the Foreign Policy of the European Union: A Legal Appraisal (2008); *see also* Values and Principles in European Union Foreign Policy (Sonia Lucarelli & Ian Manners eds., 2006).
66. Development Council Resolution of 30 Nov. 1998 on Indigenous Peoples within the Framework of the Development Cooperation of the Community and the Member States, 13461/98.
67. European Commission, Programming Guide for Strategy Papers (Jan. 2006), *available at* http://ec.europa.eu/development/icenter/repository/F47_indigenous_peoples_fin_en.pdf.

Rights (EIDHR), a program aimed to promote and support human rights and democracy worldwide, and included specific references to the case of indigenous peoples.[68] In particular, the document established that in implementing the EIDHR, the European Commission should "ensure the promotion of gender equality, of children's rights and of the rights of indigenous peoples, through 'mainstreaming' them as cross-cutting issues in all projects."[69] Similarly, references to indigenous peoples' rights were included in the 2006 Strategic Paper for the European Instrument for Democracy and Human Rights (Strategic Paper), the regulation that replaced the previous EIDHR scheme.[70]

The traditional leading role of Europe in the protection of human rights suggests that special attention should be paid to normative developments taking place in the region. Therefore, both the opinions of the Advisory Committee of the FCNM and the principles guiding the foreign policy of the EU with regard to indigenous peoples should be appreciated. It is undoubted that the support of such a key player was crucial in order for indigenous peoples' rights to gain momentum at the global level. After all, it should not be forgotten that all EU countries have consistently supported initiatives aimed to foster the rights of indigenous peoples within the UN human rights machinery.

IV. THE CONTRIBUTION TO THE LEGAL PROCESS OF CLARIFICATION AND INTERPRETATION

The previous sections discussed the contribution of regional systems to the realization of the global project of recognition of indigenous rights. However, as briefly noted in Section I, these influences were not only of a political character, for regional systems made also important contributions in clarifying a number of crucial legal issues that threatened to undermine the effectiveness of the relevant regime. As the following sections will describe, the judicial decisions of the IACHR and the pronouncements of the African Commission provided vital interpretations of the content of this regime, with important consequences with regard to its reception and implementation among states.

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68. *Communication from the Commission to the Council and The European Parliament the European Union's Role in Promoting Human Rights and Democratisation in Third Countries,* COM (2001) 252 final (8 May 2001).
69. *Id.* at 29.
70. Council & Parliament Regulation 1889/2006, Establishing a Financing Instrument for the Promotion of Democracy and Human Rights Worldwide, art. 2, 2006 O.J. (L 386) (EC).

A. The Issue of Definition

Contrary to the views expressed by a number of states, the final decision was made to omit a definition of indigenous peoples in the text of the UNDRIP. As a consequence, the question of "who is indigenous" was left partially unanswered.[71] Indigenous peoples and other international players dealing with indigenous rights maintained that the concept of indigenous peoples should apply indiscriminately throughout the world. In contrast, strong resistance to accepting the applicability of the concept within their territories came from numerous Asian and African countries. As discussed in Section II, promoting an inclusive concept of "indigenous peoples" was key to the establishment of a truly universal regime of indigenous rights. In this regard, the roles played by the African Commission and IACHR have been of primary importance.

The position of the African Commission on this issue is reflected in the Report of the Working Group on Indigenous Peoples and Communities referred to above (Report).[72] The Report, adopted by the African Commission in 2003, develops a concept of indigenous peoples which is both in line with the global normative framework and compatible with the African situation. Crucially, the Report emphasizes that the term "indigenous" should not be intended as "first inhabitant" of a territory exclusively. "Definitely all Africans are indigenous," the Report notes, "however, if the concept of indigenous is exclusively linked with a colonial situation, it leaves us without a suitable concept for analysing internal structural relationships of inequality that have persisted after liberation from colonial dominance."[73] Thus, the Report concludes that the term "indigenous" should suggest special attachment to and use of traditional land, as well as experience of subjugation, marginalization, and dispossession instead of mere prior occupancy of a specific territory.[74] In particular, the following characteristics shared by certain African communities are highlighted: their cultures and ways of life differ considerably from the dominant society; the survival of their particular

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71. Despite the lack of a definition in the UNDRIP, a number of working definitions have been regularly used in UN settings in order to identify indigenous groups. *Note on Criteria Which Might Be Applied When Considering the Concept of Indigenous Peoples by Ms. Erica-Irene Daes*, U.N. ESCOR, Comm'n on Hum. Rts., Sub-Comm'n on Prev. of Discrim. & Protect. Of Min., Working Grp. on Indigeous Populations, 13th Sess., U.N. Doc. E/CN.4/Sub.2/AC.4/1995/3 (1995); *Working Paper on the Concept of "Indigenous People," by Mrs. Erica-Irene A. Daes, supra* note 26.
72. Report of the African Commission's Working Group of Experts on Indigenous Populations/Communities, *supra* note 51.
73. *Id.* at 92.
74. *Id.* Acknowledging the complications that could emerge as a consequence of its findings, however, the WGIPC also specifies that the term indigenous peoples should not be "misused as a chauvinistic term with the aim of achieving rights and positions over and above other ethnic groups or members of the national community." *Id.* at 102.

way of life depends on access and rights to their traditional land and the natural resources thereon; they suffer from discrimination as they are being regarded as less developed and less advanced than other more dominant sectors of society; they often live in inaccessible regions and suffer from various forms of marginalization, both politically and socially; they are subject to domination and exploitation within national political and economic structures that are commonly designed to reflect the interests and activities of the national majority.[75] Because of these characteristics, the Report goes on, these peoples are prevented from "being able to genuinely participate in deciding on their own future and forms of development," with the consequence that their cultures and ways of life are put at risk.[76]

Importantly, the IACHR has supported the approach of the African Commission, taking the view that being "indigenous" does not necessarily imply being the "first inhabitant" of a certain land. In two recent cases the IACHR extended its existing jurisprudence on indigenous rights to some Afro-indigenous communities living in Suriname despite the fact that they are descendants of African slaves who were resettled in Suriname only in the eighteenth century in context of the slave trade.[77] The Court found that these groups are nevertheless entitled to special protection of their communal property rights by virtue of their culture, special relationship with their land, and long connection with the region.[78]

In sum, the African Commission and IACHR made important contributions in clarifying the meaning of the expression "indigenous peoples" in international law. In particular, they provided legal recognition to a modern concept of "indigenous peoples," notably one that has evolved from a narrow understanding bound to ideas of historical precedence and colonial subjugation towards a more inclusive and functional understanding. Given the traditional resistance to accepting the concept of indigenous peoples in Africa, the Report endorsed by the African Commission was of paramount value. Furthermore, considering that those Asian states, which sought to oppose the applicability of indigenous rights in their territories, relied on the same narrow understanding of the concept of "indigenous peoples." It is clear that the African Commission's dynamic approach had important global implications.

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75. *Id.* at 89, 90.
76. *Id.*
77. Moiwana Community v. Suriname, Inter-Am. Ct. H.R. (ser. C) No. 124 (15 June 2005); Saramaka People v. Suriname, Inter-Am. Ct. H.R. (ser. C) No. 172, (28 Nov. 2007). For a broad discussion of the theme see Gerald Torres, *Indigenous Peoples, Afro-Indigenous Peoples and Reparations, in* Reparations for Indigenous Peoples: International & Comparative Perspectives 117 (Federico Lenzerini ed., 2008).
78. *Saramaka People*, Inter-Am. Ct. H.R. (ser. C) No. 172, ¶ ¶ 84, 96.

B. The Right to Self-Determination

Article 3 of the UNDRIP establishes that "indigenous peoples 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." During the negotiations on the draft declaration, a number of states proposed alternative versions of the article with a view to emphasizing the internal aspect of this right, and, contextually, ruling out the possibility that indigenous self-determination would include a right to independence.[79] Ultimately, none of these proposals were accepted.

When the draft declaration reached the UN General Assembly in November 2007, the African Group of States introduced a resolution to defer the adoption of the text.[80] The essence of the African states' reservations was captured by a subsequent decision of the Assembly of Heads of State and Government of the African Union Assembly.[81] Welcoming the decision to not adopt the declaration in its then form, the Assembly highlighted a number of "matters of fundamental political and constitutional concern" that demanded additional consideration on the part of African states. Primary among those concerns were the right to self-determination and the principle of national and territorial integrity.[82] In particular, the Assembly expressed its concern about "the political, economic, social and constitutional implications," that the Declaration, and in particular self-determination, could have on the African continent.[83] In addition, it made an explicit reference to the UN General Assembly Declaration on the Granting of Independence to Colonial Countries and Peoples,[84] an occurrence indicating the conservative approach to self-determination taken by the Assembly. If self-determination, as suggested by the abovementioned General Assembly Declaration, was

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79. Among others, the representative of Venezuela proposed the following wording: "Indigenous peoples have a right to self-determination. By virtue of that right they have the right to autonomy, or self-government in matter relating to their internal and local affairs," *Report of the Working Group on the Draft Declaration*, U.N. ESCOR, Comm'n on Hum. Rts., 53d Sess., ¶ 318, U.N. Doc. E/CN.4/1997/102 (1996).
80. *Namibia: Amendments to Draft Resolution A/C.3/61/L.18/Rev.1*, U.N. GAOR, Third Comm., 61st Sess., U.N. Doc. A/C.3/61/L.57/Rev.1 (2006) (introduced by Namibia on behalf of the African Group of States). The Third Committee of the UN General Assembly adopted the resolution by a vote of 82 in favor and 67 against (with 25 abstentions).
81. Decision on the United Nations Declaration on the Rights of Indigenous Peoples, *supra* note 30.
82. *Id.* ¶ 6. The other matters of concern were: the definition of indigenous peoples; ownership of land and resources; and establishment of distinct political and economic institutions.
83. *Id.* ¶ 3.
84. Declaration on the Granting of Independence to Colonial Countries and Peoples, *adopted* 14 Dec. 1960, G.A. Res. 1514 (XV), U.N. GAOR, 15th Sess., at 66, U.N. Doc. A/4684 (1961).

intended as including a right to independence, it should be expected that states would strenuously oppose it. Indeed, the Decision of the AU Assembly also recalled a 1964 resolution of the Organization of African Unity, in which all member states pledged "to respect borders existing on their achievement of national independence."[85] From this, it is evident that the majority of African states regarded the recognition of the right to self-determination to indigenous peoples, in the form endorsed by the then text of the declaration, as being incompatible with the principle of territorial integrity.

Against this background, the African Commission took the lead issuing an Advisory Opinion on the UN draft declaration in the attempt to clarify the contents and implications of the most critical provisions of the text.[86] In this opinion, the African Commission noted that the concept of self-determination has evolved since the time of decolonization, and that at present it is compatible with the unity and territorial integrity of states.[87] In dismissing the perceived problem arising from the issue of territorial integrity, the African Commission also emphasized that the protection of indigenous rights was to be interpreted:

> [W]ithin the context of a strict respect for the inviolability of borders and of the obligation to preserve the territorial integrity of State Parties, in conformity with the principles and values enshrined in the Constitutive Act of the AU, the African Charter on Human and Peoples' Rights and the UN Charter.[88]

Following the circulation of this opinion, the African Group of States proposed an amended version of the text and began negotiations with states and indigenous delegates with a view to agreeing upon a final text to be adopted by the UN General Assembly. As requested by the African Commission, the provision on the right to self-determination, namely Article 3, was not an object of discussion and was maintained in its original form, as adamantly demanded by indigenous peoples. In contrast, a number of safeguards were included in other parts of the UNDRIP.[89] Thanks to the agreement reached by the African states and indigenous peoples the text was adopted by a vast majority of votes.

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85. Decision on the United Nations Declaration on the Rights of Indigenous Peoples, *supra* note 30, ¶ 2.
86. *Advisory Opinion of the African Commission on Human and Peoples' Rights on the United Nations Declaration on the Rights of Indigenous Peoples, adopted* May 2007, Afr. Comm'n on Hum. & People's Rts., 41st Ord. Sess., *available at* http://www.achpr.org/english/Special%20Mechanisms/Indegenous/Advisory%20opinion_eng.pdf.
87. *Id.* ¶ 27.
88. *Id.* ¶ 6.
89. "[N]othing in this Declaration may be . . . construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States." *Id.* art. 46.

C. Land Rights

The last controversial issue to be considered is that of land rights. As discussed in Section II, during the negotiations on the UN draft declaration a number of states opposed the recognition of such rights, especially the right to restitution, pointing out that the land rights regime envisaged in the document was unworkable and could not be implemented. Notwithstanding these objections, the final version of the UNDRIP included several strong provisions on land rights such as Article 26, on the right of indigenous peoples to own and control their lands, territories, and resources, and Article 28, on the right to redress, including restitution, for the lands that were lost without their free, prior, and informed consent. In light of the centrality of these rights, it was important to clarify the actual content of the regime and prove that it could work in practice.

Against this background, the IACHR developed a significant jurisprudence on the issue of indigenous land rights, departing from Article 21 of the American Convention on Human Rights (American Convention) on the right to property.[90] The IACHR promoted an extensive interpretation of this provision taking into account the most recent international normative developments in the sphere of indigenous peoples' rights.[91] It established that Article 21 also protects the right of the members of indigenous groups to collectively own their ancestral lands. This groundbreaking interpretation, introduced for the first time in the 2001 case, *Mayagna (Sumo) Awas Tingni Community* v. *Nicaragua,*[92] and later confirmed in a number of equally significant cases,[93] stems from the preliminary recognition of the special relationship between indigenous peoples and their land. On this basis, the IACHR held that members of those groups who are characterized by a traditional collective form of organization, a spiritual relationship with their ancestor lands, and a communal system of ownership of the said lands, are

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90. Article 21 of the Convention reads as follows:

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

American Convention on Human Rights, *signed* 22 Nov. 1969, art. 21, O.A.S. Doc. OEA/Ser.L/V/II.23, doc. 21, rev. 6 (1979), O.A.S.T.S. No. 36, 1144 U.N.T.S. 143 (*entered into force* 18 July 1978).

91. Barelli, *The Role of Soft Law in the International Legal System, supra* note 24.

92. Mayagna (Sumo) Awas Tingni Cmty. v. Nicaragua, Inter-Am. Ct. H.R. (ser. C) No. 79 (31 Aug. 2001).

93. Comunidad Indigena Yakye Axa v. Paraguay, Inter-Am. Ct. H.R. (ser. C) No. 125, ¶ ¶ 124, 137 (17 June 2005); Sawhoyamaxa Indigenous Cmty. v. Paraguay, Inter-Am. Ct. H.R. (ser. C) No. 146, ¶ ¶ 118–21 (29 Mar. 2006); Saramaka People v. Suriname, Inter-Am. Ct. H.R. (ser. C) No. 172, ¶ ¶ 87–96 (28 Nov. 2007).

entitled to the protection provided by Article 21.[94] Importantly, the IACHR also established that the protection of indigenous land rights accorded under Article 21 of the American Convention must be read in combination with a contextual right to restitution. Initially, it observed that "the members of indigenous peoples who have unwillingly left their traditional lands, or lost possession thereof, maintain property rights thereto, even though they lack legal title, unless the lands have been lawfully transferred to third parties in good faith."[95] In addition, the IACHR stressed that under the latter circumstance, indigenous peoples are not left without protection altogether. Despite lacking property rights, it noted, indigenous peoples have a right to restitution with regard to those lands. As noted above, a number of states maintained that establishing such a right would unjustly discriminate against third parties and would ultimately make the system unworkable. In this context, the IACHR's approach to this issue becomes of special value.

As a premise, the IACHR noted that Article 21 of the American Convention protects communal properties of indigenous communities as much as private properties of individuals.[96] It follows that competing claims of indigenous peoples and individuals need to be balanced and assessed on an ad hoc basis. The general rule upheld by the IACHR is that restrictions to the right to property, whether they affect indigenous peoples or individuals, must meet a number of specific requirements: first, they must be established by law; second, they must be necessary and proportional; and third, they must be aimed towards attaining a legitimate goal in a democratic society.[97] Thus, not every restriction to the enjoyment and exercise of the right to property is permissible.[98] This said, in case of clashes between private property and claims for ancestral property, the IACHR emphasized that "states must

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94. In the words of the IACHR:

> [A]mong indigenous peoples there is a communitarian tradition regarding a communal form of collective property of the land, in the sense that ownership of the land is not centered on an individual but rather on the group and its community. Indigenous groups, by the fact of their very existence, have the right to live freely in their own territory; the close ties of indigenous people with the land must be recognized and understood as the fundamental basis of their cultures, their spiritual life, their integrity, and their economic survival. For indigenous communities, 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.

Mayagna (Sumo) Awas Tingni Cmty., Inter-Am. Ct. H.R. (ser. C) No. 79, ¶ 149.

95. *Sawhoyamaxa Indigenous Cmty., supra* note 93, ¶ 128.
96. *Comunidad Indigena Yakye Axa*, Inter-Am. Ct. H.R. (ser. C) No. 125, ¶ 143.
97. *Id.* ¶ 144.
98. Accordingly, the IACHR held that "the necessity of legally established restrictions will depend on whether they are geared toward satisfying an imperative public interest." Therefore, it would be insufficient "to prove, for example, that the law fulfils a useful or timely purpose." Furthermore, the Court explained that the criterion of proportionality is "based on the restriction being closely adjusted to the attainment of a legitimate objective, interfering as little as possible with the effective exercise of the restricted right." Finally, the IACHR stated that "for the restrictions to be compatible with the Convention,

take into account that indigenous territorial rights encompass a broader and different concept that relates to the collective right to survival as an organized people, with control over their habitat as a necessary condition for reproduction of their culture, for their own development and to carry out their life aspirations."[99] It follows, the IACHR continued, that "disregarding the ancestral right of the members of the indigenous communities to their territories could affect other basic rights, such as the right to cultural identity and to the very survival of the indigenous communities and their members."[100] At the same time, the IACHR observed that "restriction of the right of private individuals to private property might be necessary to attain the collective objective of preserving cultural identities in a democratic and pluralist society, in the sense given to this by the American Convention; and it could be proportional, if fair compensation is paid to those affected pursuant to Article 21(2) of the Convention."[101]

This apparent predisposition for deciding in favor of indigenous peoples, however, is counterbalanced by two important elements. First, the IACHR introduced a time restriction on the exercise of the group's property rights. More specifically, it found that the right is enforceable as long as the special relationship between an indigenous community and its land continue to exist.[102] According to the IACHR, this "relationship may be expressed in different ways, depending on the particular indigenous people involved and the specific circumstances surrounding it, and it may include the traditional use or presence, be it through spiritual or ceremonial ties; settlements or sporadic cultivation; seasonal or nomadic gathering, hunting, and fishing; the use of natural resources associated with their customs and any other element characterizing their culture."[103] Second, the IACHR made clear that recognizing the right of restitution in one specific case does not imply "that every time there is a conflict between the territorial interests of private individuals or of the State and those of the members of the indigenous communities, the latter must prevail over the former."[104]

The IACHR has also addressed the critical issue of natural resources found on and within indigenous peoples' lands. In affirming that Article 21 of the American Convention recognizes and protects these resources, the IACHR noted that this article "should not be interpreted in a way that pre-

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they must be justified by collective objectives that, because of their importance, clearly prevail over the necessity of full enjoyment of the restricted right." This is in line with the general prescription of Article 21(1) according to which the law may subordinate the use and enjoyment of property to the interest of society. *Id.* ¶ 145.

99. *Id.* ¶ 146.
100. *Id.* ¶ 147.
101. *Id.* ¶ 148.
102. *Sawhoyamaxa Indigenous Cmty, supra* note 93, ¶131.
103. *Id.*
104. *Comunidad Indigena Yakye Axa, supra* note 93, ¶ 149.

vents the state from granting any type of concession for the exploration and extraction of natural recourses," within a territory owned by an indigenous community.[105] Thus, under certain conditions, states may legitimately restrict the rights of indigenous peoples to own and control these resources.[106] Following the same principles elaborated in the context of land rights, the Court found that restrictions are possible only if they are established by law, are necessary and proportional, and have the aim of achieving a legitimate objective in a democratic society. However, the IACHR listed four additional obligations that states must respect in order to safeguard the special relationship between indigenous peoples and their territories, and, in turn, their very existence: first, to ensure the effective participation of the members of the community in any development or investment, plan; second, to ensure that the concerned people have a reasonable share of the benefits; third, to perform or supervise prior environmental and social impact assessments; and fourth, to implement adequate safeguards and mechanism so as to avoid that the concerned activities significantly affect the conditions of the traditional lands and natural resources at stake.[107]

In sum, the IACHR elaborated a coherent and workable system of adjudication with regard to indigenous peoples' land rights, including a right to restitution and rights over natural resources. Crucially, the IACHR's balanced analysis of competing claims showed that land rights can be recognized within existing domestic constitutional frameworks without necessary prejudice to states' or third parties' interests. By doing so, the IACHR contributed significantly to elucidating the regime of land rights included in the UNDRIP.[108]

V. CONCLUSIONS

The emergence of indigenous rights represents a remarkable novelty in the field of international human rights. The recognition of critical rights to in-

105. Saramaka People v. Suriname, Inter-Am. Ct. H.R. (ser. C) No. 172, ¶ 126 (28 Nov. 2007).

106. The IACHR specified that the resources to be protected are those "necessary for the very survival, development and continuation of [indigenous peoples'] way of life." However, activities related to resources that are not necessary for the survival of indigenous peoples will nevertheless fall within the scope of Article 21 if they have important repercussions on resources that are necessary for the survival of these peoples. *Saramaka People*, Inter-Am. Ct. H.R. (ser. C) No. 172, ¶ 103.

107. *Id.* ¶ 126.

108. It should be noted that a recent decision of the African Commission on Human and Peoples' Rights concerning, among others, the land rights of an indigenous community living in Kenya fully endorsed the jurisprudence of the IACHR. *See* Centre for Minority Rights Development (Kenya) v. Kenya, Afr. Comm'n on Hum. & Peoples' Rts., 276/2003 (4 Feb. 2010), *available at* http://www.escr-net.org/usr_doc/Endorois_Decision.pdf.

digenous peoples, such as the right to self-determination and to collectively own their traditional lands, not only significantly differentiates the regime of indigenous rights from that of national minorities, but also, and crucially, challenges traditional conceptions of state sovereignty and the conventional Western view that human rights are individual in character. The implications stemming from these innovations should, therefore, be carefully considered and evaluated. At the same time, the process that led to the emergence of these *sui generis* rights should be aptly analyzed. Among the distinguishing features that characterized this process, the interplay between the international and regional layers is of special interest. It is widely recognized that regional human rights systems can play a crucial role in strengthening the effectiveness of universal human rights. There is little doubt that this will also hold true with regard to indigenous peoples' rights. However, regional bodies can also play a significant role in the very process of the construction and consolidation of an emerging international regime. In the case of indigenous peoples' rights, the parallel legal and quasi-legal processes taking place within the context of the Inter-American, African, and European regional systems importantly supported and strengthened the global political process of recognition of indigenous rights. On another level, they have also contributed to the legal process of clarification and interpretation of a number of critical provisions of the regime, facilitating its reception and implementation among states. In doing so, regional bodies have successfully combined instruments of varied content and legal effects such as declarations, opinions, comments, and judicial decisions. Obviously, each regional player contributed in a singular way and to a different degree. Nevertheless, the combined effect of the concerned actions had an important impact on the global level. This impact proves that in the context of a more dynamic international legal system where the interaction between hard and soft law gradually becomes more valuable, and where non-state actors are permitted a more significant role in the process of international law-making, the increasing number of political and legal initiatives taking place at the regional level can have an important effect on the emergence of new global human rights regimes.