

# Amerindian Land and Natural Resources Tenure under the International Human Rights Law<sup>\*</sup>

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*“Os índios padeceram e padecem – síntese do drama de toda a América Latina – a maldição de sua própria riqueza.” Eduardo Galeano<sup>1</sup>*

## I- Introduction

Indigenous communities can differ from each other profoundly, from the Japanese Ainu and the Nordic Saami to all the different Latin-American groups. Still, there are common features. Indeed, in the cultural complexity of an indigenous community, the territory in which they live and work has an intrinsic value that goes beyond a mere matter of possession and subsistence, for the land is a cornerstone of their integrity, labor, spiritual life and culture, and an indispensable prerequisite for the maintenance of their way of life and cultural legacy.

It is a new dawn for the Amerindian. Simultaneously to the important advances in indigenous rights under international law, globalization brings new winds for old practices of natural resources' plunder and cultural extinction.

“Analogous to the Gold Rush that tore lands away from American Indian communities 150 years ago, the lands of indigenous peoples are sought for commercial potential by today's global enterprises.

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<sup>1</sup> “The indians had suffered and still suffer - synthesis of the drama of all Latin America - the curse of its own riches” (my translation). In: GALEANO, Eduardo. *Veias Abertas da América Latina*. 26<sup>a</sup>. Ed. Trad. Galeno de Freitas. Rio de Janeiro: Paz e Terra, 1988, p.59. In U.S. this book edition was under the title of “Open Veins of Latin America: Five Centuries of the Pillage of a Continent”.

Faced with the threatened loss and destruction of lands and resources vital to their cultural practices and essential for their survival, indigenous communities throughout the Americas are forging new tools to address these challenges”<sup>2</sup>.

The present work intends to examine some of the juridical “new tools” that can and should be used to defend the indigenous cause.

## **II- International Law and the denial of the Other**

Modern international law as configured nowadays was born in the 16th century, with the discovery / invasion of the American Continent, the beginning of the colonization process and the theological and juridical thinking of Iberian thinkers, especially the Dominican Francisco de Vitoria<sup>3</sup>. He and other Spanish theologians of that time used the Christian system of Natural Law to reformulate papal basis for legitimating Spanish property titles in the Americas<sup>4</sup>. According to Vitoria, the indigenous inhabitants of the Americas were free from papal subjugation under the terms of Natural Law. However, this very Law, in the form of the Law of Peoples, or *ius gentium*, while universal, was bound to all Indians, regardless of their consent<sup>5</sup>. Thus, violations of these binding norms of international conduct perpetrated by Indians could allow Spain to exert control over their lives and lands, and to govern the New World’s “recalcitrant” and “uncivilized” peoples.

Therefore, Francisco de Vitoria, although regarded as a very advanced thinker of his time and even a defendant of indigenous peoples<sup>6</sup>, justified what the prominent Latin-American contemporary philosopher Enrique Dussel calls the “civilization myth” that

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<sup>2</sup> SEWARD, Timothy; WILLIS, F. Michael. Protecting And Preserving Indigenous Communities In The Americas, Human Rights, 33-SPG, Spring, 2006, p.21.

<sup>3</sup> For a succinct study on Vitoria as the father of international law, mainly for its conception of *totus orbis*, see TRUYOL Y SERRA, Antonio. El Derecho de Gentes como Orden Universal. In: MANGAS, A. (ed.), *La Escuela de Salamanca y el Derecho Internacional en América. Del pasado al futuro*, Salamanca, 1993, pp. 17 ss..

<sup>4</sup> WILLIAMS Jr., Robert A. The medieval and renaissance origins of the status of the american indian in western legal thought, *Southern California Law Review*, University of Southern California. Volume 57, Issue 1, pp.1-99, November 1983.

<sup>5</sup> *Id.*, pp. 9-11.

<sup>6</sup> See, for example, REISMAN, W. Michael. Protecting Indigenous Rights in International Adjudication. *American Journal of International Law*, v. 89, April 1995, p.351.

legitimizes colonization processes, because according to Vitoria, for instance, if the Christian faith is proposed to the “barbarians” [that is how he refers to the Amerindians] in likely means, they become obliged to accept it, falling in a mortal sin if otherwise<sup>7</sup>. That is, in Dussel’s terms: the Amerindian, the non-European, is still the “barbarian”, the Other who is still un-covered, the one to be “civilized”. Therefore, Vitoria represents another fetter in the modern excluding rationality, which guides all models of colonial exploitation<sup>8</sup>. The legitimacy basis of indigenous peoples’ oppression by the “civilized”, Christian European, which can and was implied from Vitoria’s thinking, influenced all the major internationalists of subsequent centuries, and, as a tragic consequence, a hierarchical conception of the legal status of the Amerindian remained in western legal and political thought<sup>9</sup>.

The impacts of the European invasion, conquest and colonization on the original men and women of the American Continent were brutal<sup>10</sup>. Millions of indigenous peoples were vanquished because of diseases, the battles of *conquista*, slavery and forced labor practices which provoked what is known as the American Holocaust, the first genocide of Modernity<sup>11</sup>.

International law as a whole, from Vitoria’s Law of Peoples and the later positive international law of the 19<sup>th</sup> century to very recently, made its contribution to the justification of indigenous peoples’ oppression and colonialism and post-colonialism’s

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<sup>7</sup> See RALGEL, Jesús Antonio de la Torre. *El derecho como manifestación Del humanismo clásico español: Francisco de Vitória, Luis de Molina y Francisco Suárez*, In: WOLKMER, Antonio Carlos (coord.) *Fundamentos do Humanismo Jurídico no Ocidente*. São Paulo: Manole, 2005, p. 58.

<sup>8</sup> DAL RI JÚNIOR, Arno. *História do Direito Internacional; Comércio e Moeda; Cidadania e Nacionalidade*. Florianópolis: Fundação Boiteux, 2004. p. 67.

<sup>9</sup> *Id.*, pp. 93-99.

<sup>10</sup> Colonization has been addressed in uncountable works. For an amazing and also terrifying analysis of those initial times of colonization, see LAS CASAS, Bartolomeu. *História Geral das Índias*. Trad. Heraldo Barbuy. São Paulo: Edições Cultura, 1944. For a broader work on Latin America, from colonization to post-colonization times, see GALEANO, op. cit. For a different approach under the lens of the Latin-American Philosophy of Liberation, see DUSSEL, Enrique. *1492 - O encobrimento do outro. A origem do mito da modernidade*. Petrópolis: Vozes, 1993. The latter presents an interesting theory of how Europe was peripheral vis-à-vis the Muslim World until the 15<sup>th</sup> century, and how it only becomes the “center of the world”, the “center of universal history”, when it experiences the slaughter and violent submission of the Other, the Amerindian. Moreover, Dussel traces a certain pattern of rational and philosophical discourse that justifies the alleged European superiority and that perpetuates in western thought until nowadays, legitimating, for instance, the inequalities of first world and third world countries.

<sup>11</sup> This idea of “the first genocide of Modernity” is obviously most plausible and present in many authors, including HACHIM LARA, Luis. *¿Por qué volver a los textos coloniales?: Herencias y coherencias del pensamiento americano en el discurso colonial*. *Literatura y Lingüística*, 2006, no.17, p.16-17.

inequalities. The U.S. - Great Britain Arbitration Tribunal of 1926 provided with a remarkable précis of the Amerindian historical status:

“From the time of the discovery of America the Indian tribes have been treated as under the exclusive protection of the power which by discovery or conquest or cession held the land which they occupied. [...] The power which had sovereignty over the land has always been held the sole judge of its relations with the tribes within its domain. The rights in this respect acquired by discovery have been held exclusive”<sup>12</sup>.

The expression “acquired by discovery” is especially offensive to indigenous land rights, for the tribunal does not consider the historical background of the alleged “discovered” lands, and the suffering that this discovery acquiring of lands brought to the Amerindians. Additionally, as REISMAN observes, the notion of “exclusive national protection” means the denial of any international protection or interference in favor of indigenous peoples, who were naturally under the domestic jurisdiction of the concerned sovereign State<sup>13</sup>.

Bartolomeu de Las Casas, who was a Spanish thinker and theologian from Vitoria’s epoch, brought forward a genuine defense of indigenous peoples by denouncing the unnamable atrocities made by the Spaniards with a sole purpose: gold, the spoliation of natural riches<sup>14</sup>. Indeed, indigenous peoples suffered in those times the greed of the conquistadores, and one of the central conflicts was the exploitation of natural resources – needed for European development in the times of Mercantilism – which was based on a triangle of interests whose actors were the incipient bourgeoisie, the Church and the Iberian Crowns. More than 500 years later, descendants of those Indians who managed to survive still suffer the threat of cultural extinction because their lands happen to have natural riches. In a pattern sadly analogous to colonization times, the State cedes indigenous lands to

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<sup>12</sup> Cayuga Indians (Gr. Brit.) v. United States, 6 R.I.A.A. 173 (U.S.- Brit. Arb. Trib. 1926). Apud: REISMAN, W. Michael, loc. cit.

<sup>13</sup> Id.

<sup>14</sup> LAS CASAS, cit. For Dussel, Las Casas does not perpetuate the denial of the Other, and is one of the first examples of a praxis of Liberation. See DUSSEL, Enrique. Op. cit., p. 41.

enterprises, usually multinational corporations, to exploit natural resources in the name of its “development” and the “public interest”, as a regular exercise of the country’s territorial sovereignty. In the case of Latin America, the gross profit made from the exploitations does not bring development to the State in question, and rather benefit other countries, which allow one to draw another analogous feature, since in colonial times and throughout the 17<sup>th</sup> and 18<sup>th</sup> century, other European States benefited from Iberian dirty works in the Americas<sup>15</sup>. Unfortunately, the logic of the denial of the Other prevailed, and Las Casas’ positions were not successful in transforming the international rule of law. Indigenous peoples would remain juridically uncovered until the major change in international law history: the rise of international human rights law.

### **III- The emergence of International Human Rights Law in universal and regional levels**

International human rights law is defined as “the law that deals with the protection of individuals and groups against violations of internationally guaranteed rights, and with the promotion of these rights”<sup>16</sup>. This branch of international law has many historical antecedents, such as Grotius’ doctrine of humanitarian intervention, the Treaties of Paris (1956) and Berlin (1878), the Mandates System of the League of Nations, the Geneva Conventions on Slavery and on War Prisoners (1926 and 1929, respectively)<sup>17</sup>. However, one could not positively affirm that there was a conscious and organized concern over the theme of human rights before the foundation of the United Nations<sup>18</sup>.

The main historical fact that intensifies the process of international human rights law consciousness and formation is the World War II, for the magnitude of the conflicts, the outrageous number of dead and wounded and all the destruction that was caused, and also for its ideological framework, which was very distinct from World War I. On the latter,

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<sup>15</sup> In this sense, Galeano’s topics are more than suggestive: “Spain had the cow, but the others drink the milk” (GALEANO, cit., p.34-39) and “Brazilian gold contribution to England’s progress” (Id., p.66-69).

<sup>16</sup> BUERGENTHAL, Thomas. SHELTON, Dinah. STEWART, David P. *International Human Rights in a nutshell*. 3<sup>rd</sup> ed. St. Paul, MN: West Group, 2002, p.1.

<sup>17</sup> For a historical retrospect of the evolution of human rights, see COMPARATO, Fábio Konder. *A afirmação histórica dos direitos humanos*. 3. ed., rev. e ampl. -. São Paulo: Saraiva, 2003.

<sup>18</sup> REZEK, José Francisco. *Direito internacional público: curso elementar*. 10. ed. São Paulo: Saraiva, 2005, p.218-219.

COMPARATO says the World War II was deflagrated on a project of subjugation of the peoples deemed inferior by the Nazi regime, likewise the episode of discovery and conquest of the Americas. From this context, the following idea emerged and was extended to many nations: “humanity’s survival demanded the cooperation of all peoples in a reorganization of international relations based on the unconditional respect to human dignity”<sup>19</sup>.

The notion of universal respect for human rights was promoted with the adoption of the Universal Declaration of the Rights of Men by the UN General Assembly, in 1948. Since General Assembly Resolutions do not bind UN Member States, the Declaration was not legally binding. Therefore, two international human rights law treaties (thus binding to their parties) were formulated, adopted by General Assembly Resolution 2200A (XXI) and opened for signature, ratification and accession in 1966: the International Covenant on Civil and Political Rights (hereinafter ICCPR) and the International Covenant on Economic, Social and Cultural Rights. The three instruments – declaration and covenants - are together known as the International Bill of Rights and from them on several other international human rights instruments were drafted. As a result of this process, there was a broad human rights codification which complemented the meaning of the expression “human rights and fundamental freedoms” in the UN Charter, and the obligations of UN Member-States set forth in its articles 55 and 56<sup>20</sup>.

At the same time that international human rights law was developed in the UN framework, an Inter-American Human Rights System was built. In 1948 – in the same historical context of the beginning of the Cold War, right after the end of World War II - the Ninth International Conference of American States took place, gathering representants of 21 countries of the American continent. This meeting resulted in the creation of the Organization of the American States (OAS) by the drafting of the Charter of the Organization of American States, which entered into force in 1951. In the same meeting, the very first cornerstone of what became later the mentioned Inter-American Human Rights System was adopted: the American Declaration of the Rights and Duties of Man.

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<sup>19</sup> “...a sobrevivência da humanidade exigia a colaboração de todos os povos, na reorganização das relações internacionais com base no respeito incondicional à dignidade humana.” In: COMPARATO, op. cit.,p.210.

<sup>20</sup> MUGWANYA, George William. Realizing Universal Human Rights Norms Through Regional Human Rights Mechanisms: Reinvigorating The African System. *Indiana International and Comparative Law Review*, v. 10, 1999.

Even though this declaration preceded the Universal Declaration by almost seven months, making it the first international human rights instrument, it was strongly influenced by the *travaux preparatoires* of the latter. Analogous to the adoption of the two International Covenants in the universal level, in November 1969, an international human rights treaty, the “Pact of San Jose” or “American Convention on Human Rights” (hereinafter “American Convention”), was adopted in the regional level, at the Inter-American Specialized Conference on Human Rights, entering into force after the eleventh State ratification, in 1978.

#### **IV- Protecting indigenous land rights in the universal level: the International Covenant on Civil and Political Rights**

The ICCPR does not directly refer to indigenous peoples or land rights. However, its dispositions may be claimed by indigenous communities, especially the rights affirmed in article 27 of the covenant, which addresses the rights of minorities, given that indigenous peoples are a type of ethnic minority. Moreover, as demonstrated below, indigenous land claims may also be supported on the rights assured in art. 27.

Article 27 reads as follows:

“In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language.”<sup>21</sup>

The Human Rights Committee (hereinafter HRC) is an organ constituted under the terms of ICCPR, part IV, and its main role is to monitor and ensure State compliance with the covenant’s norms. In order further to achieve ICCPR purposes, a First Optional Protocol to the Covenant on Civil and Political Rights was adopted and opened for signature in 1966, entering into force in 23 March 1976 after the 10<sup>th</sup> ratification. This OP conceded to the HRC “competence (...) to receive and consider communications from

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<sup>21</sup> International Covenant on Civil and Political Rights, art. 27.

individuals subject to its jurisdiction who claim to be victims of a violation by that State Party of any of the rights set forth in the Covenant”<sup>22</sup>.

Indigenous peoples could, then, bring their claims to HRC through the individual communications procedure. To do so, they must follow the formal requirements prior to the admissibility procedure<sup>23</sup>, and also the admissibility requisites<sup>24</sup>. Once the petition is declared admissible, the State party is informed and must “submit to the Committee written explanations or statements clarifying the matter under consideration and the remedy, if any, that may have been taken by that State”<sup>25</sup> within six months. The State may argue that the petition is not admissible, even after it was accepted as admissible. The State’s explanations or statements will be forwarded to the petitioner, who may submit “additional written information or observation”<sup>26</sup> and, in the case of existing State’s questions on admissibility, the Committee “may review a decision that a communication is admissible”<sup>27</sup>. The Committee, in the light of all information provided to it by parties, petitioner and State in question, decides whether a violation occurred or not.

Besides the individual communications procedure, the HRC may adopt general comments, whose function is to present official interpretations on the contents of human rights norms vis-à-vis specific themes, in light of all its experience from monitoring functions, other UN agencies’ material and, in some cases, other international law instruments. The main goal of the general comments is to assist States parties with the full observance and implementation of the ICCPR, since the treaty text can not be exhaustive when describing the rights, their applicability, the obligations and the means for implementing the provisions<sup>28</sup>. In 1994, The HRC issued an official document in which it interprets the rights expressed in article 27, called “General Comment No. 23: The rights of minorities (Art. 27)”<sup>29</sup>. In this general comment, the HRC stressed that the enjoyment of the

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<sup>22</sup> Art. 1.

<sup>23</sup> See, mainly, HRC Rules of Procedure, rule 80.

<sup>24</sup> See *Id.*, rules 87-92; OP, art. 3, 5 para.2 (a) (b).

<sup>25</sup> HRC Rules of Procedure, rule 93, para.2.

<sup>26</sup> *Id.*, rule 93, para.3.

<sup>27</sup> *Id.*, rule 93, para.4.

<sup>28</sup> See, generally, HRI/GEN/1/Rev.7, “Compilation of General Comments and General Recommendations adopted by Human Rights Treaty Bodies”, retrievable at [http://www.unhchr.ch/tbs/doc.nsf/0/ca12c3a4ea8d6c53c1256d500056e56f/\\$FILE/G0441302.doc](http://www.unhchr.ch/tbs/doc.nsf/0/ca12c3a4ea8d6c53c1256d500056e56f/$FILE/G0441302.doc) (last visit on January 12<sup>th</sup> 2006)

<sup>29</sup> General Comment No. 23: The rights of minorities (Art. 27): 08/04/94.

rights to which article 27 relates does not prejudice the sovereignty and territorial integrity of a State party, and, moreover, the rights of minorities include the enjoyment of a certain culture, which is, on the subject of indigenous peoples, for instance, consist in a way of life which is closely associated with territory and use of its resources<sup>30</sup>. The same understanding is even clearer in paragraph 7 of the same document:

“With regard to the exercise of the cultural rights protected under article 27, the Committee observes 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. That right may include such traditional activities as fishing or hunting and the right to live in reserves protected by law. The enjoyment of those rights may require positive legal measures of protection and measures to ensure the effective participation of members of minority communities in decisions which affect them.”<sup>31</sup>

This general comment was influenced by the HRC case law under the OP individual communications procedure, especially indigenous peoples’ related cases<sup>32</sup>. Although the general comment is not binding, its juridical character is uncontested, for it is “a valuable jurisprudential resource”<sup>33</sup> that provides an official interpretation of a norm which binds all the States parties to the ICCPR, and it is adopted by the very organ which was created by the treaty to promote ICCPR’s effectiveness.

### **The Ominayak v. Canada Case**

In 1984, indigenous peoples from Canada submitted a petition to the HRC under the OP. The case, known as the Ominayak v. Canada Case<sup>34</sup>, also known as the “Lubicon Lake Band Case”, was the first indigenous land rights claim under article 27. The case was

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<sup>30</sup> Id., para. 3.2.

<sup>31</sup> Id., para.7.

<sup>32</sup> Id., notes 1, 2 and 5.

<sup>33</sup> JOSEPH, Sarah; SCHULTZ, Jenny; CASTAN, Melissa. *The International Covenant On Civil And Political Rights: Cases, Materials, And Commentaries*. 2d Ed. Oxford: Oxford University Press, 2004, p.21.

<sup>34</sup> *Ominayak v. Canada*, Communication No. 167/1984, CCPR/C/38/D/167/1984 (1990).

brought by Chief Bernard Ominayak, the leader of the Band people. The Band people have been living in a territory of 10.000 square kilometers in the region of Lake Lubicon for time immemorial. They kept their traditional culture, religion, political structure and subsistence economy<sup>35</sup>. The provincial government of Alberta, where the Lubicon Lake region is situated, granted concessions to private enterprises to exploit oil, gas, timber and other natural resources in the region. The conceded area corresponded to almost the entire Band territory. The exploitation provoked a huge impact on the Band people, making their traditional means of subsistence impossible and putting their unique way of life in danger of extinction. The petitioner alleged several violations of ICCPR provisions, including article 1 (right to self-determination, that is, the “right to determine freely its political status and pursue its economic, social and cultural development, as well as the right to dispose freely of its natural wealth and resources and not to be deprived of its own means of subsistence”<sup>36</sup>) and article 27, since the enjoyment of their culture was clearly menaced. After a long procedure in which the petitioner and the State actively participated, the HRC decided that it was incompetent to accept claims on self-determination, for this is a collective right, and the OP allows the committee only to observe individual rights claimed by individuals, and not peoples<sup>37</sup>. However, the committee fortunately ruled that there was a violation of article 27, and that the rights of minorities “include the right of persons, in community with others, to engage in economic and social activities which are part of the culture of the community to which they belong”.<sup>38</sup>

## **I. Lansman et al. vs. Finland Case**

In 1990, the same year that the HRC reached its decision on the Ominayak Case, municipal authorities in Finland granted to a private company a permission to extract 5,000 cubic metres of anorthosite, a special type of stone, from the mount Etela-Riutusvaara<sup>39</sup>. Mr. Ilmari Lansman, a Saami member, along with 47 other members of the Muotkatunturi

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<sup>35</sup> Id., para.2.2.

<sup>36</sup> Id., para. 2.1.

<sup>37</sup> *Ominayak v. Canada*, para. 32.1. This was also the committee’s understanding in another case brought by Canadian indigenous peoples which was not about land related claims: *Miqmaq v. Canada*, Communication No. 205/1986, CCPR/C/43/D/205/1986 (1991).

<sup>38</sup> Id., 32.2

<sup>39</sup> *I. Lansman et al. vs. Finland (Comunicación N° 511/1992)*, CCPR/C/52/D/511/1992, para. 2.3.

Herdsmen's Committee, brought the issue to the HRC in 1992<sup>40</sup>, claiming that Finland violated article 27 of the ICCPR because mount Etelä-Riutusvaara “is a sacred place of the old Sami religion”<sup>41</sup>, and “the quarrying and transport of anorthosite would disturb their reindeer herding activities and the complex system of reindeer fences determined by the natural environment”<sup>42</sup>. In support of their claims, I. Lansman et al refer to the decisions of the HRC in the cases of *Ivan Kitok v. Sweden*<sup>43</sup> and *Ominayak v. Canada*, and also to ILO Convention No.169<sup>44</sup>. Finland stressed that the quarrying was lawful under its law provisions<sup>45</sup>, the area was state-owned<sup>46</sup>, and, even though reindeer herding is part of Saami’s cultural rights under article 27<sup>47</sup>, the extraction did not provoke any other negative effects on reindeer husbandry<sup>48</sup>, and “not every interference can be regarded as a denial of rights within the meaning of article 27 ... (but) restrictions must have both a reasonable and objective justification and be consistent with the other provisions of the Covenant”<sup>49</sup>. Then, Finland concludes stating that article 27 was not violated in the quarrying permission and activities because the rights of minorities had been promoted by Finland through legislative measures and the Saami people from the region was able to continue to practice reindeer husbandry and was not forced to abandon their lifestyle<sup>50</sup>. In its decision, the HRC once again recalled that “economic activities may come within the ambit of article 27, if they are an essential element of the culture of an ethnic community”, and reindeer herding of the ethnic minority in question is an example.<sup>51</sup> The committee also ruled that the right to enjoy culture is not to be determined *in abstracto*, and minorities who adapted their methods of traditional activities “over the years and practice it with the help of modern technology” are

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<sup>40</sup> *I. Lansman et al. vs. Finland (Comunicación N° 511/1992)*, CCPR/C/52/D/511/1992.

<sup>41</sup> *Id.*, para. 2.6.

<sup>42</sup> *Id.*, para. 2.5.

<sup>43</sup> *Kitok vs. Sweden*, *Report of the Human Rights Committee*, 43 UN GAOR Supp. (No.40) at 221, UN Doc. A/43/40 (1988). This case was also brought by an indigenous individual from the Saami ethny, and, although it did not refer to logging and natural resources’ exploitation issues, it is another interesting piece of jurisprudence for the HRC decided, likewise in the *Omynaiak v. Canada* case, that traditional economic activities are protected under article 27 of the ICCPR. *Id.*

<sup>44</sup> *I. Lansman et al. vs. Finland*, para. 3.2.

<sup>45</sup> *Id.*, para. 4.1.

<sup>46</sup> *Id.*, para. 7.1.

<sup>47</sup> *Id.*, para. 7.3.

<sup>48</sup> *Id.*, para. 7.6.

<sup>49</sup> *I. Lansman et al. vs. Finland*, para. 7.9. Finland based this argument on the Views adopted by the community in the *Sandra Lovelace v. Canada* case. See *Lovelace vs. Canada* (No. 24/1977), *Report of the Human Rights Committee*, 36 UN GAOR Supp. (No. 40) at 166, UN Doc. A/36/40 (1981).

<sup>50</sup> *I. Lansman et al. vs. Finland*, para. 7.13.

<sup>51</sup> *Id.*, para. 9.2.

not prevented from invoking article 27 of the Covenant<sup>52</sup>. The committee also acknowledged the petitioner's concern with the environment<sup>53</sup>. In the light of a controversy between the petitioner and the State-party concerning the interpretation of article 27<sup>54</sup>, the HRC ruled that, although article 27 requires that a member of a minority shall not be denied the right to enjoy his / her culture, measures that have a certain limited impact on the way of life of persons belonging to a minority will not necessarily amount to a violation of this provision<sup>55</sup>. In this sense, "quarrying on the slopes of Mt. Riutusvaara, in the amount that has already taken place, does not constitute a denial of the authors' right, under article 27, to enjoy their own culture"<sup>56</sup>. Furthermore, the indigenous people concerned were consulted during the proceedings<sup>57</sup>, Finland seems to have taken measures to minimize impacts on the environment and on reindeer herding activity<sup>58</sup>, and this activity "does not appear to have been adversely affected by such quarrying as has occurred"<sup>59</sup>. However, the committee acknowledged that Finland is under a duty to bear in mind that economic activities must "be carried out in a way that the authors continue to benefit from reindeer husbandry", and future extensions of logging contracts or new concessions may constitute a violation of article 27.<sup>60</sup>

### **J. Lansman et al. vs. Finland Case**

In 1995, one year after the decision on the I. Lansman et al. vs. Finland Case, Jouni E. Länsman and other members of the Saami filled another petition to the HRC<sup>61</sup>. This case may be regarded as a continuation of the previous case, and in fact there are many similarities between them. The authors argued that the subsequent exploiting activities in

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<sup>52</sup> Id., para. 9.3.

<sup>53</sup> Id.

<sup>54</sup> Id., para. 8.4.

<sup>55</sup> Id., para. 9.4.

<sup>56</sup> Id., para. 9.6.

<sup>57</sup> Id. For the duty to consult indigenous peoples in international law, see ANAYA, James. Indigenous Peoples' participatory rights in relation to decisions about natural resource extraction: the more fundamental issue of what rights Indigenous Peoples have in lands and resources, *Arizona Journal of International and Comparative Law*, v. 22, Spring, 2005, p.7 ss.

<sup>58</sup> Id., para. 9.7.

<sup>59</sup> Supra note 49.

<sup>60</sup> Id., para. 9.8.

<sup>61</sup> *Jouni Lansman et al. vs. Finland (Communication No. 671/1995)*, CCPR/C/58/D/671/1995.

their region, including not only logging but road construction and future mining<sup>62</sup> were putting their traditional livelihood in danger, especially their reindeer herding activities, thus violating article 27 of the ICCPR. Finland argued that this communication was in many aspects similar to the previous case, and, likewise, the conducted activities and plans only have “certain limited impact” and were reconciled with reindeer husbandry<sup>63</sup>, and the Saami were consulted<sup>64</sup>. Once again, the HRC recalled that economic activities may come within the ambit of article 27, if they are an essential element of the culture of an ethnic community<sup>65</sup>, and, given that the Saami were undoubtedly consulted<sup>66</sup> and also that it is not clear whether the impact of logging plans would be such as to amount to a denial of the authors' rights under article 27<sup>67</sup>, the committee ruled that no violation occurred<sup>68</sup>. And also as in the *I.Lansman v. Finland* case, the HRC considered “important to point out that the State party must bear in mind when taking steps affecting the rights under article 27, that though different activities in themselves may not constitute a violation of this article, such activities, taken together, may erode the rights of Sami people to enjoy their own culture”<sup>69</sup>.

### **Some considerations**

From the cases above mentioned, one must stress the importance of those precedents for they linked lands and natural resources to indigenous peoples' cultures and also limited State's exercise of territorial sovereignty to the fulfillment of duties to respect indigenous social and economic activities and to consult them.

Moreover, although forced relocation of indigenous communities was not mentioned in General Comment No. 23 and the committee has not yet decided a case on the issue, one may add to the cited duties a respect for native freedom from relocation, based on HRC's concluding observations with regard to Chile's State Report of 1999. As ROOS stated:

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<sup>62</sup> See *Id.*, para. 2.6 to 2.8.

<sup>63</sup> *Id.*, para. 6.7.

<sup>64</sup> *Id.*, para.6.1. This was strongly contested by the authors. See *Id.*, para. 7.8.

<sup>65</sup> *Id.*, para.10.2.

<sup>66</sup> *Id.*, para. 10.5.

<sup>67</sup> *Id.*, para.10.5 and 10.6.

<sup>68</sup> *Id.*

<sup>69</sup> *Id.*, para. 10.7.

“In the observations, the committee raised concerns about hydroelectric and other development projects that might affect the way of life and the rights of persons belonging to the Mapuche and other indigenous communities, and concluded that ‘relocation and compensation may not be appropriate in order to comply with article 27 of the Covenant,’ and that ‘when planning actions that affect members of indigenous communities, the State party must pay primary attention to the sustainability of the indigenous culture and way of life and to the participation of members of indigenous communities in decisions that affect them.’”<sup>70</sup>

But, at the same time the HRC protects land rights through cultural prerogatives, it had the opportunity to rule on indigenous traditional tenure rights, and yet it did not. In the *Jouni Lansman et al. vs. Finland* case, for instance, the authors raised the question of property rights, when they expressed that the Saami were “generally dissatisfied with the way the State forest authorities exercise their powers as ‘landowners’”<sup>71</sup>. On another big issue for indigenous peoples, their relation to the principle of self-determination, the HRC repeatedly dismissed any arguments on preliminary bases, when it could, in my opinion, face them and contribute to the just recognition of indigenous rights in the international dimension. Finally, despite the fact that indigenous advocacy shall use the Committee as another means for bringing their claims and perhaps succeed against corporate interests, as the *Ominayak v. Canada* Case demonstrated, the other rulings of the HRC show that only a “substantial impact”<sup>72</sup> on indigenous communities may constitute a violation of article 27, and therefore, “, courts need not fear that a cultural rights claim that does not allege purpose might permit actions for trivial harms”<sup>73</sup>. Still, the HRC Jurisprudence represented an important advance that would be strengthened in the Inter-American Human Rights System.

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<sup>70</sup> Stefanie Ricarda Roos. Development Genocide And Ethnocide: Does International Law Curtail Development-Induced Displacement Through The Prohibition Of Genocide And Ethnocide? *Human Rights Brief*, v.9, issue 3, Spring 2002, pp.20-21.

<sup>71</sup> *Jouni Lansman et al. vs. Finland* (Communication No. 671/1995), CCPR/C/58/D/671/1995, para.7.8.

<sup>72</sup> See both *Lansman v. Finland* cases.

<sup>73</sup> HERZ, Richard L. Litigating Environmental Abuses Under The Alien Tort Claims Act: A Practical Assessment. *Virginia Journal of International Law*, v.40, Winter 2000, p.631.

## V- Indigenous land rights in the Inter-American System

The Inter-American Human Rights System is based on two main organs: the Inter-American Commission on Human Rights (hereinafter “the Commission” or “IACHR”) and the The Inter-American Court of Human Rights (hereinafter “the Inter-American Court” or “the Court”). The Inter-American Commission on Human Rights (hereinafter “IACHR”) was created in 1959 with the goal of promoting human rights in the Americas. In 1960 the OAS Permanent Council adopted the “Statute of the Commission”, since the OAS Charter did not originally established the commission. The Charter was amended later, by the Protocol of Buenos Aires of 1970, which changed the commission’s status to a formal OAS organ. Since 1965 the commission is competent to hear cases brought by individual petitions. Like the HRC, the Commission functions as a “quasi-judicial” organ and its rulings in this procedure are not binding. There is a considerable jurisprudence of the commission on indigenous peoples<sup>74</sup>. In 1984, a case submitted on behalf the Miskito Indians of Nicaragua was examined and the commission, assuming that the American Convention addressed only generically ethnic groups’ rights (referring to art. 1.1 of the convention) and following article 29 of the American Convention, which deals with standards for interpretation of the latter, referred to article 27 of the ICCPR, of which Nicaragua was a party<sup>75</sup>. The commission, then, “found that the ‘special legal protections’ accorded the Indians for the preservation of their cultural identity should extend to ‘the aspects linked to productive organization, which includes, among other things, the issue of ancestral and communal lands.’”<sup>76</sup> One year later, while examining a case against Brazil, the commission also referred to ICCPR, but Brazil, differently from Nicaragua, was not even a party to the covenant by that time. The commission “viewed a series of incursions into Yanomami ancestral lands as a threat not only to the Yanomami's physical well-being

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<sup>74</sup> Cf. DULITZKY, Ariel. Los pueblos indígenas: Jurisprudencia del Sistema Interamericano de Protección de los derechos humano. *Revista IIDH*, n.26, 1998, p.137 ss.

<sup>75</sup> *Id.*, p.144-145.

<sup>76</sup> Report on the Situation of Human Rights of a Segment of the Nicaraguan Population of Miskito Origin and Resolution on the Friendly Settlement Procedure Regarding the Human Rights Situation of a Segment of the Nicaraguan Population of Miskito Origin, Inter-Am. Comm. on Hum. Rts., O.A.S. Doc. OEA/Ser.UV/II.62, doc. 10 rev. 3 (1983), O.A.S. Doc. OEA/Ser.UV/II.62, doc. 26 (1984) (Case No. 7964 (Nicaragua)), at 81. Apud ANAYA, James. International Human Rights And Indigenous Peoples: The Move Toward The Multicultural State. *Arizona Journal of International and Comparative Law*, v.21, Spring, 2004, p.28.

but also to their culture and traditions”<sup>77</sup> and also cited article 27 “thus indicating the norm's character as general or customary international law”<sup>78</sup>. ANAYA stresses that this same understanding of article 27 was presented by the commission in its report on Ecuador, “which included an analysis of the situation of indigenous peoples in the Amazon region who had experienced environmental damage as a result of oil development”<sup>79</sup>.

Regardless of the commission’s advances on indigenous peoples’ rights in its jurisprudence, for it conceived land related issues as linked to cultural rights as the HRC, it was only with the *Awes Tingni* Case that the Inter-American Commission would address land and natural resources’ issues in a fully judicial proceeding before the Inter-American Court of Human Rights.

### **The *Awes Tingni v. Nicaragua* Case**

In 1995, a portion of the *Awes Tingni* indigenous people’s territory was granted by the government of Nicaragua to a Korean multinational corporation for logging natural resources. Nicaragua does recognize legally indigenous lands, but submitted that the lands conceded to exploitation belonged to the State, and not to the *Awes Tingni* community, since there was no formal title. After bringing the matter to Nicaraguan Judiciary, representatives of the *Awes Tingni* community brought the issue to the Inter-American Commission on Human Rights, because the higher courts of Nicaragua ruled that the concession was unconstitutional and yet Nicaragua kept the permission and the plans to resource exploitation. The commission examined the indigenous people’s claims and found Nicaragua in violation of several provisions of the American Convention, demanding it to demarcate *Awes Tingni*’s communal territory and respect their rights over lands and natural resources. The Inter-American Commission brought the case to the Inter-American Court of Human Rights, which heard the case in November 2000.

The indigenous peoples, represented by the commission, provided evidence from legal experts, such as the prominent internationalist and indigenist lawyer James Anaya,

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<sup>77</sup> ANAYA, loc. cit.

<sup>78</sup> Id., p.29. See also DULITZKY, cit., pp.140-141.

<sup>79</sup> Report on the Situation of Human Rights in Ecuador, Inter-Am. Comm. on Hum. Rts., O.A.S. Doc. OEA/Ser.L/V/II.96, doc 10, rev. 1, Chapter IX (Apr. 24 1997). Apud ANAYA, ibid.

and also anthropological analysis, made by Harvard's professor Theodore MacDonald, in order to support their claims of traditional title of the lands concerned. In its turn, the Nicaraguan government insisted on its respect towards indigenous peoples' rights, which were enhanced through administrative and legal measures, but, because those lands belonged to the State, and the community in question had already had sufficient lands previously demarcated, the logging cession was lawful. Moreover, Nicaragua argued that the Awas Tingni was not truly a traditional indigenous people of the region in dispute, and, in fact, it was ethnically mixed and composed of members who have moved to those lands only recently.

The Court examined the merits and sentenced that Nicaragua failed to respect the community's human rights, incurring in the violation of the American Convention. The core legal provision which supported the court's decision was article 21 of the American Convention. This provision was interpreted in a surprisingly progressive manner, coherent to the logic of historical evolution of human rights law and consequently its treaties' provisions. Article 21 of the Convention, which is entitled "The Right to Property", affirms that:

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

It is important to notice that when the article was first conceived, it was surely not thought as ranging communal indigenous ownership to land and natural resources. The right to property as a fundamental right or human right actually served especially the interests of the same corporations that menace the environment and indigenous peoples by exploiting natural resources (!). In its interpretation of the article, the Court acted under the terms of article 29 of the American Convention, and used other international law provisions

and Nicaragua's domestic law as legal support. Nicaragua was compelled to refrain from acts of action and omission towards any activity which may affect the enjoyment of indigenous property in the region and to adopt legal, administrative and any other measures to effectively delimitate, demarcate and give property titles of the lands to the indigenous communities, in light of their own customs and mores.

This decision was the first to recognize land tenure and need for due demarcation of indigenous lands. It was later followed in the *Yakye Axa Indigenous Community v. Paraguay Case*, in which the Court recognized indigenous peoples' ownership of land and natural resources as related to the enjoyment of their culture, and determined that Paraguay should identify the traditional lands of the Yakye Axa indigenous community. In another case recently ruled by the Inter-American Court, the *Moiwana Community versus Suriname Case*, the court decided that members of the Moiwana Community should be regarded as legitimate owners of their traditional territories, in response of the community's claims under article 21.

## **VI- Conclusions**

Indigenous peoples of Latin America will find most likely to be efficient to bring their land and natural resources' claims under international human rights law through the Inter-American System. This is affirmed based on three reasons: (i) there are more Latin-American countries under the competence of the Inter-American Court of Human Rights than of the Human Rights Committee's individual communications' procedure; (ii) the Inter-American System is potentially more effective in bringing decisions to effectiveness than the Universal System; (iii) the precedents of the Inter-American System and the applied laws meet more approximately indigenous land and natural resources' submissions.

While a major country such as Brazil does not recognize the HRC's competence to hear individual petitions, the individual petitions' procedure of the Inter-American Commission, which is very alike the HRC one, is bound to all OAS Members, and, furthermore, the following Latin-American states have accepted the Inter-American Court's jurisdiction: Argentina, Bolivia, Brazil, Chile, Colombia, Costa Rica, Dominican Republic,

Ecuador, El Salvador, Guatemala, Honduras, Mexico, Nicaragua, Panama, Paraguay, Peru, Uruguay, and Venezuela.

One of the features of the Universal System adopted by 1966 covenants was “the absence of decision-making powers of a judicial or quasi-judicial character vested in the treaty bodies”.<sup>80</sup> Indeed, the HRC’s decisions are not legally binding, and are frequently disrespected by States. This was in contrast with the Inter-American System, in which the Court’s decision is legally binding and more likely to be enforced.

Lastly, the core of the conclusions reached by HRC’s relevant jurisprudence on indigenous rights, which relies on article 27, was acknowledged in the Inter-American Commission’s precedents. However, the limitations here pointed of the HRC Jurisprudence were overpassed by the Inter-American Court. With the landmark case of the *Awas Tingni Community v. Nicaragua*, the court added another perspective to the horizon of indigenous advocacy by creating an unrivaled historical international precedent on indigenous land rights based on the human right to property.

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<sup>80</sup> CRAWFORD, James. *The UN Human Rights Treaty System: a system in a crisis?*, In: ALSTON, Philip & CRAWFORD, James (editors). *The Future of UN Human Rights Treaty Monitoring*. Cambridge (Inglaterra): Cambridge University Press, 2000, p.2.