Contours of an Indigenous Peoples’ Right to Water in Latin America under International Law

Marco Parriciatu\textsuperscript{a} & Francesco Sindico\textsuperscript{b}
\textsuperscript{a) Visiting Researcher at the Centre for Energy, Petroleum and Mineral Law and Policy, University of Dundee, UK (2011) marco.parriciatu2@unibo.it
\textsuperscript{b) Reader in International Environmental Law, School of Law, University of Strathclyde, Glasgow, UK and Honorary Lecturer in International Law, Centre For Energy, Petroleum and Mineral Law and Policy, University of Dundee, UK francesco.sindico@strath.ac.uk

Abstract

This article critically assesses the nature and the content of a possible human right to water for Indigenous People in the Latin American context. On the one hand, after introducing the deliberately unclear definition of Indigenous People, the article considers that a human right to water is embedded in Indigenous Peoples’ customary laws, which, according to legal pluralism, are to be considered as a legitimate source of law. The article then moves to the content of a possible human right to water for Indigenous People in the Latin American context. The importance of the jurisprudence of the Inter American Court of Human Rights is highlighted, and the obligation for States to consult with Indigenous People when dealing with their water resources is hailed as one of the key elements of a human right to water.

Keywords

Indigenous People; human rights; water; Latin America; Inter-American Court of Human Rights

1. Introduction

Latin America is home to numerous Indigenous People’s communities.\textsuperscript{1} They have lived in the region for centuries settling there well in advance than the Spanish and Portuguese colonisers. In some cases, they still live very isolated

\textsuperscript{1} The authors would like to thank two anonymous referees for their useful comments.

\textsuperscript{1} Article 1 of the Indigenous Peoples’ Kyoto Water Declaration states: ‘We were placed in a sacred manner on this earth, each in our own sacred and traditional lands and territories to care for all of creation and to care for water’. Third World Water Forum, Indigenous Peoples’ Kyoto Water Declaration [2003], available at: <http://portal.unesco.org/science/en/ev.php-URL_ID=3886&URL_DO=DO_TOPIC&URL_SECTION=201.html> accessed 28 September 2012.
from the rest of the world and follow ancestral ways of life. In other cases, they have been assimilated to non-Indigenous Peoples’ culture and life style. For Indigenous People in Latin America – as elsewhere – water is crucial. While one could argue that water is important for everybody, and the current discussions surrounding access to water as a human right seems to prove this point, it is undeniable that access to water reaches a different, quasi-spiritual, degree of importance when indigenous communities’ are involved. For them water – as most other natural resources, such as the forest and the land itself in some cases – is an integral part of their sense of community. Water resources in Latin America, within regions populated by indigenous communities, face multiple threats, such as pollution and over-exploitation. These threats are not that different from what water resources are facing in other regions. While some improvements have been made over the years in respect to the international recognition of Indigenous Peoples, they can still be labelled as ‘vulnerable’ in Latin America, since Indigenous Peoples are rarely involved as legitimate stakeholders in water-related decision-making process.

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3) Kyoto Water Declaration (n 1), para 3: ‘Our relationship with our lands, territories and water is the fundamental physical cultural and spiritual basis for our existence.

4) D Craig and E Gachenga, ‘The Recognition of Indigenous Customary Law in Water Resources Management (2009) 20 (5/6) in Water Law 279: ‘Indigenous peoples have integral and unique relationship with the earth (including land, seas, resources, wildlife) and they do not fragment or compartmentalize their rights and obligations relating to their ecological, spiritual, cultural and economic and social dimensions’.

5) See examples in Mikkelsen (n 2) and for a study of the relationship between Indigenous People and water in one specific Latin American country see N Yáñez and R Molina, Las aguas indígenas en Chile (LOM Ediciones, 2011).

6) Land entitlement and their rights over natural resources can be mentioned here. For example by 2004 Brazil had recognized over 15 million hectares as indigenous reserves; see UN Economic and Social Affairs, Department of Economic and Social Affairs, State of the World’s Indigenous Peoples (UN, 2009) 28 (State of the World’s Indigenous Peoples).

7) The case between Ecuador and the oil giant Chevron regarding indigenous communities in the Amazon is just one example of how vulnerable these groups still are. In 1993 people from within Ecuador sued Texaco (which then merged with Chevron) in US courts for oil related pollution in the Amazon region. Texaco claimed that the US courts could not hear the court since the Ecuadorian judiciary system was the proper competent forum. In 2002 the US Court ruled in favour of Texaco on the basis that the oil company agreed to submit to the Latin American country court system if the plaintiffs brought a case in Ecuador. In 2003 this happened and a case was opened in Lago Agrio, Ecuador. While the Ecuadorian case was on-going Chevron filed an investor state dispute against the government of Ecuador before the Permanent Court of Arbitration claiming that due process was being violated within the domestic Ecuadorian case thereby violating terms of the US Ecuador Bilateral Investment Treaty. See Chevron Corp. & Texaco Petroleum Co. v Republic of Ecuador, PCA Case No. 2009-23. Chevron
Against this background, this paper wishes to critically assess the question of Indigenous Peoples’ right to water in Latin America. Section 2 will attempt to provide an answer to a key crucial initial question: what do we mean by Indigenous People? Section three then looks closely at the peculiar nature of Indigenous Peoples’ rights over land and natural resources as *lex specialis* under international law as well as at the emergence of an *ad-hoc* right to water for them. Following on, section four analyzes the role that the Inter-American Human Rights System has played out *vis-à-vis* Indigenous Peoples’ rights to water in Latin America. In particular, the jurisprudence of the Inter-American Court of Human Rights (hereinafter IACtHR), which has been key to operationalize an Indigenous Peoples’ right to water by providing evidence of its enforceability and justiciability, will be appraised. Interestingly, the IACtHR has done so taking into account the ‘special’ nature of such an Indigenous Peoples’ right to water. Finally, the last section assesses whether the Indigenous Peoples’ right to water is broadly recognized on the basis of current international law.

2. A deliberately unclear definition of Indigenous People

Indigenous representatives have on numerous occasions maintained that a definition of the concept of ‘Indigenous People’ is not necessary or, let alone, desirable, stressing the importance of self-identification ‘as an essential component of any definition which might be elaborated by the United Nations system’.

Nevertheless, a definition of ‘Indigenous Peoples’ is crucial in order to provide effectiveness and legal certainty in the application, implementation and enforcement of norms contained in contemporary legal instruments applicable to Indigenous Peoples. The semantic roots of the term


‘indigenous’ share a single conceptual element: priority in time\textsuperscript{10} \textit{vis-à-vis} the European colonization. Nevertheless, the word ‘indigenous’ rapidly aligned itself with ‘inferiority’,\textsuperscript{11} leading to physical, cultural and social marginalisation,\textsuperscript{12} dispossession,\textsuperscript{13} racial discrimination\textsuperscript{14} or forced assimilation.\textsuperscript{15} This situation has led to what can be defined as Indigenous Peoples’ ‘ethnocide’.\textsuperscript{16}

An attempt to provide a less Euro-centric definition of ‘indigenous’ has been offered in the eighties by Jose Martínez Cobo, Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities. Despite pointing out the extreme difficulty in formulating a definition of indigenous populations from an international law point of view, Martínez Cobo has advanced the following definition:

> Indigenous communities, peoples and nations are those which, having a historical continuity with pre-invasion and pre-colonial societies that developed on their territories,

\textsuperscript{10} According to the Chairperson-Rapporteur Mrs. Erica-Irene A. Daes, it evolved ‘within the framework of European languages, notably English, Spanish, and German. English and Spanish share a common root in the Latin term ‘\textit{indigenae}’, which was used to distinguish between persons who were born in a particular place and those who arrived from elsewhere (\textit{advenae}) [...]. Hence, the semantic roots of the term historically used in modern international law share a single conceptual element: priority in time’. Daes Working Paper (n 8), 5.

\textsuperscript{11} ‘[...] the history of ignoring national minorities in the New World is inextricably tied up with European beliefs about the inferiority of the indigenous peoples who occupied the land before European settlement’. W Kymlicka, \textit{Multiculturalisms Citizenship: A Liberal Theory of Minority Rights} (Oxford University Press, 1995) 22.

\textsuperscript{12} State of the World’s Indigenous Peoples (n 6).


\textsuperscript{15} An example of the doctrine of assimilation can be found in the 1957 ILO Convention n° 107. In 1977 the Second Annual Assembly of the World Council of Indigenous Peoples entirely rejected this agreement with the following words: ‘[a]ll those Conventions and Declarations on Human Rights which have been approved in the United Nations or in other international bodies by the representatives of the national Governments are not adhere to, because the United Nations has no mandatory power nor are the member States particularly keen on realising them in practice. These Conventions, furthermore, do not take in account of the true situation and rights of the Indigenous Peoples’, (E/CN.4/Sub.2/476/Add.5, Annex III) 2. Specifically, it explicitly rejected the ILO Convention n° 107 and Recommendation n° 104 because it ‘did not involve Indigenous Peoples and in fact would continue oppression of [them] wherever concerned’, (n 14) (E/CN.4/Sub.2/476/Add.5, Annex. III, Resolution B.1) 1-5.

\textsuperscript{16} Cobo Report (n 13).
consider themselves distinct from other sectors of the societies now prevailing in those territories, or parts of them. They form at present non-dominant sectors of society and are determined to preserve, develop and transmit to future generations their ancestral territories, and their ethnic identity, as the basis of their continued existence as peoples, in accordance with their own cultural patterns, social institutions and legal systems.  

Elements as the ‘historical continuity’, ‘distinct culture’ and ‘non-dominance’ were disregarded being merely empirical elements of such a definition, even if they have not been rejected completely by Indigenous representatives. Article 1 paragraph 1 lett. b) of the 1989 ILO Indigenous and Tribal Peoples Convention nº 169 has tried to translate these concepts in legal terms by making reference to notions of ‘historical continuity’ (in terms of being pre-conquest/colonization societies), ‘territorial connection’ (their ancestors inhabited the country or region) and social, economic, cultural and political institutions’ ‘distinctiveness’ as objective criteria. Also, Article 1 paragraph 2 contains the so-called subjective criteria by recognising self-identification of Indigenous and Tribal Peoples as a fundamental criterion.

In sum, while there seems to be a gradual recognition of Indigenous People’s rights in international law, there is still no clear definition of Indigenous

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20) In practical terms the notion of objective criterion would mean that ‘[a] specific indigenous or tribal group or people meets the requirements of Article 1 paragraph 1, and recognises and accepts a person as belonging to their group or people’, ILO, ILO Convention on Indigenous and Tribal Peoples, 1989 (No 169): A Manual (ILO, 2003) 14.
21) By virtue of the subjective criterion ‘[t]his person identifies himself or herself as belonging to this group or people; or the group considers itself to be indigenous or tribal under the Convention.’
People. There are grounds on which to maintain that this ambiguity is deliberate and, to some extent, desirable due to how Indigenous People consider themselves. However, despite the difficulties intrinsic in reaching any clear classification, as highlighted by a paper by Daes to the UN Commission on Human Rights back in 2000,\(^\text{23}\) there are a number of characteristics that may help to identify a group of people as Indigenous.\(^\text{24}\) In particular, a sense of community and a strong linkage with nature – are two of the key elements that help distinguish Indigenous communities from non-indigenous communities.\(^\text{25}\)

3. Indigenous Peoples and right to water

This section of the article aims to discuss the nature of Indigenous Peoples’ rights to water. It argues that these rights stem from Indigenous Peoples’ customary law and that the latter is recognised by international law and is based on the notion of communal regime. Hence, before providing an account of the current state of play regarding water rights for Indigenous People, this section first analyses Indigenous People’s customary law and the notion that underpins it: the concept of communal regime.

3.1. Indigenous Peoples’ Customary Law

The philosophical background of specific rights to Indigenous Peoples lies on the concept of legal pluralism,\(^\text{26}\) according to which a society can rely on


\(^{24}\) Such as ‘precedent habitation; historical continuity; attachment to land; the communal sense and the community right (including those societies which do not have a strong conception of individual rights); a cultural gap between the dominant groups in a State and the indigenous, and the colonial context’; P Thornberry (n 9) 55.

\(^{25}\) According to the UN Permanent Forum on Indigenous Peoples, Indigenous People, Indigenous Voices, Fact Sheet: ‘the UN system has developed a modern understanding of this term based on the following: self-identification as indigenous peoples at the individual level and accepted by the community as their member; historical continuity with pre-colonial and/or pre-settler societies; strong link to territories and surrounding natural resources; distinct social, economic or political systems; distinct language, culture and beliefs; form non-dominant groups of society; resolve to maintain and reproduce their ancestral environments and systems as distinctive peoples and communities.’ Emphasis added. The fact sheet is available at: <http://www.un.org/en/events/indigenousday/pdf/Indigenous_Advances_Eng.pdf> accessed 28 September 2012.

different legitimate sources of rules. Within the context of legal pluralism as the theoretical basis of Indigenous Peoples’ rights, following a definition used by Craig and Gachenga, customary laws can be understood as

...sets of rules, established through the process of socialisation, that enable members of a community to distinguish acceptable from unacceptable behaviour and includes conventions and usages adhered to and followed by people through generations.

Relying on legal pluralism leads to self-government as a necessary institutional framework for protecting and promoting the distinctiveness and cultural integrity of Indigenous People by virtue of a set of specific and differentiated norms dealing with their rights viewed as exemptions to general rules applied to non-Indigenous Peoples. These exemptions to the lex generalis, which are established in compliance with the lex specialis’ doctrine, as well as required by the notion of legal pluralism, lead to the recognition under international law of Indigenous Peoples’ customary laws, which could lead to a conflict

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27) See D Craig and E Gachenga, ‘The Recognition of Indigenous Customary Law in Water Resources Management’ (2009) 20 (5/6) Water Law 278, referring to A Bilal, H Haque and P Moore, Customary Laws – Governing Natural Resources Management in the Northern Area (IUCN Law Programme, 2003) xii: ‘When a society accepts as legitimate more than one system of rules having different sources, and in some cases in contradiction with each other, the society is said to have a polycentric, ‘pluralistic’ legal system’. Emphasis added.

28) Ibid.

29) The substantive principles of equality and human dignity require that domestic law and regulations at all levels apply ‘special’ exemptions to Indigenous Peoples. This is needed in order to preserve their cultural integrity, which is an essential element of their material and spiritual survival. This is the case of Indigenous Peoples’ rights under international law, where a specific corpus iuris of both ‘hard’ and ‘soft’ law instruments can be found as lex specialis directly flowing from the general principles of international human rights law. These are the 1957 ILO Convention n°107, later replaced by the 1989 ILO Convention n°169, the 2005 Convention on the Protection and Promotion of the Diversity of Cultural Expression and the 1992 Convention on the Biological Diversity, which, combined with several soft law instruments (above all the 2007 UNDRIP, which crystallises latest international customary law concerning Indigenous Peoples’ rights), State Practice and both domestic and international case law, form a consistent and rather complex legal corpus related to Indigenous Peoples’ rights. The legal notion of lex specialis derogare lege generali has been recently investigated by the International Law Commission in its work: Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law. Report of the Study Group of the ILC, finalized by M Koskenniemi (A/CN.4/L.682, 2006), para 46.

30) See article 7 of the ILO Convention n° 107; Article 8 of the 1989 ILO Convention n°169; Chapter 26 paragraph 4 lett. b) of Agenda 21; article 26 of the UNDRIP; and article 8 lett. j of the Convention on Biological Diversity. The latter has led to a Working Group dealing with Indigenous Peoples’ rights, which has issued a ‘Voluntary Guidelines for the conduct of cultural, environmental and social impact assessments regarding developments proposed to take place on, or which are likely to impact on, sacred sites and on lands and water traditionally occupied or used by indigenous and local communities’. 
between indigenous customary laws and State laws and regulations. In fact, if the recognition of indigenous customary laws in international law represents a limit to State sovereignty, according to the right of self-determination and a particular implementation of the legal pluralism approach, State sovereignty, as well as international human rights law standards, can similarly be viewed as external limits to the validity of indigenous’ customary laws.

Despite the difficult balance between State sovereignty and Indigenous People’ rights in general, and Indigenous Peoples’ customary law more in particular, the recognition of these rights in international law can provide a strong legal rationale for the existence of an indigenous right to water, amongst other rights. This may lead to a twofold consideration: (i) such a de jure recognition of Indigenous Peoples’ rights over land, territories and natural resources appears not to be enough for the existence of those rights insofar as it does not create them; (ii) however, by recognising those rights, States can not be irrespective of indigenous customary laws and land tenure systems over lands and natural resources and must guarantee effective and full rights over them according to indigenous customary legal institutions. This latter consideration requires a better understanding of the notion of communal regime, which stands as the foundation of Indigenous Peoples’ customary law, and of the legal implications of a communal ownership.

3.2. Indigenous Peoples’ Rights and the Notion of Communal Regime

3.2.1 Communal Regime

The ‘communal regime’ is the founding institution of indigenous customary law over land and natural resources, including water. This concept is closely linked to the religious and cultural beliefs of Indigenous People, according to which land must be respected and venerated as something belonging to Mother Earth and its worship. This sense of oneness among living creatures

31 The possible tension between domestic laws and Indigenous Peoples customary laws has been highlighted by Craig and Gachenga (n 27) 280-281. The authors argue that, if properly implemented in a domestic legal system, legal pluralism should be able to bridge the gap between domestic laws and Indigenous Peoples’ customary laws by providing both with the same degree of legitimacy as sources of law within a domestic legal system. However, Craig and Gachenga also acknowledge, at 284, that, in order to coexist, domestic laws and Indigenous Peoples’ customary laws need to tackle ‘constitutional, legal and administrative frameworks’ related challenges. In the context of water resources management in Latin America, and of the Achamayo River Basin in Peru in particular, R Boelens, A Guevara-Gil and A Panfichi, ‘Indigenous Water Rights in the Andes: Struggles over Resources and Legitimacy’ (2009) 20 (5/6) Water Law 269-271 provide a very clear account of the tension between state laws and other rules (customary and non) that provide grounds for water rights to local users (indigenous and non).
and Earth is something hard to be conceived by the Western notion of ‘absolute ownership’. In fact, a legal system founded on private property entitles the individual owner to sell, consume, transfer, lease, grant as a usufruct, use, mortgage, abandon and even destroy its res by virtue of three elements inherent in the concept of ‘absolute ownership’: jus utendi, jus fruendi and jus abutendi. This approach often appeared to be a far cry from a sound and sustainable way for the management of land and its natural resources, bearing in mind that it would entail that they are merely deemed as commodities or possessions. On the opposite, to the extent that land and natural resources are felt as something sacred and strongly linked to their own identity as a people, they should belong to the entire community in accordance with indigenous land tenure. For this reason, land and natural resources ought to be protected, managed and kept for the benefit of future generations. From this standpoint, land and natural resources can not longer be regarded as a mere possession or commodity, ergo they can not be sold, leased, left unused indefinitely or destroyed, inherited or simply acquired by virtue of prolonged possession. In accordance with indigenous customary legal systems, land and its resources could only be entitled to by virtue of ‘usufruct’ and ‘priority of

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32) Generally, present Western legal tradition does not contemplate the communal ownership on land and natural resources since the absence of private property (alias absolute ownership) is substantially considered as the way to lawlessness. See also: G Hardin ‘The Tragedy of Commons’ (1968) 162 (13859) Science 1243–48.

33) The only limit, according to which the absolute ownership ought to be in compliance with, might be the ‘general interest’ as provided for by law.

34) In Roman Law ‘[...] the rights of the dominus, or owner, are summed up in the jus utendi, the right to exclusive use, jus fruendi, the right of enjoying the produce of, and jus abutendi, the right of consuming the thing if capable of consumption’. See: G Campbell, Compendium of Roman Law Founded on the Institutions of Justinian (Clark, 2008).

35) Indigenous Peoples have, thus, the right to own, use, develop and control the lands, territories and natural resources that they possess by reason of traditional ownership or other traditional occupation. In dealing with such entitlements for Indigenous Peoples, States shall not only recognise and protect these lands, territories and natural resources but, in implementing their obligations, they must respect Indigenous Peoples’ customary laws, land tenure systems and legal traditions. At the heart of all this discourse there are, of course, factual considerations. In fact, the special relationship between Indigenous Peoples and their ancestral lands and natural resources should be taken in due account. Such relationship seems to be no longer an empathic connection with the land of ancestors. On the contrary, it describes an intimate and profound correlation with their cosmological vision of the material world including their religious beliefs and their own cultural and emotional considerations: in the words of the Cobo Report ‘land is synonymous with the very life of indigenous populations’.

36) Cobo Report (n 13), Ch XVII, para 56.

37) See the Ulpianus’ brocard: ‘nemo plus iuris ad alium transferre potest quam ipse haberet’, no one can transfer to another a larger right than he himself has. Ulpianus, Ad Edictum, Libro 46 (50.17.54).

38) According to Roman Law, usufruct is the legal right to use and derive profit from property that belongs to another subject of law. It can not be alienated, damaged or merely possessed, even only psychologically, by the usufructuary.
use with a corollary obligation to be used in the manner required by ecology and customs. Moreover, certain lands and resources could be under a stricter regime of authentic common ownership that appears to be deemed as ‘common to everybody’ and in respect of which ‘any individualized form of takeover by any person, whether by way of priority of use or of usufruct, [is] expressly and categorically ruled out’.

Usufruct, priority in use and absolute communal ownership are, therefore, the pillars upon which the indigenous communal regime over land and natural resources as a collective right is founded. Despite the fact that the concept of communal regime has been often misinterpreted as an open-access system where no concept of ownership applies, it should be stressed that, on the contrary, communal regime is entirely based on the concept of a group-level ownership, rather than on single individual entitlements. Within its legal framework, communal ownership does, therefore, impose restraints, limits and conditions that are inherent in the structure of the regime itself. This does not necessarily lead to lawlessness or to the mismanagement of lands and natural resources.

3.2.2. Legal Implications of a Communal Ownership
Now, as already pointed out, international law, as well as domestic law in selected States, expressly recognises Indigenous Peoples’ customary law and

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39) Particularly, ‘priority’ rights ‘[...] were often recognised over certain areas, such as residential sites for certain segments of the community (tribe, sub-tribe, clan) which had been occupied by their respective ancestors since the land was first occupied; areas that had always been cultivated by specific groups and their ancestors; places for fishing; areas for hunting, capturing or setting traps; part of wood, a clump of trees or individual trees. Only groups holding such special priority rights in these sites or areas had a right of decision over them [...]’. Cobo Report (n 13) Ch XVII, paras 58-9.
40) Ibid, para 56.
41) In western legal terms, this concept and the Roman Law’s notion of res communis omnium appear to be alike. According to Roman Law res communis omnium are things that belong to everybody in accordance with the principles of equality and redistributive justice.
43) On the contrary, it has often been pointed out that the indigenous way of land and natural resources’ use, given the relative small dimension of the communities, is by far more sustainable and ecologically friendly compared with those legal regimes based on absolute ownership. See, for example, all the programs that took place within the framework of the 1992 Convention on Biological Diversity in applying Art. 8 lett. j). All these actions emphasised the importance vested by Indigenous traditional lifestyles for the conservation of biological diversity and the sustainable use of the environment, (n 30).
traditional land tenure system as a legitimate source of law which, being inherent to their rights as peoples, must be respected as such by States when dealing with the management of indigenous’ lands and natural resources. Consequently, on the one hand, it leads to the emergence of a binding international obligation according to which concerned States must take in consideration those indigenous’ customary laws in addressing policies dealing with indigenous ancestral territories. On the other hand, and most importantly, the communal regime, as a source of regulation and management of Indigenous Peoples’ land and natural resources, constitutes the very content of the international obligation. Therefore, international and domestic regulation related to water and any other natural resources management should, to the greatest extent possible, take into account Indigenous Peoples’ customary rights when dealing with their natural resources.

In such a scenario, the western approach based on absolute ownership must be abandoned, which leads to the following considerations, all of which apply to the management of water. First, in international law Indigenous Peoples’ rights can be understood as *lex specialis* by virtue of their right to diversity and cultural integrity (as a reasonable implementation of the more general principles of equality and redistributive justice). Second, international law acknowledges, in both hard and soft law instruments, Indigenous Peoples’ rights bearing in mind that their relationship with ancestral land is a matter of utmost importance for their own identity, cultural integrity and, above all, for their own material survival. For such reasons, the acknowledgment of their customary law and fundamental institutions based on the communal regime appears to be a coherent and appropriate corollary and, in general terms, an application of the notion of legal pluralism. Accordingly, as shall be explored in the next section, the recognition of the communal ownership upon natural resources as an international law obligation seems to outline a different regime in dealing with water-related rights.

### 3.3. Indigenous Peoples’ Rights over Freshwater Resources

The last two decades have seen the emergence of a human right to water as essential for the enjoyment of other basic rights such as the right to life. Among the main international instruments dealing with this issue General Comment 15 (adopted in 2002 by the Committee on Economic, Social and Cultural Rights), the work of the Human Rights Council based in Geneva and the 2010

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45) The right to diversity and cultural integrity might be achieved by differentiating for those peoples who, for centuries, lived an existence of subjugation and marginalization that led into a downright ethnocide.  
46) Kymlicka (n 11); Peña Guzmán (n 26).
Resolution 64/292 of the UN General Assembly stand out as the most relevant.\(^{47}\) Within this more general framework of an emerging human right to water, access to the latter, although not directly mentioned throughout the ILO Convention n°169, has been given express recognition by Articles 25 and 32 of the UNDRIP.\(^{48}\) However, through state practice and case law Article 15 and 16 of the ILO Convention can already be interpreted as including freshwater resources among the relevant natural resources that States must duly consider.\(^{49}\) Indeed, Article 15 of the ILO Convention No 169, by making reference to natural resources pertaining to indigenous lands, fully recognises freshwater

\(^{47}\) See: S C McCaffrey, 'A Human Right to Water: Domestic and International Implications' (1992) 5 The Georgetown International Environmental Law Review 1-24; P H Gleick, ‘The Human Right to Water’ (1998) 1 Water Policy 487-503; V Shiva, Water Wars. Privatization, Pollution and Profit (Cambridge University Press, MA, 2002). P M Dupuy, ‘Le droit à l’eau, un droit international?’ (2006) 6 EUI Working Paper Law; A Tanzi, ‘Reducing the Gap between International Water Law and Human Rights Law: The UNECE Protocol on Water and Health’ (2010) 12 International Community Law Review 267-85; I Winkler, The Human Right to Water: Significance, Legal Status and Implications for Water Allocation (Hart Publishing, 2012). \(^{48}\) B W Morse, ‘Indigenous Peoples and Water Rights: Does the United Nations’ Adoption of the Declaration on the Rights of Indigenous Peoples Help?’ (2009) 20 (5/6) Water Law 267, goes as far as maintaining that: ‘...it is perhaps even now plausible to consider both Indigenous rights and the human right to water as reflective of customary international law.’ \(^{49}\) Against this background, the Ecuador Constitutional Court Case Arcos v Dirección Regional de Minería appears to be particularly significant. Communities claimed that their survival depended on the Cayapas River and challenged the concession issued by the Ministry of Energy and Mines for the exploitation of a local mine on the communities’ territory. The commencement of exploration and exploitation would have caused irreparable damages to the natural resources, the health and lives of the families of the communities that inhabited the zone affected, thus violating the collective rights of indigenous communities over their lands according to Article 15 of the ILO Convention No 169. The Court maintained: ‘[t]hat, the mining concession, without a doubt, will environmentally affect the settlements of the Chachis and black people living in the concession zone, who are in ancestral possession of these lands and whose ownership has been legally recognized, in some cases, lands that are bathed by the Cayapas River, which serves as the channel for communication and connecting these peoples, resource that is indispensable in the pursuit of their daily lives, upon which they depend for food, through fishing, and for hygiene through the use of its water, therefore, appropriate consultation prior to granting the concession was required [...]; and Article 15 of ILO Convention No 169 on Indigenous and Tribal Peoples to which the Ecuadorian State has subscribed, provides the protection of natural resources in indigenous lands and territories, for which consultation procedures must be established to assess the effects that exploitation would have on the lives of the peoples, to determine whether their interests would be prejudiced, and to what extent, before undertaking or authorising any program for prospecting or exploitation of the resources that exist on their lands. [...] the completion of the consultation was imperative, the omission of which determined the illegality of the act that is in question’. Claudio Mueckay Arcos v Regional Directorate of Mining of Pichincha: Regional Director [2002] Ecuador Constitutional Court 170-2002-RA, in Application of Convention No. 169 by Domestic and International Courts in Latin America: A Casebook (Geneva: ILO, 2009) 148-49. An Indigenous Peoples’ right to water has been also recognised by the Supreme Court of Chile, by applying domestic legislation, in the case Comunidad Atacameña Toconce v Essan S.A. [2004] Segundo Juzgado de Letras de El Loa Calama Rol. n° 4.064.
resources as a basic resource for the survival of indigenous communities.\textsuperscript{50} Article 15 must, at this end, be read in conjunction with Article 13 paragraph 2, which declares as follows:

\begin{quote}
the use of the term lands in Article 15 and 16 shall include the concept of “territories”,\textsuperscript{51} which covers the total environment of the areas which peoples concerned occupy or otherwise use.
\end{quote}

It was only with the adoption of the UNDRIP that some rights over freshwater resources have been fully incorporated in an official text by vesting a prominent position among the natural resources to be granted to Indigenous Peoples. Their effective application requires States concerned to implement such rights in accordance with a particular set of principles of administrative nature. These include the right to be consulted through prior, free and informed consent before the approval of any project that may affect their lands and natural resources. In relation with this, Article 32 paragraph 2 of the UNDRIP reads as follows:

\begin{quote}
[... ] 2. States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, “water”\textsuperscript{52} or other resources [...].
\end{quote}

Moreover, Article 25 seems to stress the importance of a distinctive spiritual relationship between Indigenous Peoples and their waters as well as their territories and lands:

\begin{quote}
Indigenous Peoples have the right to maintain and strengthen their distinctive spiritual relationship with their traditionally owned or otherwise occupied and used lands, territories, “waters”\textsuperscript{53} and coastal seas and other resources and to uphold their responsibilities to future generations in this regard.
\end{quote}

Whereas official recognition to indigenous rights over freshwater resources was given only through the adoption of the UNDRIP, claims over waters have always been taken into account by the indigenous international community.

\begin{itemize}
\item \textsuperscript{50} 'As a basic principle, these resources comprise both renewable and non-renewable resources such as timber, fish, water, sand and minerals'. See, ILO, \textit{Indigenous and Tribal Peoples’ Rights in Practice: a Guide to ILO Convention n° 169} (ILO, 2009) 107.
\item \textsuperscript{51} Emphasis added. The term ‘land’ must, therefore, include the concept of ‘territory’ which usually embraces forests, rivers and other water bodies, mountains and sea, the surface as well as the sub-surface.
\item \textsuperscript{52} Emphasis added.
\item \textsuperscript{53} Emphasis added.
\end{itemize}
For example, water grabbing was stigmatized as a symbol of colonial physical domination in the 1977 Declaration of Barbados. Perhaps, the first example of an explicit claim for a right to water can be found in the 1977 Declaration on Human Rights adopted by the Second General Assembly of the World Council of Indigenous Peoples. Preamble no 7 vests a particular importance as it attempts to infer, ante litteram, a right to water from the 1966 Covenants. Furthermore, in declaring the fundamental principles that must be observed in dealing with indigenous' rights, the World Council’s Principles 6 and 8 stated as follows:

II. We, therefore, wish to make clear those irrevocable and inborn rights which are due to us in our capacity as Aboriginals:

[...] 6. Right to organise ourselves and administer our land and natural resources;

[...] 8. Right to make use of the natural resources existent in the areas of the Indigenous Peoples, such as forest, “rivers”, ore deposit and the riches of the sea, and a right for Indigenous Peoples to take part in the project and construction work and the use of it.

The right to water for Indigenous Peoples was also reaffirmed, inter alia, by the 1977 International NGOs Conference, which adopted a Draft Declaration of Principles made by the indigenous participants.

In 2003, during the Third World Water Forum, the 2003 Indigenous Peoples Kyoto Water Declaration was approved. The Declaration was instrumental to the consolidation of a human right to water for Indigenous Peoples. In fact, it reasserted the special link between indigenous People and water, as well as other natural resources, and the perils that water resources face in regions inhabited by Indigenous Peoples. The Declaration then moves on to clearly

55) ‘[...] no less serious is the inclination of certain States to deny the indigenous populations, in group or as individuals, the right to land and water. These are the fundamental resources for human life and prerequisite to an indigenous development of their own institutions, culture and language. All this also constitutes principles, which have been manifested in international conventions:

1. International Convention on Economic, Social and Cultural Rights;
2. The international Labour Organization’s Convention no 107;

56) Ibid, 2. Emphasis added.
57) Principle 11 affirms: ‘[i]t shall be unlawful for any State to make or permit any action of course or conduct with respect to the territories of an indigenous nation or group which will directly or indirectly result in the destruction or deterioration of an indigenous nation or group through the effects of pollution of earth, air, ‘water’, or which in any way depletes, displaces or destroys any natural resource or other resources under the dominion of, or vital to the livelihood of an indigenous nation or group’. Ibid, (Annex IV E/CN.4/Sub.2/476/Add.5) 3.
58) Kyoto Water Declaration (n 1), paras 1-8.
state the basis of a human right to water for Indigenous Peoples under international law:

[w]e Indigenous Peoples have the right to self-determination. By virtue of that right we have the right to freely exercise full authority and control of our natural resources including water. We also refer to our right of permanent sovereignty over our natural resources, including water.\(^{59}\)

Not only does the Kyoto Water Declaration explain where this right would be arising from, but it also provides a clear guide as to what it entails. Amongst the different obligations that this right imposes upon a State, one of the most important ones – and that will be seen later in this paper in the context of Latin America\(^{60}\) – is the right to be consulted and to take part in water related decisions. Indigenous Peoples in the Kyoto Water Declaration maintain that ‘[T]o recover and retain our connection to our waters, we have the right to make decisions about waters at all levels’.\(^{61}\) Interestingly, and along the lines of one of the main arguments put forward in this paper, properly taking into account Indigenous Peoples’ customary law is paramount for a proper implementation of a human right to water for Indigenous Peoples.\(^{62}\) A further element of the Kyoto Water Declaration is that Indigenous Peoples therein make their distrust towards key international and multinational economic players very clear.\(^{63}\)

A further element in favour of an emerging human right to water for Indigenous Peoples can be seen in paragraph 16 lett. d) of General Comment No 15:

\[\text{[i]}\text{ndigenous Peoples’ access to water resources on their ancestral lands is protected from encroachment and unlawful pollution. States should provide resources for indigenous peoples to design, deliver and control their access to water.}\]

In sum, Indigenous Peoples official declarations and resolutions, Articles 15 and 16 of the ILO Convention n° 169 and their juridical application, Articles 25 and 32 of the UNDRIP, as well as general opinio iuris and soft law instruments,\(^{64}\)

\(^{59}\) Ibid, para 9.

\(^{60}\) See n 90.

\(^{61}\) Kyoto Water Declaration (n 1), para 16.

\(^{62}\) Ibid, para 12 and 15.

\(^{63}\) The likes of the World Trade Organization and North American Free Trade Agreement (ibid, para 26), the World Bank and the International Monetary Fund (ibid, para 25), key polluting industries in the mining, logging and tourism sectors (ibid, para 24), and trends leading to the commodification of water (ibid, para 21), are clearly criticised as constituting an obstacle to a human right to water for Indigenous Peoples.

\(^{64}\) See, again, the Voluntary Guidelines as a result of the Working Group on Article 8 lett. j) of the 1992 Convention on Biological Diversity (n 30).
all corroborate that Indigenous Peoples’ rights over freshwater resources are owned *ab origine* and protected under international law as *lex specialis*. Moreover, their water resources must be managed and administered according to their communal ownership and inherent institutions, customs and tradition as vital instruments tied to their existence and cultural integrity to the extent that ‘property of the land ensures that the members of the indigenous communities preserve their cultural heritage’.

Wrapping up, and linking the discourse presented on the nature of Indigenous Peoples’ rights and of Indigenous Peoples’ right to water, it can be argued that Indigenous Peoples’ rights over freshwater resources are collective rights. States are under an international obligation to entitle them to groups on a collective-basis. At the same time individual rights stemming from the communal right to freshwater resources (or other natural resources) are a matter of indigenous customary law. Thus, institutions as usufruct, priority of use and pure communal ownership are only relevant through indigenous customary law, being inherent in the communal ownership’s system.65

Against this background, a number of questions seem to arise: does the recognition of such rights over freshwater resources create a different legal regime (a special regime) in the management of freshwater resources? What is the very content of such rights over freshwater resources? Are such rights enforceable and justiciable?

The first two questions have already been answered affirmatively by arguing that Indigenous Peoples have a special right to water under international law, right that must be interpreted in accordance with their customary law and institutions, founded on the concept of communal ownership over land and natural resources. This special approach has been endorsed in numerous judicial decisions in Latin America and in a number of Constitutions throughout the region,66 as will be shown in the next section. Giving an answer to the third question – enforceability and justiciability of Indigenous Peoples’ right to

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65 In this context, rights are no longer linked to an individualistic, atomised, self-interested social system, but rather on a broader cosmological sense of oneness between Man and Nature that challenges current western individualistic-based-rights. They are, hence, indissolubly tied to a range of elements strictly related to their ways of life, cultural and religious beliefs as well as material and spiritual integrity.

66 Particularly, Article 231 paragraph 2 of the Brazilian Constitution recognises certain rights over freshwater resources: ‘[t]he lands traditionally occupied by Indians are intended for their permanent possession and they shall have the exclusive usufruct of the riches of the soil, the rivers and the lakes existing therein’; paragraph 3 reads as follows: ‘[h]ydric resources, including energetic potentials, may only be exploited [...] after hearing the communities involved [...]’; moreover, paragraph 6 states: ‘[a]cts with a view to occupation, domain and possession of the lands referred to in this article or to the exploitation of the natural riches of the soil, rivers and lakes existing therein, are null and void, producing no legal effect, except in case of relevant public interest of the Union [...]’. All these provisions refer to the Indigenous Peoples’ right on freshwater resources. Text of the Constitution of the Federative Republic of Brazil in
water – requires taking into consideration the role played by courts, be they at a domestic or international level, in the defence of these rights. The next section will try to answer this third question in the Latin American context.

4. Indigenous Peoples’ Right to Water in Latin America

As just mentioned, this section aims to discuss how Indigenous Peoples’ right to water has span out in Latin America. The IACtHR has played a major role, and the first sub section is devoted to introduce this court in the context of the Inter-American Human Right System (IACHR). This is followed by an analysis of the IACtHR’s approach to Indigenous Peoples’ rights over lands and natural resources more generally. The section ends by zooming on freshwater resources and discussing the IACtHR’s approach to Indigenous Peoples’ right to water.

4.1. The Inter-American Human Rights System

Undoubtedly the IACHR, which operates within the framework of the Organization of American States (also known as OAS) has played an important role in Latin America. The Inter-American Convention is enforced by two independent organs. The first one is the IACtHR, whose decisions upon indigenous matters have been of utmost relevance, having contributed to the development of a ‘minimum content’ of rights encompassing the communal ownership over their lands and natural resources. Its jurisprudence is

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67) The Inter-American Convention on Human Rights (also known as the Pact of San José) was adopted in 1969 at San José (Costa Rica) and entered into force in 1978. It should be pointed out that the IACHR has been ratified by 25 countries: Argentina, Barbados, Brazil, Bolivia, Chile, Colombia, Costa Rica, Dominica, Dominican Republic, Ecuador, El Salvador, Grenada, Guatemala, Haiti, Honduras, Jamaica, Mexico, Nicaragua, Panama, Paraguay, Peru, Suriname, Trinidad and Tobago, Uruguay and Venezuela. The United States and Canada are not part of the IACHR.

68) ‘The organs of the Inter-American system have long paid particular attention to indigenous and tribal peoples’ right to communal property over their lands and natural resources, as a right itself, and as a guarantee of the effective enjoyment of other basic rights’. See OAS – Inter-American Commission on Human Rights, Indigenous and Tribal Peoples’ Rights over their Ancestral Lands and Natural Resources: Norms and Jurisprudence of the Inter-American Human Rights System (OEA/Ser.L/V/II Doc. 56/09, 2009) para 3.
fundamentally based on the IACHR interpreted in light of the ILO Convention n° 169, the UNDRIP, the Draft American Declaration of the Rights of Indigenous Peoples and other applicable sources on this issue. The second organ to enforce the Inter-American Convention is the Commission, whose mandate consists in promoting the observance and the defence of human rights in the region. Most importantly, the Commission has been vested with important powers since it can call for the intervention of the Court. In fact, it can: 1) submit cases to the Court (upon petition\textsuperscript{69}) and appear before the Court in the litigation of cases;\textsuperscript{70} 2) request advisory opinions from the Court regarding questions of interpretation of the Inter-American Convention;\textsuperscript{71} and 3) request that the Court order ‘provisional measures’ in urgent cases which involve danger to persons, even where a case has not yet been submitted to the Court.\textsuperscript{72}

4.2. The IACtHR’s Approach to Indigenous Peoples’ Rights over Lands and Natural Resources

Since 2001 the Court has delivered a number of important decisions relevant to the issues dealt with in this paper. In fact, it has given substantial application to the Indigenous People’s rights over land and its natural resources through the interpretation of the IACHR in light of the current corpus iuris concerning Indigenous Peoples. Particularly, its jurisprudence has been based on the combined provisions of sources such as Article XXIII of the American Declaration of the Rights and Duties of Man and Article 21\textsuperscript{73} of the IACHR. At a first glance, it may be asserted that neither one of these articles define the rights of Indigenous Peoples and indeed neither of them seem to state on the matter at hand. Nevertheless, the Court has found that these articles can protect the rights of the peoples concerned over ancestral lands and their natural resources.

\textsuperscript{69} Any person, group of persons or non-governmental organization may present a petition to the Commission alleging violations of the rights protected in the American Convention and/or the American Declaration. In general, the petitions presented must show that the victim has exhausted all means of remedying the situation domestically.

\textsuperscript{70} Article 61 para 1 of the IACHR.

\textsuperscript{71} See Article 64 paragraph 1 of the IACHR read in conjunction with Chapter X of the Convention and Title III ‘Advisory opinions’ of the Rules of Procedure of the Inter-American Court of Human Rights.


\textsuperscript{73} Article 21: ‘Right to Property. 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’.
In 2001, the Court has delivered an important and authoritative pronouncement in the case of Awas Tingni Community v. Nicaragua. In this case the term ‘property’ of Article 21 of the IACHR was read through an evolutionary interpretation of international instruments, which are, according to the Court, ‘live instruments whose interpretation must adapt to the evolution of the times and, specifically, to current living conditions’. By virtue of such an evolutionary interpretation, the Court found that Article 21 of the IACHR ‘[…] protects the right to property in a sense which includes, among others, the rights of members of the Indigenous communities within the framework of communal property [...]’. As a result, namely by acknowledging Indigenous Peoples’ communal rights under Article 21, the Court arrived to the conclusion that the term ‘Right to Property’ was not only to be referred to the Western notion of ‘private property’, which reflects the concept of ‘absolute ownership’. On the opposite, in adapting to the ‘evolution of times’ and to ‘current living conditions’, the right to property would rather cover different institutions as those deriving from the notion of communal ownership. The ‘Right to Property’, therefore, has been understood as the right to use and enjoy:

[...] those material things which can be possessed, as well as any right which may be part of a person’s patrimony; that concept includes all movable and immovable, corporeal and incorporeal elements and any other intangible object capable of having value.

The system through which such a right to property may be realized cannot be fully grasped only through the typical western notion of ‘absolute ownership’. In fact, since one of the main features of Indigenous Peoples’ life is their profound relationship with land and its natural resources from which their existence is closely dependent on, and since their customary laws are founded on the notion of communal ownership over those lands and natural resources – as has been highlighted in previous sections of this paper - the right to property can no longer be understood only through the lens of the right to private property. This is in accordance with the principles of equality upon which the corpus iuris dealing with Indigenous Peoples have been founded on. Such a legal reasoning, which reflects contemporary evolution in human rights matters aimed at implementing legal pluralism as an approach to Indigenous Peoples, has led the Court to state as follows:

74) Mayagna (Sumo) Awas Tingni Community v Nicaragua, Ser. C No 79 (IACtHR, Judg. of August 31, 2001).
75) Ibid, para 146.
76) Ibid, para 148.
77) Ibid, para 144.
[...] some specifications are required on the concept of property in indigenous communities. Among 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 economical 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.

This passage is very relevant because it effectively enforces Indigenous Peoples’ rights over their ancestral lands and natural resources by framing them as ‘original’ rights. Moreover, and most importantly, the Court has specified the extent of the notion of communal ownership by stating that the communal form of the right to property is that of collective property, which is not focused on an individualistic basis, but rather on a group basis. Thus, in the same way as Indigenous Peoples have enjoyed their rights to property through a peculiar development throughout centuries by virtue of a different relationship with the nature and the surrounding environment, so should their customary law be respected by States concerned as well as other stakeholders. The judgement at hand seems also to reflect the general opinio iuris on this matter since it mirrors Article 26 of the UNDRIP.

4.3. The IACtHR’s Approach to Indigenous Peoples’ Right over Freshwater Resources

The collective property over land and natural resources accorded to Indigenous Peoples must be effective, which means that they must be able to control their territory without outside interference. Mere grants or privileges to use their lands, territories and natural resources are categorically ruled out.
Nevertheless, such a collective right meets its limit when confronted with state sovereignty, in accordance with the notion of ‘internal’ self-determination.

With regard to this latter issue, the Court stated as follows:

“[a]rticle 21 of the Convention does not per se preclude the issuance of concessions for the exploration and exploitation of natural resources in indigenous or tribal territories. Nonetheless, if the State wants to restrict, legitimately, the [community]’s right to communal property, it must consult with the communities affected by the development or investment project planned within territories which they have traditionally occupied, [...] and complete prior assessment of the environmental and social impact of the project [...]”.

Effective mechanisms should, hence, be developed in order to respect and protect Indigenous Peoples’ rights.

Following on, the framework that has been developed by the Court in case of conflicts between communal and ‘absolute ownership’ deserves particular attention. According to this framework, States are under an obligations not to pollute, divert, overexploit, dam freshwater resources or, otherwise, restrict indigenous’ rights over their traditionally owned natural resources. Particularly, with regard to the latter issue, restrictions can be put in place by a State only when they are: ‘1) previously established by the law; 2) necessary; 3) proportional; and 4) with the aim of achieving a legitimate objective in a democratic society’.

However, restrictions to Indigenous Peoples’ rights (including to water) are not allowed when they are potentially able to deny their survival as people.

In all other cases, indigenous rights’ provided for in Articles 15 and 16 of indigenous lands, territories or resources lacks true meaning where the property has not been physically established and delimited”.

Saramaka People v Suriname, Ser. C No 172 (IACtHR, Judg. of November 28, 2007) para 115. In this case, the State of Suriname issued four logging concessions and a number of mining concession to both Saramaka and non-Saramaka members and foreign companies within territory traditionally owned by members of the Saramaka community.

See the debate in section 3.1 of this article.

The concept of ‘internal self-determination’ has been now broadly recognised in Article 4 of the UNDRIP: ‘[i]ndigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions’. According to Antonio Cassese, international obligations resulting from the principles and rules of self-determination are of an erga omnes nature and have a twofold corollary when related to Indigenous Peoples: first, a right to take part in the national decision making process as distinct subjects; second, the prohibition to invoke the right of secession. See: A Cassese, Self-Determination of Peoples: A Legal Reappraisal (Cambridge University Press, 1995) 101-124.

Case of Tingni Community, (n 74), para 143.

Ibid, (n 74), para 127.

In this respect the Court states that: ‘[…] without them [their natural resources], the very physical and cultural survival is at stake. Hence the need to protect the lands and resources [is necessary] to prevent their extinction as a people’. Ibid, para 121.
of the ILO Convention shall apply in conjunction with the relevant provisions of the UNDRIP over freshwater resources. These are: 1) the right to use, manage, administer and protect these resources; 2) the right to be consulted prior to the approval of any project or exploration that may affect their resources; 3) the right to be free from external pressure or influence in delivering the final decision; 4) the right to be adequately and appropriately informed about the risks that may occur; 5) the right to determine and develop priorities and strategies for the development or use of their resources.

Within this context, IACtHR case law has showed that prior, free and informed consent has become a *condicio sine qua non* for a State to be in compliance with its Indigenous Peoples' rights related obligations under international law. This discourse also applies, of course, to freshwater resources. In fact, the very content of Indigenous Peoples' rights over freshwater resources entails that States must obtain the prior, free and informed consent of Indigenous People in order to explore or exploit natural resources within their lands and territories, since the natural resources belong to those peoples. Along these lines the IACtHR maintained in the Saramaka case\(^{88}\) that:

> “[c]lean natural water, for example, is a natural resource essential for the Saramakas to be able to carry out some of their subsistence economic activities, like fishing”\(^{89}\) and “[…] gold-mining concession have affected natural resources that have been traditionally used and are necessary for the survival of the members of the Saramaka people [which] have not traditionally used gold as part of their cultural identity or economic system […] because of any mining activities within Saramaka territory “will necessary affect” other natural resources necessary for the survival of the Saramakas, such as waterways, the State has a “duty to consult” them, in conformity with their traditions and customs”.\(^{90}\)

The quote is interesting because it clarifies that States have an obligation to consult with Indigenous Peoples ‘in conformity with their traditions and customs’\(^{91}\). In other words, in order to comply with its human rights obligation, it is not enough for a State to follow ‘normal/general’ procedures aimed at securing the consent of the party on whose territory water resources would be affected. The State will have to follow ‘specific’ procedures akin to those required by Indigenous Peoples customary law. This was clearly put forward in the Kyoto Water Declaration, there where it provided content to the right to be consulted. Consultations had to be conducted ‘under the communities own systems and mechanisms’\(^{92}\) and must allow

\(^{88}\) Case of Saramaka People (n 82) para 115. In this case, the State of Suriname issued four logging concessions and a number of mining concession to both Saramaka and non-Saramaka members and foreign companies within territory traditionally owned by members of the Saramaka community.

\(^{89}\) Ibid, para 126.

\(^{90}\) Ibid, para 155. Emphasis added.

\(^{91}\) Emphasis added.

\(^{92}\) Kyoto Water Declaration (n 1), para 16.a).
Indigenous Peoples exercise of both their local and traditional decision-making processes, including the direct participation of their spiritual and ceremonial authorities, individual members and community authorities as well as traditional practitioners of subsistence and cultural ways in the consultation process and the expression of consent for the particular project or measure.93

The Saramaka case shows that the communal regime, thus, applies also to freshwater resources as lex specialis in accordance with indigenous customary law.

A contrariis, if States are not able to fulfil Indigenous Peoples’ rights over their ancestral lands and natural resources, including water, or in case of loss of their traditional territories, the IACtHR has found that international general human rights provisions, provided for in various international instruments correlated to the right to life, apply. In other words, if members of the communities concerned remain landless, States are under the obligation to provide basic services and goods required for their sustenance, such as potable water, in compliance with international general provisions. The same view has been shared in the Case of Xákmok Kásek Indigenous Community v. Paraguay delivered in 2010. According to the IACtHR these general obligations apply only when Indigenous People are not in control of their lands and natural resources for various reasons. General obligations seem, then, to be relevant as subsidiary sources of law as lex generalis is to lex specialis. Besides, they seem to apply in the terms and to the extent contained in General Comment No 15 where States should give special attention to vulnerable groups, such as Indigenous People.96

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93) Ibid, para 16.c).
94) Case of Yakye Axa (n 80), para 221.
95) See Xákmok Kásek Indigenous Community v Paraguay, Ser. C No 214 (IACtHR, Judg. of August 24, 2010). The Court found that the State concerned was under the duty to take up immediate, periodic, and permanent measures while the Community’s traditional or alternative land were in the process of being handed over in order to apply Article 4 of the Convention (Right to Life). First, the Court ordered the State to take supplies of enough potable water for Community members’ consumption and personal hygiene. Second, the State would have had to prepare a detailed study in order for the provisions of basic goods and services to be adequate and regular. The aforementioned study would have established: a) the regularity with which the deliveries of water should be made; b) the method to be used to deliver it and ensure the preservation of its purity; and 3) the quantity of water to be delivered per person and/or per family; ibid, paras 301-303. A minimum standard to be applied was determined through reference to General Comment 15; ibid, para 195. According to international standards, a minimum of 7.5 litres per day per person in order to meet all people basic need, which included food and hygiene, including under extreme conditions, ought to be guaranteed.
96) Case of Yakye Axa, (n 80), para 146. There rights, furthermore, apply to the use and full enjoyment of water bodies, such as creeks, streams, rivers, lakes, wells and subsoil resources as groundwater. Indigenous people rights over these resources are collective and international law recognises them as such, although it does not necessarily mean that individual rights are, for this very reason, ruled out. In particular, the collective nature of such rights, when applied over freshwater resources, would suggest the existence of a different qualitative regime within the body of international water law.
Moreover, in terms of justiciability the mechanisms developed in the last decade by the Court and the Commission have provided these special rights (Indigenous Peoples’ right to water) with an effective judicial forum for their realization. In fact, the IACtHR can be seen as the final judicial body where to seek redress for all issues related to the protection and enforcement of Indigenous Peoples’ rights over lands and natural resources in the region where the IACHR applies. In fact, the jurisprudence of the Court has revealed that Indigenous Peoples’ rights over freshwater resources, being related to the sphere of human rights, have a solid base under the IACHR. As far as States are bound to observe the decisions of the Court according to Article 62 of the Convention, such rights upon freshwater resources are ipso facto enforceable, and States, when condemned, must enact the Court’s decision. Furthermore, the Court, in interpreting and applying the Convention, has also referred to domestic legal frameworks (especially to principles contained in the constitutions thereof) dealing with Indigenous Peoples’ rights over lands and natural resources.

Indeed, according to Article 31 of the Rules of Procedure of the Inter-American Commission on Human Rights, a petition advanced before the Commission, which in turn has the power to bring a case before the Court, must take into account the exhaustion of all possible domestic remedies as a prerequisite of the admissibility of a matter. Exemptions may regard cases where a State concerned: 1) does not afford due process of law for protection of the rights that have allegedly been violated; 2) denies access to justice under domestic law or prevents exhausting available remedies; 3) unlawfully delays in rendering a final judgment. An important rule is set forth in paragraph 3 of Article 31, which contemplates the inversion of the burden of proof in favour of the petitioner when the latter is unable to prove compliance with the aforementioned requirements related to the exhaustion of all available remedies. In this case the State shall demonstrate that those remedies have not been exhausted as affirmed in paragraph 3 of Article 31: ‘the State concerned [shall] demonstrate to the Commission that the remedies under domestic law have not been previously exhausted, unless that is clearly evident from the record’.

Article 62 of the Conventions states as follows: ‘1. A State Party may, upon depositing its instrument of ratification or adherence to this Convention, or at any subsequent time, declare that it recognizes as binding, ipso facto, and not requiring special agreement, the jurisdiction of the Court on all matters relating to the interpretation or application of this Convention’. As of 2010, 25 of the 35 OAS’s member States have ratified the Convention. Among them 22 have recognised the jurisdiction of the Court with the only exemptions of the Commonwealth of Dominica, Grenada and Jamaica.

The effectiveness of such a system consists in the fact that any failure in addressing Indigenous Peoples’ claims to their lands, natural and freshwater resources will amount to a violation of the rights that can be brought before the Inter-American Court as a court of last resort.

Among Latin-American countries, only 7 of them (Bolivia, Brazil, Colombia, Costa Rica, Panama, Paraguay and Peru) have made a high level commitment, through either their constitution, international agreements (such as ILO 169) or both, to indigenous rights, and they have followed through with a regulatory framework and concrete actions to ensure those rights, including recognition of indigenous peoples’; 6 of them (Argentina, Guatemala, Honduras,
In conclusion, the special provisions of international law, the constitutional recognition made by many States in the Region, the Inter-American System and the firm jurisprudence of the Court upon this matter, are all elements that corroborate a more protective and effective right to water for Indigenous Peoples in accordance with the well-established principle of non-discrimination, equality and self-determination. This perspective can be confirmed by the latest international developments, as contained in the UNDRIP, which have explicitly declared a right to freshwater resources by crystallising, on the one hand, Indigenous Peoples’ claims and, on the other hand, what was the general understanding in interpreting the ILO Convention No 169 and other international instruments.

5. Concluding remarks

Under international law there is a corpus iuris whose nature of lex specialis applies to a certain category of peoples (Indigenous Peoples) who have suffered – and in many parts of the world still suffer - unjust dispossession of their lands, territories, natural resources and social marginalization. Such corpus recognises those rights over freshwater resources as original, and indigenous customary law dealing with water has been acknowledged as a legitimate source of law. Indigenous customary law, by including the concept of communal ownership over natural resources, gives Indigenous Peoples the collective right over freshwater resources. Indigenous Peoples have the right to fully enjoy their rights over freshwater resources without external interference. However, since they enjoy a right to internal self-determination, States within which they live can exploit their natural resources, but only after having gained their prior, informed and free consent. However, restrictions are not allowed when potentially able to deny their survival as a people. In the Latin American context the IACtHR’s authoritative jurisprudence has hugely contributed in outlining a final remedy and giving juridical effectiveness to Indigenous Peoples’ rights to water. It has done so by largely following the

Mexico, Nicaragua and Venezuela) have made a ‘high level commitment, through either their constitution, international agreements (such as ILO 169) or both, to indigenous rights, but they have not followed through with an adequate regulatory framework, and they generally have not made much progress in recognizing indigenous land rights’; 4 of them (El Salvador, Guyana, Suriname and Uruguay) ‘have not entered into any high-level commitments on indigenous rights, and they have made little or no effort to respond to indigenous demands for legal recognition of their land claims’. See R Roldán Ortiga, ‘Models for Recognizing Indigenous land Rights in Latin America’ (2004) Paper n° 99 Latin America Biodiversity Series – World Bank Envt. Dept. 2-3.
above-mentioned approach based on a communal nature of the right and by acknowledging indigenous customary law as a legitimate source when dealing with freshwater resources.

In conclusion, the imperative nature of the rights at stake, together with a certain degree of effectiveness granted by the uniform jurisprudence of the IACtHR, represent the main features of an existing, differentiated, more effective and binding system concerning Indigenous Peoples’ rights over freshwater resources in Latin America.