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ARTICLE

The Scope and Implementation of the Right of Indigenous Peoples to Maintain their Own Juridical System under International Human Rights Law

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Abstract
International law has historically been, and in some cases continues to be, operationalised in order to disempower Indigenous peoples. In addition, legal systems in settler states and postcolonial contexts often continue to be largely unavailable to Indigenous people as a tool for empowerment due to multiple forms of discrimination. It is therefore unsurprising that for Indigenous peoples, Indigenous justice mechanisms are more accessible and often preferable. Through comprehensive doctrinal analysis, this article investigates the right of Indigenous peoples to maintain their own legal systems under both international and regional human rights law. First, the article explores instances in which this right is enumerated in international legal documents, as well as the increasingly frequent references to the right by Treaty Bodies in general comments/recommendations and concluding observations. Next, I examine the approaches of the three major regional human rights regimes: The Organization of American States, The African Union, and the Council of Europe. I then examine limits to the right, specifically the requirement that when Indigenous legal systems are active, they must operate in accordance with international human rights law. Finally, the article explores some dynamics of the implementation of the right, drawing on the examples of the US and Bolivia. These cases demonstrate that even in contexts where the state recognises substantial Indigenous jurisdiction, progress in the realisation of the right of Indigenous peoples to maintain their own legal systems is likely to be unsystematic and non-liner, resulting exceedingly intricate legal realities.

Keywords: indigenous law; indigenous rights; international law; legal pluralism.

I INTRODUCTION

International law has historically been, and in some cases continues to be, operationalised in order to disempower Indigenous peoples. Colonisation was facilitated in part by the "colonial powers' un-

limited capacity for legal invention"(Tobin, 2014, p. 20). For example, the fifteenth century international law Doctrine of Discovery, grounded in Christian and ethnocentric conceptions of civilisation, sought to 'legitimate' the colonisation of Indigenous peoples' territories. The Doctrine was based in part on the concept of *terra nullius* which prescribed that unoccupied land, or lands that "were occupied but they were not being used in a manner that Euro-American legal systems approved, then the lands were considered empty, vacant, and available for Discovery claims" (Miller, 2019, p. 41). According to Miller, the Doctrine "remains an applicable principle in many countries and also continues to limit the human, sovereign, commercial, and property rights of Indigenous Peoples and their governments" (Miller, 2019, p. 35). Working alongside these principles, was the longstanding exclusion of Indigenous peoples as a recognised group in international law. When colonial administrators did enter into treaties with Indigenous peoples, "the colonial powers were the arbiters of international law, and they defined the subjects of international law to be 'civilised states', a club that did not recognize the 'organised wandering tribes'" (Tobin, 2014, p. 25). This meant that the treaties signed by Indigenous nations were not valid and non-enforceable in the international legal arena. For this reason, Third World Approaches to International Law (TWAIL) scholars have argued that "the international system was born racialized" (Merino, 2018, pp. 774–775). As Merino describes, at its very core, the international system "holds as an epistemological premise that legality was the creation of unique and civilized institutions, and that only states possessing them could be part of international society" (Merino, 2018, pp. 774–775). Indigenous peoples were thus excluded from participating through their own governing bodies in international law-making.

There are also well-founded reasons why Indigenous peoples may also have reservations about seeking justice in national legal institutions. Merino describes that "[t]he decolonization process was not the end of indigenous dispossession but the beginning of internal colonialism, in which the power over land not only allowed resettlement and exploitation but also the territorial foundation of the settler society" (Merino, 2018, p. 775). Again, law was wielded to accomplish colonisation. For example, Allison and Cunneen note that for Aboriginal peoples in the Australian context, state law was employed as "a tool of oppression" in numerous ways: "the criminal law to supress resistance, civil law to create racially discriminatory regimes of extensive segregation, forced labour and alienation of law, and family law through child welfare laws that forcibly removed generations of children" (Allison and Cunneen, 2023, p. 83). They assert that it is essential to remember that these experiences "[inform] contemporary views that see the law as an alien system which is the opposite of one that provides remedies for wrongs and delivers justice" (Allison and Cunneen, 2023, p. 84). Legal systems in settler states and post-colonial contexts often continue to be largely unavailable to Indigenous people as a tool for empowerment due to multiple forms of discrimination. The Expert Mechanism on the Rights of Indigenous Peoples (Expert Mechanism) has described how comprehensive networks of structural discrimination result in "discriminatory laws and practices, lack of funding necessary to seek justice, including legal aid, insufficient numbers of indigenous judges and lawyers, and biases against indigenous peoples and individuals involved in legal proceedings" (Expert Mechanism on the Rights of Indigenous Peoples, 2013, para. 26). The Committee on the Elimination of Discrimination Against Women has recently asserted that state "[j]udicial structures tend to reflect ongoing colonialism" meaning "Indigenous women and girls [in particular] frequently face racism, structural and systemic racial discrimination, and forms of marginalization, and often have to participate in procedures that are not culturally appropriate and do not take into account Indigenous traditions and practices" (Committee on the Elimination of Discrimination Against Women, 2022, para. 30). All of these elements work together to deny Indigenous peoples meaningful access to justice. In fact, the Special Rapporteur on the rights of Indigenous Peoples (Special Rapporteur) commented in 2004 that "one of the more problematic areas regarding the human rights of indigenous peoples is the field of administration of justice" which in turn impacts the effective protection of other human rights (Stavenhagen, 2004, p. 6). That is why, even when laws or courts appear to act broadly 'in favour' of

Indigenous peoples' interests, they can still be met with scepticism. It is therefore unsurprising that for Indigenous peoples, Indigenous justice mechanisms "are generally perceived as more accessible, culturally appropriate and often constitute the primary source of dispute resolution for indigenous communities"(Special Rapporteur on the rights of indigenous peoples, 2019, para. 62).

The UN Permanent Forum on Indigenous Issues (Permanent Forum) describes 'Indigenous traditional knowledge' as including "expressions of cultural values, beliefs, rituals and community laws" (United Nations Permanent Forum on Indigenous Issues, 2007, para. 2). Though extremely diverse, broadly speaking Indigenous laws "flow from Indigenous cultures as a contextually specific set of ideas and practices aimed at generating the conditions for greater peace and order" (Snyder, Napoleon and Borrows, 2015, p. 596). Indigenous communities globally have engaged in a sustained struggle to recover and revive their traditional knowledge and justice systems (Special Rapporteur on the rights of indigenous peoples, 2019, para. 27). However, when Indigenous communities wish to operationalise their own legal norms and institutions, the state invariably has an intrinsic role to play. The international system is based on the Weberian conception of the state, which has traditionally resulted in an understanding of it as a "monolithic" entity and the people "in such states are treated as monolithic too: one law to rule them all" (Barfield, 2010, p. 67). Legal centralism has been the dominant paradigm in Western jurisprudence and insists that "the label 'law' should be confined to the law of the state" (Manji, 1999, p. 437). Alternative normative orders have been, and in some cases continue to be regarded as threats; as fundamentally undermining the authority of the state. That is why, in many instances Indigenous legal regimes have endured "centuries of marginalization, repression, distain and attempts at their destruction by colonial and settler state governments" (Tobin, 2014, p. 1). Under the traditional authority of state sovereignty, it is states that have the power to choose whether or not to recognise the jurisdiction of Indigenous legal systems in their territory. If a state does choose to recognise Indigenous jurisdiction, it is the state that determines its scope. For example, the Canadian state has long been parsimonious in its recognition of First Nations legal systems, employing "a European epistemological framework to recognize indigenous legal orders" which "has been criticized as ethnocentric and colonial" (Anker, 2016, p. 27). Canadian courts have explicitly asserted a "retrospective" approach to recognition, meaning unless a right is clearly connected to "a pre-European practice" it is not regarded as being protected by the Constitution (Borrows, 2017, p. 115). The Constitution therefore only preserves "what was, 'once upon a time,' central to the survival of a community, not necessarily about what it central, significant, and distinctive to the survival of these communities today" (Borrows, 2002, p. 60). This means that cultural adaptions made by Indigenous communities in response to colonisation and the passage of time are not afforded protection (Borrows, 2002, p. 61). As a result, the corpus of rights afforded to Indigenous peoples has, until recently, been extremely narrow (Borrows, 2017, p. 116). Borrows stresses that because recognition is undeniably on the state's terms, "Indigenous agency is consequently eroded" (Anker, 2016, p. 23).

Some Indigenous groups are working for the recovery of their juridical autonomy, which is often part of a wider campaign for self-determination. When realised, self-determination "enables Indigenous peoples to remain distinct peoples by having control of their own affairs and practicing their own laws, customs, and land tenure systems through their institutions and in accordance to their traditions" (Kuokkanen, 2019, p. 27). These sustained efforts by Indigenous communities have gradually led to a repositioning in international human rights law. The past four decades have been marked by the increasing recognition of Indigenous peoples' rights in both international human rights law and as a result, in national legal systems. The Permanent Forum recognises that "the international arena is now heavily engaged in protecting indigenous rights and in raising awareness of indigenous issues" (United Nations Permanent Forum on Indigenous Issues, 2007, p. 34). Within this corpus is the right of Indigenous peoples' to maintain their own legal systems, which Tobin describes as "[a]n extremely significant but oft-times overlooked aspect of this renaissance" (Tobin, 2014, p. 1). In

her 2013 doctrinal review, Quane found that, particularly in relation to Indigenous peoples, "legal pluralism *may* be required under international human rights law" (emphasis added) and notes an "increasing number of [Treaty Body] recommendations to states to respect or take into account the customary laws of indigenous peoples" (Quane, 2013, p. 694). As one of the most substantial works in this area, Tobin's book *Indigenous Peoples Customary Law and Human Rights: Why Living Law Matters* (2014) ultimately asserts that:

> International law is quite clear on two things: first that Indigenous peoples have a right to maintain and most importantly strengthen their own legal regimes, and second that rights to practice customary law must be carried out in a manner that conforms with and does not lead to a breach of universal human rights (Tobin, 2014, p. 181).

These previous works have set a foundation and have identified some issues that deserve further exploration.

This article builds upon Tobin's work, though while his analysis centres on the 'importance of Indigenous peoples' legal systems' (Tobin, 2014, p. 9), this article offers an up-to-date vista of the development of the right of Indigenous peoples to maintain their own juridical system under international law. Specifically, I systematically and comprehensively review and compare the approaches of each of the major human rights conventions, courts and Treaty Bodies. While the existence of the right is well established (for example: Quane, 2013, p. 694, 2015, p. 122; Tobin, 2014, p. 181; Brems, 2017, p. 28), this article assesses it's evolution and precise scope. Section II comprises a doctrinal analysis of the right in international human rights law; following a brief discussion of the Indigenous and Tribal Peoples Convention No. 169 (1989) and United Nations Declaration on the Rights of Indigenous Peoples (2007), I explore innovations in relation to other international instruments that do not focus specifically on the rights of Indigenous peoples, but that nonetheless assert increasingly strong recognition of this right. Section III will assess the articulation of this right in the three major regional human rights regimes: the Organization of American States, the African Union and the Council of Europe. Section IV assesses the limits on the right. This paper specifically adds clarity to the scope of the right, including obligation for states to maintain normative pluralism, however, it also explores challenges that arise in relation to implementation. Section V explores issues surrounding the politics of recognition and jurisdictional delineation, where I focus on the United States of America and The Plurinational State of Bolivia. I have selected these case studies because, while they are often regarded as being the exemplars of how states ought to manage relations with Indigenous legal systems, there are still major shortcomings in relation to full implementation in these cases.

II INTERNATIONAL HUMAN RIGHTS LAW

a. Enumerated Protection of the Right

The first substantial international convention concerning Indigenous people's rights was the International Labour Organization's (ILO) Indigenous and Tribal Populations Convention No. 107 (1957). Created in 1919, the ILO is a now UN agency committed to promoting social justice and respect for international human rights, with a focus on labour. Convention No. 107 represents a legally-binding effort to ensure Indigenous and Tribal peoples' rights. It is inclusive in that it refers to both Indigenous and Tribal peoples because at the time of adoption "the description of certain population groups as tribal was more easily accepted by some governments than a description of those peoples as indigenous" (Errico, 2020, p. 158). However, it also subscribes to an anachronistic approach, describing Indigenous and Tribal peoples in terms of their relative 'stage of development' vis-à-vis 'other segments of the national community' (art. 1). Therefore, Tobin describes that this Convention was "[not] well received by Indigenous peoples owing to its focus on protection of human rights through assimilation"(Tobin, 2014, p. 34). The Convention is important to mention, as it requires States Party recognise the legal institutions and norms of Indigenous people in Articles 7

and 8. Though it is no longer open for ratification and is "considered outdated, at times even forgotten" (Larsen and Gilbert, 2020, p. 85), it is still in force in 17 countries including India, Bangladesh, Angola, Ghana and Pakistan.

Convention No. 107 was superseded by Indigenous and Tribal Peoples Convention No. 169 (1989). This Convention expressly provides for the recognition and respect of Indigenous legal systems by the state. It asserts that Indigenous and Tribal peoples "shall have the right to retain their own customs and institutions" (art. 8.2), and that "the methods customarily practised by the peoples concerned for dealing with offences committed by their members shall be respected" (art. 9.1). It goes further, contending that states must actively support Indigenous peoples in developing and maintaining their own institutions and customs (art. 2), and provide the necessary resources in order to "establish means for the full development of these peoples' own institutions and initiatives" (art. 6(c)). Furthermore, the Convention emphasises that this development must be led by the Indigenous communities themselves: "The peoples concerned shall have the right to decide their own priorities for the process of development as it affects their lives, beliefs, institutions" (art. 7(1)). In addition to the recognition of Indigenous legal systems, Convention No. 169 also requires that states provide for a degree of normative pluralism in state institutions (i.e. state institutions taking Indigenous legal norms into consideration in cases involving Indigenous persons). Article 8.1 reads: "[i]n applying national laws and regulations to the peoples concerned, due regard shall be had to their customs or customary laws", and Article 9.2 states that "[t]he customs of these peoples in regard to penal matters shall be taken into consideration by the authorities and courts dealing with such cases." While this convention is legally-binding, its application is limited as it has only been ratified by 24 states to date. Furthermore, there is a significant qualification built into these provisions. Indigenous legal systems and norms can only be recognised to the "extent [they are] compatible with the national legal system and internationally recognised human rights" (art. 9.1). Given that a national legal system could contain many norms that are contradictory to Indigenous legal norms, this has the potential to negate the right in effect.

The United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) was adopted in 2007 following extensive consultations between governments and Indigenous communities. Indigenous legal scholars describe the Declaration as 'compatible with their legal traditions,' and while it is legally non-binding, it crucially "provides Indigenous peoples with an international standard by which to measure state action" (Nagy, 2022, p. 199). The Declaration is explicit in its affirmation of the right of Indigenous peoples "to maintain and strengthen their distinct political, legal, economic, social and cultural institutions" (art. 5). Furthermore, Article 34 stipulates that "Indigenous peoples have the right to promote, develop and maintain their institutional structures [...] and, in the cases where they exist, juridical systems or customs, in accordance with international human rights standards". These provisions expressly require states to facilitate legal pluralism. In addition, it is also worth exploring commentary made by the Expert Mechanism on the Rights of Indigenous Peoples, which "provides the [Human Rights] Council with expertise and advice on indigenous peoples' rights as set out in [UNDRIP] and assists states to achieve their goals"(Connors and Shah, 2022, p. 399). The Expert Mechanism has repeatedly affirmed that the right of Indigenous peoples to maintain their own legal institutions is also grounded in cultural rights and their right to self-determination. In 2013, the Expert Mechanism report stated: "self-determination affirms their right to maintain and strengthen indigenous legal institutions, and to apply their own customs and laws" (Expert Mechanism on the Rights of Indigenous Peoples, 2013, para. 19), and "[t]he cultural rights of indigenous peoples include recognition and practice of their justice systems [...], as well as recognition of their traditional customs, values and languages by courts and legal procedures" (Expert Mechanism on the Rights of Indigenous Peoples, 2013, para. 28). More recently, the Expert Mechanism reported:

> Indigenous peoples have their own customs, traditions and land tenure systems, which

> should be respected. The institution of individual, as opposed to collective, land rights and the vesting of power over lands customarily owned by indigenous peoples in the State undermine these systems. When customary law is not incorporated into titling procedures, the land rights of indigenous peoples are not fully protected (Expert Mechanism on the Rights of Indigenous Peoples, 2020, para. 6).

These statements highlight the interconnectedness of Indigenous rights, in particular between recognition of Indigenous legal norms and protection of Indigenous land rights, right to culture and right of self-determination, among others.

UNDRIP is marked by limiting factors, resulting in "on-the-ground implementation of the Declaration [being] slow at best" (Côté *et al.*, 2024, p. 2). As noted above, it is a declaration rather than a convention meaning it is legally non-binding. In addition, while the Declaration explicitly seeks to quell fears that implementation of self-determination may challenge state sovereignty (for example, Article 46.1 categorically protects the territorial integrity of the state), it may continue to be a salient factor. Having carried out a thematic review of the literature on the implementation of UNDRIP, Côté et al. found that a "majority of studies portray the relationship between self-determination and state autonomy as a conflictual one" (Côté *et al.*, 2024, p. 5). Notwithstanding these shortcomings, "the implementation of UNDRIP at the state-level is taking place at different speeds and through different modes" (Côté *et al.*, 2024, p. 4), and in addition to ILO Convention No. 169, it remains a vital instrument for Indigenous people in asserting their rights on a national level. However, it is beneficial to look beyond these thematically-aligned instruments, as there are many other international human rights instruments that are more-widely ratified and legally-binding that also support the recognition and facilitation of Indigenous legal systems. The next section will consider the major international human rights conventions. These instruments have Committees made up of experts who monitor their implementation; they facilitate state reporting, issue general recommendations/comments and some of them are authorised to hear individual complaints subject to ratification of Optional Protocols. Though none of these conventions initially focused on Indigenous peoples' right to maintain their own juridical systems, their respective Committees have increasingly become proponents of this right, albeit to varying degrees.

b. Unenumerated Protection of the Right

This section investigates international human rights instruments that support the recognition and facilitation of Indigenous legal systems. While it is important to acknowledge the role of the Human Rights Council's and its Universal Period Review (UPR) process, this paper does not explore this mechanism in detail. That is because UPR consists of a broad-scope review of each state's human rights commitments under the various treaties that it has ratified. In order to gain better insight into the precise content of these international human rights commitments, I determined that it would be more valuable in this instance to examine how the various Treaty Bodies have interpreted the provisions of the treaties of which they are the authoritative voice. The following review will therefore comprise examination of Treaty Bodies general comments and recommendations and concluding observations. However, it is clear that experts appointed by the Human Rights Council, namely members of the Expert Mechanism (as discussed above) and successive Special Rapporteurs, have emphatically called for the implementation of Indigenous peoples' right to maintain their own juridical systems. In 2004, then Special Rapporteur Rodolfo Stavenhagen commented that "indigenous peoples do not have equal access to the justice system and that in the operation of the justice system, they frequently encounter discrimination of all kinds" which is "partly due to racism and partly the result of the non-acceptance of indigenous law and customs by the official legal institutions of a national State" (Stavenhagen, 2004, p. 2). He recommended that States undertake reforms that "include respect for indigenous legal customs, language and culture in the courts and the administration of justice" as well as "the full participation of indigenous people in justice reform" (Stavenhagen, 2004,

p. 3). In 2019, then Special Rapporteur Victoria Tauli-Corpuz concluded that "[i]nternational human rights standards recognize the right of indigenous peoples to maintain and develop their own legal systems and institutions" (Special Rapporteur on the rights of indigenous peoples, 2019, para. 103), and recommended that states "explicitly recognize, in constitutional or other legal provisions, the right of indigenous peoples to maintain and operate their own legal systems and institutions" (Special Rapporteur on the rights of indigenous peoples, 2019, para. 106).

The International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) was adopted by UN General Assembly resolution in 1965 and there are currently 182 States Party. Though the text of the Convention does not expressly mention the right of Indigenous peoples to maintain their own legal systems, Article 5 guarantees enjoyment of the "right to equal participation in cultural activities" (art. 5(e.vi)). Over time, this provision has specifically been interpreted in a manner that expands protections for minorities and Indigenous peoples. In 1997, the Committee on the Elimination of Racial Discrimination (CERD) called upon states to "[r]ecognize and respect indigenous distinct culture, history, language and way of life" (Committee on the Elimination of Racial Discrimination, 1997, para. 4(a)), and to ensure "that indigenous communities can exercise their rights to practise and revitalize their cultural traditions and customs" (Committee on the Elimination of Racial Discrimination, 1997, para. 4(e)). However, the Committee has also bolstered the protection of Indigenous legal systems through its interpretation of the right of access to justice and through land and property rights. For example, CERD has repeatedly called upon states to recognise and protect Indigenous peoples collective approach to land, territory and resources (Committee on the Elimination of Racial Discrimination, 1997, para. 5). It has described that "indigenous peoples' land rights derive from their own customary laws and forms of land tenure, and that as such they exist as valid and enforceable rights notwithstanding the absence of formal recognition by the government" (Gilbert, 2017, p. 98). In 2022, the Committee recommended that Suriname "[t]ake measures to develop and recognize the collective rights of indigenous and tribal peoples to own, develop, control and use their lands, resources and communal territories according to customary laws and traditional land-tenure systems and to participate in the exploitation, management and conservation of the associated natural resources through their institutions in accordance with their own traditions" (Committee on the Elimination of Racial Discrimination, 2022a, para. 24(a)).

In 2005, CERD issued General Recommendation No. 31 on discrimination in the administration and functioning of criminal justice. Here, the Committee expressly called upon States Parties to pursue national strategies to "ensure respect for, and the recognition of the traditional systems of justice of indigenous peoples, in conformity with international human rights law" (Committee on the Elimination of Racial Discrimination, 2005, para. 5(e)) and it has been consistent in emphasising this point in Concluding Observations. For example, in light of this recommendation, the Committee urged Guatemala, "to recognize the indigenous legal system and to ensure respect for, and recognition of, the traditional systems of justice of indigenous peoples, in conformity with international human rights law" (Committee on the Elimination of Racial Discrimination, 2010, para. 8). In 2019, the Committee 'noted with concern the high degree of impunity' in the Mexican justice system, particularly in cases of gender-based violence against Indigenous women, describing 'the lack of coordination between the ordinary and Indigenous justice systems as a major barrier' (Committee on the Elimination of Racial Discrimination, 2019, para. 26). Accordingly, CERD called upon Mexico to "[c]ontinue making efforts to recognize, respect and strengthen the indigenous justice system, in line with international human rights law, including through harmonization, cooperation and coordination involving the authorities of the ordinary and indigenous systems of justice at both the local and the federal levels" (Committee on the Elimination of Racial Discrimination, 2019, para. 26(e)). In 2023, in addition to recommending that the Philippines address barriers Indigenous peoples face when seeking to access state justice institutions, the Committee called upon the state to guarantee the availability of "alternative dispute resolution in accordance with the rights, customs, traditions

and cultures of the individuals and communities affected" (Committee on the Elimination of Racial Discrimination, 2023, para. 14(d)). In 2024, as will be discussed in more detail below, CERD issued a very expansive recommendation when it called upon Bolivia to amend the legislation governing Indigenous jurisdiction to bring it in line with "the principle of hierarchical equality of the Indigenous and the ordinary justice systems, expanding the scope of the Indigenous justice system to cover personal, material and territorial matters" (Committee on the Elimination of Racial Discrimination, 2024, para. 54). Furthermore, the Committee recommended that Bolivia establish "specific mechanisms to ensure coordination and cooperation between the Indigenous and the ordinary justice systems, respecting the principle of hierarchical equality" in addition to "the allocation of sufficient financial, human and technical resources to the Indigenous, original and campesino justice system so that it can effectively carry out its mandate" (Committee on the Elimination of Racial Discrimination, 2024, para. 54). These repeated assertions in country-specific observations demonstrate CERD's emphatic commitment to this issue. The Committee consistently operationalises rights that are enumerated in the Convention, namely the rights to property/territory and access to remedy/justice, in order to buttress protection for Indigenous justice systems so long as they are in accordance with international human rights.

The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) was adopted by the UN General Assembly in 1979 and currently has 189 States Party. As with ICERD, the text of this Convention does not explicitly address Indigenous peoples rights, nor does it mention their legal systems. However, the Committee has been the site of interesting developments in recent years. Initially the Committee was decidedly sceptical of nonstate justice systems. Article 2(f) requires 'states take all appropriate measures to modify or abolish customs and practices that constitute discrimination against women.' In 2013, it asserted "that the preservation of multiple legal systems is in itself discriminatory against women" (Committee on the Elimination of Discrimination Against Women, 2013, para. 14). In 2015, it described that the "presence of plural justice systems can, in itself, limit women's access to justice by perpetuating and reinforcing discriminatory social norms" (Committee on the Elimination of Discrimination Against Women, 2015b, para. 62) [[35]]. Notwithstanding this initial suspicion, in recent years, the CEDAW Committee has become more accepting of Indigenous legal systems grounded primarily in an argument that they have a crucial role to play in guaranteeing effective access to justice. General Recommendation No. 39 asserted that "Indigenous Peoples must have access to justice that is guaranteed both by States and through their Indigenous customary and legal systems" (Committee on the Elimination of Discrimination Against Women, 2022, para. 24). Additionally, the Committee affirmed that "the right of Indigenous Peoples to maintain their own judicial structures and systems [is] a fundamental component of their rights to autonomy and self-determination" (Committee on the Elimination of Discrimination Against Women, 2022, para. 25). At the same time, the CEDAW Committee has continually emphasised that Indigenous norms must be applied in a manner that is consistent with international human rights (Committee on the Elimination of Discrimination Against Women, 2022, para. 25). It called upon states to immediately take steps "to ensure that religious, customary, indigenous and community justice systems harmonize their norms, procedures and practices with the human rights standards enshrined in the Convention and other international human rights instruments" (Committee on the Elimination of Discrimination Against Women, 2015b, para. 64(a)). The Committee later asserted that 'while informal justice mechanisms may be more accessible to women in rural areas,' the "rules and mechanisms that are not in conformity with the Convention must be brought into line with it and with general recommendation No. 33 on women's access to justice" (Committee on the Elimination of Discrimination Against Women, 2016, para. 8).

The International Covenant on Economic, Social and Cultural Rights (ICESCR) (1966) is widely ratified with 172 States Party. Article 15 protects 'the right of everyone to take part in cultural life' (art. 15(1)(a)). The Committee on Economic, Social and Cultural Rights (CESCR) has defined culture in

General Comment No. 21 as "a broad, inclusive concept encompassing all manifestations of human existence" (Committee on Economic, Social and Cultural Rights, 2009, para. 11), and 'cultural life' as including, "customs and traditions through which individuals, groups of individuals and communities express their humanity and the meaning they give to their existence" (Committee on Economic, Social and Cultural Rights, 2009, para. 13(a)). In General Comment No. 26 on land rights, CESCR drew upon norms enshrined in both ILO No. 169 and UNDRIP, in acknowledging the importance of Indigenous legal norms of land tenure and internal modes of socio-political organisation (Committee on Economic, Social and Cultural Rights, 2023, para. 16). The comment continued by calling upon states to recognise Indigenous peoples' collective ownership of lands, territories and resources as a means of respecting their self-determination and land tenure systems (Committee on Economic, Social and Cultural Rights, 2023, para. 19). At the same time, the CESCR also emphasised that states "should also monitor and regulate customary law, … to protect the rights of women and girls who are affected by traditional inheritance rules of male primogeniture" (Committee on Economic, Social and Cultural Rights, 2023, para. 14). This reasoning has also been applied in individual complaints including *J.T et al. v Finland* (2024). In this decision, the Committee affirmed that the right to take part in the cultural life of a community necessitates measures to give legal recognition and effective protection to Indigenous peoples' rights to their traditional lands, including forms of collective ownership (*J.T. et al. v. Finland*, 2024, para. 14.10), and the Committee requested that Finland initiate a process to achieve this (*J.T. et al. v. Finland*, 2024, para. 17). The Committee has not engaged such an unambiguous language as has been utilised by CERD, but it has pronounced that realisation of Article 15 requires States Party to the Covenant recognise Indigenous legal norms of land tenure.

The International Covenant on Civil and Political Rights (ICCPR) was adopted by a UN General Assembly resolution in 1966 and currently has 167 States Party. Articles 14 and 27 of the Convention are of particular relevance. Article 14 guarantees equality before courts and tribunals and the right to a fair trial. In General Comment No. 32, the Human Rights Committee (HRC) confirmed that this provision is applicable in instances in which a state recognises a nonstate legal system (Human Rights Committee, 2007, para. 24). The HRC further stipulated that in such contexts, the State Party must that ensure proceedings before such courts are:

> 1.) limited to minor civil and criminal matters;
>
> 2.) meet the basic requirements of fair trial and other relevant guarantees of the Covenant, and;
>
> 3.) their judgments are validated by State courts in light of the guarantees set out in the Covenant and can be challenged by the parties concerned in a procedure meeting the requirements of article 14 of the Covenant (Human Rights Committee, 2007, para. 24).

This clearly demonstrates that the Committee does not consider nonstate legal systems, including Indigenous legal orders, to be fundamentally contrary to the Convention, but it does indicate the Committee's circumspection of the matter. The Committee stresses the requirement that such legal systems must be closely supervised and limited by the state in order to ensure that they comply with international human rights norms.

Additionally, Article 27 of the ICCPR protects the 'right of persons belonging to minorities to enjoy their own culture' and over time, this provision "has been interpreted in a way that affords strong protection to indigenous peoples" (Koivurova, 2011, p. 4). In General Comment No. 23, the HRC observed 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" (Human Rights Committee, 1994, para. 7). In a recent individual complaint, *Benito Oliveira Pereira and Lucio Guillermo Sosa Benega, on their own behalf and that of the other members of the Campo Agua' Indigenous Community of the Ava Guarani people v. Paraguay* (2021) the Committee interpreted Article 27 in light

of UNDRIP in addition to drawing upon statements by CESCR and CERD. The Committee found a that Article 27, "enshrines the inalienable right of indigenous peoples to enjoy the territories and natural resources that they have traditionally used for their subsistence and cultural identity"(*Benito Oliveira Pereira and Lucio Guillermo Sosa Benega, on their own behalf and that of the other members of the Campo Agua' indigenous community of the Ava Guarani people v. Paraguay*, 2021, para. 8.6). The HRC's willingness to employ these sources in expanding its conceptualisation of Indigenous culture suggests that it is possible, if not likely, that in the event a complaint does arise concerning the right of Indigenous peoples to maintain their own legal systems, the Committee may recognise it as falling under the protection of Article 27.

Finally, the Convention on the Rights of the Child (CRC) was adopted in 1989 and is the most widely-ratified human rights treaty with 196 States party. Article 5 requires that States Parties "respect the responsibilities, rights and duties of parents or, where applicable, the members of the extended family or community as provided for by local custom…" Furthermore, Article 30 specifies that indigenous children "shall not be denied the right, in community with other members of his or her group, to enjoy his or her own culture…" The Committee on the Rights of the Child has asserted that States "are encouraged to take all appropriate measures to support indigenous peoples to design and implement traditional restorative justice systems as long as those programmes are in accordance with the rights set out in the Convention, notably with the best interests of the child" (Committee on the Rights of the Child, 2009, para. 75). Again, this demonstrates acknowledgement by a Treaty Body of the importance of the recognition and facilitation of Indigenous legal systems.

As exhibited by these examples from Treaty Bodies, while the right of Indigenous peoples to maintain their own juridical system is not enumerated in most human rights instruments, it is now protected across international human rights law, with the requirement that other international human rights norms are also respected. In particular, these committees have noted that this right is vital for the protection of other rights that are enumerated: in particular, the rights to self-determination, culture, access to justice/remedy and even property rights. Chinkin describes that, through these general recommendations/comments, Treaty Bodies "set out their understanding of the scope, applicability, and content of respective treaties" and this 'technique results in the evolution of states' treaty obligations over time' (Chinkin, 2022, p. 71). While Treaty Bodies 'do not have law-making competence,' it is also the case that "a general comment clarifies treaty provisions [and therefore] might be seen as a form of secondary treaty law, deriving its authority from the binding nature of the treaty and implied consent of states to it" (Chinkin, 2022, p. 71). Therefore, general recommendations and comments are authoritative statements on the meaning of provisions of treaties: they elucidate the scope and content of a right enshrined in the convention rather than creating a new right. Additionally, it is possible that this right is protected by customary international law. Customary international law is considered as "resulting from the combination of two elements: an established, widespread, and consistent practice on the part of States; and a psychological element known as *opinio juris*", i.e. state practice plus the belief by states that the practice is obligatory (Thirlway, 2014, p. 98). There are mixed reports about level of acceptance of the right of Indigenous peoples to maintain their own legal systems by individual states. A study examining the behaviour of states on this would be welcome but is outside the scope of this paper. However, it has also been asserted by many that while UNDRIP has not been widely ratified, it does have the status of customary international law. The next section investigates trends at the regional level.

III. REGIONAL HUMAN RIGHTS INSTRUMENTS

a. The Organization of American States

In 1969, the American Convention on Human Rights was adopted by the Organization of American States (OAS), and has subsequently been ratified by 25 of the organisation's 34 Member States.

Similar to many international human rights instruments, this document does not expressly mention Indigenous people, however the Inter-American Commission on Human Rights (IACHR) and the Inter-American Court of Human Rights (IACtHR) have explicitly stated that the Convention requires that states recognise Indigenous legal systems and also that state institutions must take Indigenous legal concepts into consideration. Furthermore, both bodies have demonstrated willingness to employ Indigenous legal concepts in their own decisions. For example, there has been a series of cases that concern, inter alia, dispossession of Indigenous peoples of their communal lands, in which Article 21 (which protects property rights) has consistently been interpreted in a manner that requires state recognition of Indigenous peoples traditional land tenure and legal systems. For example, in *Mayanga (Sumo) Awas Tingni Community v Nicaragua* (2001), the IACtHR employed Indigenous conceptions when interpreting the rights to land and natural resources (Gómez Isa, 2017, p. 63). In this case, the Court "accepted that the right to property under the [American Convention] should also uphold indigenous title deriving from customary law, and found a positive state obligation to recognise indigenous land tenure through demarcation" (Xanthaki, 2009, p. 32). In the *Case of the Kichwa Indigenous People of Sarayaku v. Ecuador*, the Court affirmed that Article 21 "protects the close relationship that the indigenous peoples have with their lands, as well as with the natural resources and the intangible elements derived from them" (*Case of the Kichwa Indigenous People of Sarayaku v Ecuador*, 2012, para. 145). This protection includes ensuring that Indigenous peoples "can continue their traditional way of living, and that their distinctive cultural identity, social structure, economic system, customs, beliefs and traditions are respected" (*Case of the Kichwa Indigenous People of Sarayaku v Ecuador*, 2012, para. 146). The Court was even more explicit in the *Case of the Kuna de Madugandí and Emberá de Bayano indigenous peoples v Panama* (2014). Drawing on language from the *Kichwa Indigenous People of Sarayaku* case, the Court demonstrates its pragmatic reasoning:

> Ignoring the specific forms of the right to the use and enjoyment of property based on the culture, practices, customs and beliefs of each people, would be tantamount to maintaining that there is only one way to use and dispose of property, which, in turn, would render protection under this provision illusory for millions of people (*Case of the Kuna Indigenous People of Madungandí and the Emberá Indigenous People of Bayano and their Members v Panama*, 2014, para. 111).

The Court ultimately held that Indigenous conceptions of collective land ownership and possession 'deserve equal protection under Article 21 even though they do not necessarily conform to the classic conception of property' (*Case of the Kuna Indigenous People of Madungandí and the Emberá Indigenous People of Bayano and their Members v Panama*, 2014, para. 111).

Additionally, the Inter-American institutions have found that the right of access to remedy also requires the recognition of Indigenous legal concepts and systems. In the *Case of Aloeboetoe et al. v. Suriname* (1993), at the request of the Commission, the IACtHR applied the customary family traditions of the Saramaka community rather than Suriname's family law when considering who may be deemed an heir of the victims of state repression in order to determine who was owed reparations (*Aloeboetoe et al. v Suriname*, 1993, para. 17). The Court specifically applied the nonstate customs in a manner that was consistent with other human rights protected in the Convention (*Aloeboetoe et al. v Suriname*, 1993, para. 62). In the *Case of the Kichwa Indigenous People of Sarayaku* the IACtHR asserted that in guaranteeing access to effective remedies, the State must take into account Indigenous peoples customary law, values and practices (*Case of the Kichwa Indigenous People of Sarayaku v Ecuador*, 2012, para. 264). In the *Case of the Kuna de Madugandí and Emberá de Bayano indigenous peoples*, the Commission recommended that Panama "[e]stablish an adequate and effective remedy that protects the rights of the indigenous peoples … including respect for the right of indigenous peoples to apply their customary laws through their own systems of justice" (*Case of the Kuna Indigenous People of Madungandí and the Emberá Indigenous People of Bayano and their*

Members v Panama, 2014, p. 5). Gómez Isa observes that "[b]y opening the door to indigenous conceptions of law, justice and dignity, the [Inter-American system] is decisively contributing with its progressive jurisprudence to an increasingly multicultural approach to human rights law" (Gómez Isa, 2017, p. 55). Faundez asserts that this "provides indigenous communities with a platform to further their struggle for improved access to justice and meaningful political, social and economic equality" (Faundez, 2010, p. 104).

Following this line of jurisprudence, the OAS adopted the American Declaration on the Rights of Indigenous Peoples in 2016. In contrast with the Convention, this document explicitly protects the right of Indigenous peoples to maintain their own juridical institutions. Article 6 calls upon states to 'recognise and respect the right of Indigenous peoples to their juridical systems or institutions' (art. 6). Article 22 expressly requires States, in conjunction with Indigenous peoples, take effective measures to ensure:

> 1. Indigenous peoples have the right to promote, develop and maintain their institutional structures [...] and, in the cases where they exist, juridical systems or customs, in accordance with international human rights standards.
>
> 2. Indigenous law and legal systems shall be recognized and respected by national, regional and international legal systems.

The Declaration clearly seeks to ensure both legal and normative pluralism, in accordance with international human rights norms. While it is technically legally non-binding, a 2017 OAS report confirms that in the Inter-American system, the collective nature of Indigenous peoples rights as set out in the Declaration are protected (Inter-American Commission on Human Rights, 2017, p. 44). It asserts that full enjoyment by Indigenous peoples of their human rights demands the preservation of their lands, which in turn requires that the 'legal system be in accordance Indigenous law, values and customs' (Inter-American Commission on Human Rights, 2017, pp. 44–45). Furthermore, the report contends that effective access to justice requires Indigenous people have access to both state and Indigenous legal institutions (Inter-American Commission on Human Rights, 2017, p. 52). Therefore, the Commission has specifically "indicated that States must adopt the necessary measures to guarantee that access to community justice can take place regardless of the coverage and/or procedural workload of State judicial institutions, and stems from respect for the autonomy of indigenous peoples" (Inter-American Commission on Human Rights, 2017, p. 52). It is therefore clear that Indigenous peoples' right to maintain their own legal systems is protected by both the American Convention on Human Rights as well as the American Declaration on the Rights of Indigenous Peoples.

b. The African Union

The Organization of African Unity (now the African Union) adopted the African Charter on Human and Peoples' Rights in 1981, and to date 54 Member States have ratified it. In addition to the African Charter, UNDRIP was officially sanctioned as a source of law by the African Commission on Human and Peoples' Rights (ACHPR) in a 2007 Advisory Opinion. In this Opinion, the Commission confirmed:

> the ACHPR is of the view that the right to self-determination in its application to indigenous populations and communities, both at the UN and regional levels, should be understood as encompassing a series of rights [... including] a recognition of their structures and traditional ways of living as well as the freedom to preserve and promote their culture (African Commission on Human and Peoples' Rights, 2007, para. 27).

The African Court on Human and Peoples' Rights (ACtHPR) interprets Indigenous peoples rights under the African Charter in light of other international human rights norms, including UNDRIP

(*African Commission on Human and Peoples' Rights v. Republic of Kenya*, 2017, para. 125). Claridge notes that both the "Endorois and Ogiek rulings [which will be discussed below] keenly demonstrate that [UNDRIP] has been repeatedly and continuously relied upon as an authoritative source of law and guidance by both the Commission and the Court in determining the scope of protection for indigenous peoples' rights in Africa" (Claridge, 2019, p. 277). This endorsement of UNDRIP is significant, given the fact that it expressly protects the right of Indigenous peoples 'to maintain and strengthen their distinct legal cultural institutions' (art. 5), and stipulates that "Indigenous peoples have the right to promote, develop and maintain their [. . .] juridical systems or customs, in accordance with international human rights standards" (art. 34). However, in addition to application of UNDRIP, both the Court and Commission have affirmed that the African Charter protects a broad understanding of culture as enshrined in Article 17, providing, inter alia, that "[e]very individual may freely, take part in the cultural life of his community" (art. 17.2).

In *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v. Kenya* (2010) (Endorois Case), the Commission drew heavily on jurisprudence from the Inter-American system in its finding of a violation of Article 14 (which protects property rights). Though it did not go as far as to specifically require the Kenyan state to recognise and support of Endorois legal norms generally, the Commission did hold that:

> Article 17 [. . .] understands culture to mean that complex whole which includes a spiritual and physical association with one's ancestral land, knowledge, belief, art, *law, morals, customs,* and any other capabilities and habits acquired by humankind as a member of society - the sum total of the material and spiritual activities and products of a given social group that distinguish it from other similar groups (emphasis added)(*Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v. Kenya*, 2010, para. 241).

The Commission noted that Article 17 requires States Party to "promote cultural rights including the creation of opportunities, policies, institutions, or other mechanisms that allow for different cultures and ways of life to exist" (*Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v. Kenya*, 2010, para. 248). In *African Commission on Human and Peoples' Rights v. Republic of Kenya* (2017) (Ogiek Case), the ACtHPR observed that "a voluntary perpetuation of cultural distinctiveness" including, inter alia, 'laws and institutions, is a relevant factor the identification and understanding of the concept of Indigenous populations.' (*African Commission on Human and Peoples' Rights v. Republic of Kenya*, 2017, para. 107). In line with jurisprudence from the Commission in the Endorois case, the Court also affirmed that "culture should be construed in its widest sense encompassing the total way of life of a particular group, including [. . .] rituals such as the group's particular way of dealing with problems" among many other practices (*African Commission on Human and Peoples' Rights v. Republic of Kenya*, 2017, para. 179). And held that the "protection of the right to culture goes beyond the duty, not to destroy or deliberately weaken minority groups, but requires respect for, and protection of, their cultural heritage essential to the group's identity" (*African Commission on Human and Peoples' Rights v. Republic of Kenya*, 2017, para. 179).

Another important component of the African Union's human rights regime is the Working Group on Indigenous Populations/Communities and Minorities in Africa (WGIPM). The ACHPR created the Working Group in 2000 and it has been described as a "significant voice in bolstering Indigenous advocacy" in the region (Côté *et al.*, 2024, p. 17). It carries out a range of work including, "conducting promotional and protection missions to different countries, undertaking research and publishing reports on the rights of indigenous peoples" (Claridge, 2019, p. 270). In particular, it has issued several reports that touch on the topic of Indigenous legal systems. The WGIPM has long-acknowledged that the non-recognition of Indigenous peoples legal systems in Africa has led to acute challenges

for those communities. A 2003 report described that Indigenous peoples' "customary laws and regulations are not recognized or respected and as national legislation in many cases does not provide for collective titling of land [...], one of the major requests of indigenous communities is therefore the recognition and protection of collective forms of land tenure" (*Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v. Kenya*, 2010, para. 91). In a later report, the Working Group noted that "pastoralist and hunter-gatherer communities have only, to a very limited extent, legal titles to their land as their customary laws and regulations are not recognized or respected" (Working Group of Experts on Indigenous Populations/Communities, 2005, p. 21). In 2017, the Working Group recommended that African states "[r]ecognise indigenous populations/communities' customary laws and traditional mechanisms of conflict resolution..." (Working Group on Indigenous Populations/Communities, 2017, p. 133). Heyns and Killander have described that outputs by the Working Groups "take the lead in developing normative instruments" (Heyns and Killander, 2022, p. 497). Indeed, in light of that 2017 report the ACHPR did adopt a resolution on the same topic in 2021 which urged States Party to "[r]ecognize indigenous populations/communities' customary laws and traditional mechanisms of conflict resolution" (African Commission on Human and Peoples' Rights, 2021). Resolutions such as these are significant because the Commission relies on them in caselaw (Heyns and Killander, 2022, p. 498). In line with trends at the international level and in the Inter-American human rights system, African Union human rights bodies are ostensibly increasingly recognising that Indigenous peoples' right to maintain their own legal systems is vital for the fulfilment of other rights. In this context, this has primarily been achieved through an expansive and holistic conceptualisation of the right to culture, but there is also potential for unequivocal recognition of a standalone right for Indigenous peoples' right to maintain their own legal systems if Articles 5 and 34 of UNDRIP are operationalised.

c. The Council of Europe

The Council of Europe (CoE) was established in 1949 and currently has 46 Member States. The Council has ratified numerous human rights treaties, including the European Convention on Human Rights (ECHR), implementation of which is overseen by the European Court of Human Rights (ECtHR). While the number of Indigenous people who fall under the jurisdiction of the Court decreased dramatically when the Russian Federation withdrew from the Council in 2022, the region is still home to many Indigenous peoples, primarily situated in the circumpolar regions of Europe: the Inuit in Kalaallit Nunaat (Greenland) and the Sámi in Sápmi (Sámi region in Scandinavia). Writing in 2011, Koivurova speculated that the lack of literature on the topic of Indigenous legal rights in the European context is due, at least in part, to the fact that "there have been no landmark cases decided by the ECtHR in favour of indigenous peoples" (Koivurova, 2011, p. 3). As of 2024, the situation remains much the same, though that is not due to lack of advocacy. Sámi groups have brought many complaints before UN Treaty Bodies and the European Court, and activists have long been calling for increased autonomy. It is evident that there is at least some appetite among community leaders and scholars for the recognition of Sámi legal institutions. Kuokkanen notes the recovery of juridical autonomy is often part of a wider campaign for self-determination which "enables Indigenous peoples to remain distinct peoples by having control of their own affairs and practicing their own laws, customs, and land tenure systems through their institutions and in accordance to their traditions" (Kuokkanen, 2019, p. 27).

The ECtHR has heard several cases concerning legal pluralism, the most widely-cited of which is *Refah Partisi v Turkey* (2003). This case concerned the banning of a Turkish political party on the grounds that it's members advocated for legal pluralism. In this case, the Court held that while *pluralism of ideas* is vital in a democracy, the form of 'thick' legal pluralism as advocated for by members of the Refah party is intrinsically incompatible with fundamental democratic principles. The Cham-

ber Judgement (2001) describes that "such a societal model cannot be considered compatible with the Convention system" because 1.) "it would do away with the State's role as the guarantor of individual rights and freedoms and the impartial organiser of the practice of the various beliefs and religions in a democratic society" and 2.) "such a system would undeniably infringe the principle of non-discrimination between individuals as regards their enjoyment of public freedoms" (*Refah Partisi and others v Turkey*, 2001, para. 70). The Grand Chamber (2003) concurred with this assessment, concluding "that a plurality of legal systems, as proposed by [the applicant] cannot be considered to be compatible with the Convention system" (*Refah Partisi and others v Turkey*, 2003, para. 119). Brems describes this decision as having "undeniably strong authority" which "is not likely to be overruled in the near future" (Brems, 2017, p. 35). However, in spite of the strong language used by the Court in *Refah*, Quane notes that there are other cases in which the ECtHR has upheld instances of normative pluralism (for example, the recognition of religious marriages by state courts), and appears to have tacitly accepted the "competence afforded to Muftis to adjudicate on certain family and inheritance disputed between Muslims" in *Serif v Greece* (2001) (Quane, 2013, pp. 688–689). Quane concludes that 'while *Refah* prohibits a certain form of legal pluralism (the establishment of a plurality of legal orders that would operate in all fields of public and private law according to religious or other beliefs), it would appear that other, 'thin' versions of legal pluralism are permitted under the Convention' (Quane, 2013, pp. 689–690).

Indeed, this is borne out in the more recent case, *Molla Sali v Greece* (2018), which concerned the mandatory application of Islamic inheritance law in the context of the Muslim minority community in Greece. While the European Court did note with concern that the application of Sharia law can sometimes result in violations of human rights (*Molla Sali v. Greece*, 2018, para. 154), it did not determine that Islamic legal norms or the co-existence of multiple legal systems are incompatible with the ECHR *per se*. The Court did however assert that 'refusing members of a religious minority the right to voluntarily opt for and benefit from state law, amounts to discrimination and a breach of the right to free self-identification' (*Molla Sali v. Greece*, 2018, para. 158). Puppinck describes that in this judgement, the ECtHR deliberately "adopts an approach that is both liberal and communitarian, capable of accommodating the coexistence of diverse communities with legal privileges within the same state" (Puppinck, 2019). Additionally, Koivurova has stressed that as Indigenous rights protection is becoming more robust at the international level, this corpus of rights will likely to be afforded stronger protection by the ECtHR over time, due to the Court's 'living instrument' approach (Koivurova, 2011, p. 31). In light of this line of jurisprudence and the living instrument approach, it seems likely that if a case did arise in relation to an Indigenous legal system, the Court would be open to supporting recognition and protection.

IV. LIMITS TO THE RIGHT

This paper demonstrates that the most of the major international human rights legal instruments guarantee the right of Indigenous peoples to maintain their own legal system and oblige states to recognise and facilitate those systems, though it is somewhat less distinct in the African Union, and even less so in the Council of Europe. It is however, unambiguous across these systems, that when Indigenous legal systems are active, they must operate in accordance with international human rights law, though this standard has developed over time. ILO Convention No. 107 allowed for Indigenous legal systems to 'an extent that is consistent with the interests of the national community' (art. 8) and, when "not incompatible with the national legal system or the objectives of integration programmes" (art. 7). This highly restrictive assimilationist approach arguably totally undermines the right and happily was not reproduced in Convention No. 169 which reads to "the extent compatible with the national legal system and internationally recognised human rights" (art. 9.1). However, this approach has also been criticised. The Expert Mechanism has held that such repugnancy clauses which demand compatibility with the national legal system "undermine and discriminate against in-

digenous peoples' legal systems" (Expert Mechanism on the Rights of Indigenous Peoples, 2013, para. 55).

Article 34 of UNDRIP requires indigenous legal systems operate 'in accordance with international human rights standards' but unlike the ILO Conventions, it does not contain a comparable provision regarding compliance with national human rights norms or legal systems. The CEDAW Committee has also stressed that Indigenous legal norms must be applied in a manner that is consistent with international human rights (Committee on the Elimination of Discrimination Against Women, 2022, para. 25). This is the standard that has been adopted by the other treaty bodies, as well as the Inter-American institutions. Additionally, Committee on the Rights of the Child specifies that "measures to support indigenous peoples to design and implement traditional restorative justice systems" must be in accordance "with the best interests of the child" (Committee on the Rights of the Child, 2009, para. 75), which is consistent with the application of children's rights. However, Special Rapporteur Victoria Tauli-Corpuz has demonstrated some unease with this prevailing standard. She asserted that "the mere existence of human rights concerns in indigenous justice systems should not in itself constitute a valid argument to reject their legitimacy" (Special Rapporteur on the rights of indigenous peoples, 2019, para. 73), and that any "[c]hanges in traditions and customs of indigenous peoples towards greater harmonization with international human rights should ideally come from within indigenous communities" (Special Rapporteur on the rights of indigenous peoples, 2019, para. 101).

V. POLITICS OF RECOGNITION AND CHALLENGES OF JURISDICTIONAL DELINEATION

The above analysis of international human rights law demonstrates that there is a right of Indigenous peoples to maintain their own legal systems, and that international and regional human rights institutions are converging in their approach. However, the politics of recognition and jurisdictional delineation is much more contentious. As set out in the introduction, nonstate legal systems have long been regarded as threats to sovereignty and as such, "traditional justice systems of indigenous peoples have largely been ignored, diminished or denied through colonial laws and policies and subordination to the formal justice systems of States" (Expert Mechanism on the Rights of Indigenous Peoples, 2014, para. 8). The Expert Mechanism has noted the specific "challenges faced by indigenous peoples in freely exercising their juridical rights and pursuing juridical development within their societies are diverse and complex" (Expert Mechanism on the Rights of Indigenous Peoples, 2014, para. 26). Broadly speaking, there are major shortcoming with regards to implementation, and there is often "a gap between what international and national frameworks proclaim and the situation on the ground, as indigenous juridical systems continue to be subordinated despite legal recognition" (Expert Mechanism on the Rights of Indigenous Peoples, 2014, para. 26). In many instances the recognition of Indigenous jurisdiction is unduly limited in scope and subject to major qualifications: "laws frequently impose restrictions on the scope of indigenous jurisdiction, often limited the competency to minor offences and restricting jurisdiction to material, personal and territorial elements which have occurred within the territorial boundaries of an indigenous community" (Special Rapporteur on the rights of indigenous peoples, 2019, para. 75). In this section, I will examine the implementation of the right of Indigenous peoples to maintain their own juridical systems, drawing on the examples of the US and Bolivia, which are both generally considered to be exemplars of how a state ought to engage with Indigenous legal systems in their respective jurisdictions. However, these examples demonstrate that even in such contexts, there are shortcomings.

a. The Plurinational State of Bolivia

Latin America offers several examples of the recognition of the exclusive jurisdiction to Indigenous peoples. The region has seen a rise in the constitutionalisation of multiculturalism, plurinationalism and legal pluralism which was precipitated by multiple factors including the development of

international law in relation to indigenous peoples' rights (Corradi, 2017, pp. 100–101). According to Corradi, while the repression of Indigenous communities and their legal institutions occurred in Bolivia since the outset of colonisation in the region, "indigenous legal orders continued to operate as grass-roots level, often in a clandestine way, perpetuating a situation of unofficial legal pluralism" (Corradi, 2017, pp. 99–100). Indigenous legal orders remain much more widely accessible than the state justice system which covers only 42% of the country (Corradi, 2017, p. 100). The 2009 Bolivian Constitution now guarantees to protect Indigenous peoples' right to "the practice of their political, juridical and economic systems in accord with their world view" (art. 30(II.14)). Bolivia is one of "only two countries that have institutionalized a plurinational state fostered by indigenous peoples" (Merino, 2018, p. 774). Under this paradigm, normative equality exists between the state and Indigenous legal systems meaning there is (supposedly) no official hierarchy between them; the two legal systems are parallel. This formal equality is set out in Article 179 of the Constitution (art. 179(II)). Notwithstanding this constitutional provision, the relationship remains complex and at times, unclear. Indigenous peoples have the right to "exercise their jurisdictional functions and competency through their authorities, and shall apply their own principles, cultural values, norms and procedures" (art. 190(I)). Article 191 outlines Indigenous jurisdiction as based on "personal, material or territorial" factors (art. 191). However, this is subject to limitations. The Constitution stipulates that indigenous justice institutions are required to respect "the right to life, the right to defense and other rights and guarantees established in this Constitution" (art. 190(II)). In addition, *Law No. 073 on Jurisdictional Delimitation* (2010) which regulates "the coexistence of state and indigenous legal orders, imposes far-reaching limits on the competence of indigenous disputing forums" by enumerating "issues that are excluded from their material jurisdiction, such as agrarian and forest law, rape, homicide and assassination, and violations of the integrity of children and adolescents" (Corradi, 2017, p. 101). This legislation effectively neuters some of the novel language in the Constitution, essentially recasting 'normative equality' into the 'subordination of indigenous law' (Bustillos, 2015, p. 112).

Indeed, there are reasons why the supervision of Indigenous law in this way may be necessary in order to ensure that they do not violate other international human rights. In fact, there are three primary areas in which Indigenous justice institutions in Bolivia contravene international human rights law in relation to access to justice: (1) the use of corporal punishment, (2) discrimination against women, and (3) the infringement of fair trial guarantees. In 2013, the HRC noted with concern "that corporal punishment continues to be used as a punishment in the community-based justice system" (Human Rights Committee, 2013, para. 16). Indigenous authorities will attempt to mediate disputes and achieve the 'restoration of normal relationship when possible,' however 'in some cases wrong-doers may be banished from their community, which may be enforced by violence in cases of non-compliance' (Corradi, 2017, p. 107). In relation to discrimination against women, the CEDAW Committee has 'lauded the Bolivian state for its constitutional recognition of indigenous jurisdiction in a manner that does not contradict women's human rights but has called upon the state to ensure that the rights of Indigenous women are not violated by "harmful" customary laws and mechanisms through sustained intercultural dialogue' (Committee on the Elimination of Discrimination Against Women, 2015a, pp. 16–17). In particular it highlights the need for women's access to inheritance to be guaranteed, in addition to measures to secure recognition of their unremunerated domestic work (Committee on the Elimination of Discrimination Against Women, 2015a, para. 38). With respect to fair trial guarantees, the HRC has noted with concern "the lack of information on mechanisms for ensuring the compatibility of the native indigenous campesino justice system with [Article 14 of] the Covenant" (Human Rights Committee, 2013, para. 22). One issue that clearly violates Article 14 is the prohibition of legal representation in indigenous legal institutions. Bolivia's Plurinational Constitutional Tribunal has held that legal "representation is alien to indigenous practices, and that in a plural society, respect for cultural diversity entails no such imposition" (Corradi, 2017, p. 98).

However, Corradi notes that the Constitutional Tribunal "provides no guidance on how to evaluate the extent to which indigenous norms and procedures are compatible with fair-trial guarantees" (Corradi, 2017, p. 98).

While it is essential that states ensure full and effective implementation of all their human rights obligations, I agree with the Special Rapporteur's assertion that in the case of Indigenous communities, 'changes to traditions and customs towards greater harmonisation with international human rights norms should ideally come from within the communities themselves' (Special Rapporteur on the rights of indigenous peoples, 2019, para. 101). However, how this is to be achieved is undoubtedly a complex and context-specific process, the specificities of which are certainly worth exploring but are outside the scope of this paper. However, as noted above, CERD has issued very expansive recommendations in its Concluding Observations. It called upon Bolivia to amend the legislation governing Indigenous jurisdiction (*Law No. 073 on Jurisdictional Delimitation*) to bring it in line with "the principle of hierarchical equality of the Indigenous and the ordinary justice systems, expanding the scope of the Indigenous justice system to cover personal, material and territorial matters" (Committee on the Elimination of Racial Discrimination, 2024, para. 54). Additionally, the Committee recommended that Bolivia establish "specific mechanisms to ensure coordination and cooperation between the Indigenous and the ordinary justice systems" as well as "the allocation of sufficient financial, human and technical resources to the Indigenous, original and campesino justice system so that it can effectively carry out its mandate" (Committee on the Elimination of Racial Discrimination, 2024, para. 54). This case demonstrates that even when a state commits to recognising the full jurisdiction of Indigenous legal system, there are many factors at play that may reduce implementation.

b. The United States of America

Generally, the US is now viewed as affording broad recognition to Tribal government authorities to oversee their own legal systems. At the outset, it is important to highlight that many Indigenous legal scholars assert that Tribes are sovereign and have inherent extra-constitutional jurisdiction which is not reliant on recognition by the US state (Deer, 2018, p. 92). However, under Federal Indian law, Tribes are regarded as political enclaves that exist within the territory of the United States, and while they now have "extensive power to govern their own affairs" they are also "treated as 'dependent nations' whose rights and responsibilities may be unilaterally changed by Congress" (Tobin, 2014, p. 37). Indeed, the lived experiences of Indigenous communities across the US has been, and continues to be shaped by a series of unilateral legal impositions by the Federal government in the form of both legislation and jurisprudence. Some have broadened and affirmed Tribal authority, while others have diminished and restricted it, resulting in a highly complex lattice of jurisdictional delineation. In *Worcester v. Georgia* (1832), Chief Justice Marshall asserted, "Indian tribes are nations, sovereigns, "a people distinct from others," one of the three sources of sovereignty under the Constitution" and thus "are entitled to govern their reservations under their own laws, traditions, and priorities" (Wilkinson, 2006, p. 380). Notwithstanding Marshall's declaration, Congress proceeded to adopt policies that were "detrimental and destructive to Indian nations" (Matoy Carlson, 2015, p. 86). For example, through the 1880s, into the early twentieth century, allotment radically "undermined Indian nations by allotting tribally held land into alienable fee simple properties held by individual Indians and assimilating Indians into mainstream American culture as farmers" (Matoy Carlson, 2015, p. 86). In the 1930's, the government 'ended allotment and instead proceeded to emphasise Tribal self-government' (National Archives, 2024). However, this assertion of Tribal authority was soon subverted as Congress began to terminate tribes: "[f]rom 1953 until 1970, Congress initiated 60 separate termination proceedings against American Indian tribes, and over three million acres of tribal lands were relinquished as a result" (National Archives, 2024). Specifically, termination "ended the political and legal relationship between the United States and over 110 tribal governments, liq-

uidated tribal assets, and converted tribally held lands into fee simple properties" (Matoy Carlson, 2015, p. 86). Wilkinson notes that throughout this entire period, "[t]he real government in Indian country was the [Bureau of Indian Affairs], pure and simple, and it had been that way for generations" (Wilkinson, 2006, p. 381). However, Congress' Self-Determination Policy, which was first adopted in 1975, and has been reasserted since, 'has provided some Tribal nations the opportunity to develop governing structures' (Matoy Carlson, 2015, p. 84).

Tribes have fought hard for this restoration of self-rule, and many now "operate full-service governments that variously provide" among many other services "functions we more specifically identify as "legal," including legislatures, courts, attorney generals and tribal attorneys offices" etcetera (Wilkinson, 2006, p. 379). In *Solem v. Bartlett* (1984) and *McGirt v. Oklahoma* (2020), the US Supreme Court reaffirmed some aspects of Native jurisdiction over reservations resulting in a degree of strengthened authority. Blackhawk describes *McGirt* in particular as "a landmark ruling for federal Indian law" in which the Court held that 'a huge swath of Oklahoma was recognised by the Federal Government as within the reservation of the Muscogee (Creek) Nation and that the decision could be read as applying to a number of other similarly-situated Nations' (Blackhawk, 2020, pp. 2–3). In this case, the Court "reaffirmed the power of the Muscogee Nation to make law, execute it, and enforce it over the lands and people within its borders" (Blackhawk, 2020, p. 25). The decision was welcomed by Muscogee leaders "as a recognition of the tribe's right to govern itself and keep people safe on its reservation" and they since have "worked to expand the tribal police force and court system to handle the burgeoning new demands" (Young, 2024). The Supreme Court's ruling asserted that the Muscogee (Creek) Nation was never disestablished and therefore "courts could no longer prosecute crimes involving Native Americans on those lands" (Young, 2024).

Notwithstanding the Self-Determination Policy, Tribal authority and capacity to maintain Indigenous juridical systems has continued to contract and expand based on dictates by the various branches of the Federal government. One specific and contentious area in Indigenous jurisdiction is in relation to crimes perpetrated by non-Indigenous persons which has major implications for the provision of justice on Tribal lands. The *Major Crimes Act* (1885) gave the Federal Government exclusive authority over most violent crimes perpetrated by non-Native people in the majority of reservations across the US (Deer, 2018, pp. 92–93). Supreme Court jurisprudence has consistently upheld this principle. From the 1980s, while more and more cases concerning Indian law were being heard by the Court, "the tribes found themselves losing most of their cases, especially in the realm of tribal jurisdiction over non-Indians" (Wilkinson, 2006, p. 388). In fact, Matoy Carlson has noted that Indian nations "lose in the Supreme Court over 75 percent of the time" (Matoy Carlson, 2015, p. 81). In *Oliphant v. Suquamish Indian Tribe* (1978) the Court asserted that "tribal nations are forbidden to prosecute non-Indians for any crime, no matter how heinous" (Deer, 2018, p. 95). The *McGirt* ruling still does not give Tribal authorities jurisdiction over non-Native persons. Blackhawk notes that the *McGirt* case "left ambiguous the implications of the decision for civil jurisdiction and left open the question of how to navigate the complex web of tribal, federal, and state criminal jurisdiction within reservation borders" (Blackhawk, 2020, p. 52). Indeed some Native scholars see federal institutions including the Supreme Court as fundamentally incapable for providing Native Americans with justice. Journalist and Lakota community organiser Nick Estes details that:

"the supreme court was created not to enforce equality, not to expand rights, it was created by Indian killers and slave owners, primarily by the ruling class to uphold their interests. So it's an articulation of their rights and their interests fundamentally (The Red Nation Podcast, 2023)."

Estes argues that upon examination of the drafting of the US Constitution and its original intent, it becomes clear that it was "meant for the extermination of Native people fundamentally" and therefore "there is no legal remedy within the Constitution for Native people to expand our rights and to actually fundamentally exist within this land in perpetuity" (The Red Nation Podcast, 2023). This is

particularly relevant given the reliance of originalism and textualism as methods of constitutional interpretation by the US courts.

Issues of jurisdictional delineation are particularly acute in relation to violence against women. The *Violence Against Women Act*, which initially came into force in 1994, has periodically given some authority to Tribes to prosecute non-Native peoples accused of violent crimes against Native women. The fact that it is particularly difficult to hold non-Native offenders to account is extremely important, because according to the National Institute of Justice, "95% of Native women who were victims of violence reported that they had a non-Native perpetrator" (Deer, 2018, p. 91). The Indian Law Resource Centre, along with partner organisations, has sought to "change and improve United States law that unjustly restricts Indian nations from adequately investigating, prosecuting, and punishing these crimes against all perpetrators" (Indian Law Resource Centre). Their 'Safe Women, Strong Nations Project' aims "to restore tribal criminal authority and to preserve tribal civil authority; and helps Indian nations increase their capacity to prevent violence and punish offenders on their lands" (Indian Law Resource Centre). More recently, in *Oklahoma v Castro-Huerta* (2022), the Supreme Court held that "The Federal Government and the State have concurrent jurisdiction to prosecute crimes committed by non-Indians against Indians in Indian country" (*Oklahoma v. Castro-Huerta*, 2022, p. 1). Specifically in response to *Castro-Huerta*, CERD expressed concern "that indigenous women are denied the right of access to justice and reparation, as a result of factors such as the failure to prosecute perpetrators at the state and federal levels because tribes lack full jurisdiction, in particular over non-indigenous perpetrators" (Committee on the Elimination of Racial Discrimination, 2022b, para. 47). The Committee therefore recommended that the US "recognize tribal jurisdiction over all offenders who commit crimes on tribal lands, and increase funding and specific training for those working within the criminal justice system" (Committee on the Elimination of Racial Discrimination, 2022b, para. 48). Indeed the Special Rapporteur has proposed that "State authorities [generally, not just in the US] should consider recognizing the jurisdiction of indigenous justice authorities to adjudicate matters involving non-indigenous persons and entities present in their lands" because "impunity of perpetrators should always be a concern, particularly in areas where State institutions are practically absent" (Special Rapporteur on the rights of indigenous peoples, 2019, para. 78).

International human rights law guarantees the right of Indigenous peoples to maintain their own legal systems and obliges states to recognise and facilitate those systems, however these two cases demonstrate the resistance by states to afford full jurisdiction to Indigenous peoples. In Bolivia, even though the state committed to recognising the full jurisdiction of Indigenous legal systems subject to their compliance with constitutional rights, the state subsequently excluded some significant issues from their material jurisdiction. It is possible that the rescission of Indigenous jurisdiction for cases of homicide, sexual violence and offences against minors represents a good faith effort by the state to prevent potential human rights violations. However, the exclusion of jurisdiction over agrarian and forest law appears to exhibit the state re-exerting control over Indigenous land and natural resources. In the US, inconsistent legal impositions by the Federal Government has resulted in a highly-complex and ever-evolving lattice of jurisdictional delineation that has hindered Indigenous authorities from ensuring access to justice for Indigenous persons, particularly Indigenous women, on Tribal lands. For decades, the state was determined to prevent non-Native people from being subject to Indigenous law, at a high cost. These two cases highlight the complexity borne from competing interests in post-colonial and settler states, and indicate that progress in the realisation of the right of Indigenous peoples to maintain their own legal systems is likely to be unsystematic and non-liner, resulting exceedingly intricate legal realities. In addition to now being a well-established human rights obligation, the recognition of Indigenous legal systems can constitute a significant step in making amends for past injustices. For example, in its final report the Truth and Reconciliation Commission of Canada identified "the revitalization of Indigenous law and legal traditions" as one of

the primary elements of reconciliation (Anker, 2016, p. 16). In light of the Commission's recommendations, the Canadian government adopted UNDRIP in 2016, passed the *United Nations Declaration on the Rights of Indigenous Peoples Act* (2021) and initiated the 'Indigenous Justice Strategy.'

VI. CONCLUSION

There are many well-founded and interconnected reasons why Indigenous peoples may prefer to handle issues in Indigenous legal institutions rather than in state legal fora, not least because state law has at times actively been utilised to oppress Indigenous communities. The above doctrinal analysis of international and regional human rights law demonstrates that there is a right of Indigenous peoples to maintain their own legal systems. This right is expressly enshrined in the ILO Conventions and UNDRIP. While other human rights conventions do not specifically mention it, their respective oversight mechanisms have increasingly acknowledged that the right of Indigenous peoples to maintain their own juridical systems is an intrinsic part of other protected rights. Specifically, this analysis demonstrates that the recognition and support of Indigenous legal norms is viewed by most international and regional human rights mechanisms as necessary for the full and effective protection of Indigenous land rights, the right to culture and the right of self-determination, among others. While it is important to note that some of these institutions are more emphatic in their assertions than others, even institutions that have not made a clear determination on the matter yet, such as the ACtHPR and the ECtHR, seem likely to recognise the right given the increasingly prominent status of UNDRIP in international law. It is consistent across these systems, that when Indigenous legal systems (or nonstate legal norms in the case of the CoE) are active, they must operate in accordance with international human rights law. This paper has also demonstrated through two case studies that the politics of recognition and issues of jurisdictional delineation remain contentious, resulting in highly complex legal realities. In Bolivia, the people, through their constitution, recognised the equality of Indigenous legal systems with the state legal system. This equality has since been the subject of qualifications and constrictions, which have not effectively resulted in the prevention of human rights violations by the Indigenous legal systems. In the case of the US, decades of overlapping Federal precedent, law and policy has resulted in an overly-complex lattice of jurisdictional delineation that has hindered the ability of Indigenous peoples, particularly Indigenous women, from being able to access effective justice. Human rights are interrelated and indivisible. While states are obliged to respect, protect and fulfil rights, this must be done in a manner that recognised and respects Indigenous juridical systems, and provides that harmonisation of Indigenous legal norms and practices with international human rights is led by members of those communities.

[1] In a minority of States, *Public Law 280* (1953) replaced the *Major Crimes Act*, giving the state jurisdiction over criminal issues which, according to Deer, has resulted in 'lawlessness' on the reservations concerned (p. 94).

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