

# BETWEEN HOPE AND CRITIQUE: HUMAN RIGHTS, SOCIAL JUSTICE AND RE-IMAGINING INTERNATIONAL LAW FROM THE BOTTOM UP

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## I. INTRODUCTION

For human rights advocates, the present era is a time of reflection. This is partly because, in several countries, authoritarian patterns old and new are restricting scope for dissent and contestation—a trend that increases the need but reduces the space for human rights strategies.<sup>1</sup> At a deeper level, however, wide-ranging critiques over the past two decades have questioned the viability of human rights as a vehicle for emancipatory action.

Critiques of rights are not new and have taken different forms.<sup>2</sup> But growing public concerns about economic inequality have sparked more recent commentary about the role human rights may have played in abetting and even sustaining the perceived ills of global economic ordering—including poverty, dispossession and exploitation.<sup>3</sup> The historical overlap, since the 1970s, between the rise to prominence of human rights in public discourse and mobilization on the one hand, and the deepening of neoliberal economic configurations on the other, has sustained these debates.<sup>4</sup>

The new wave of critique has emerged at a time when many social movements mobilize human rights to frame their action in pursuit of social justice, from challenging land grabbing and labor exploitation, to promoting fairer terms of inclusion in global value chains. Over time, the critique could foster shifts in the discursive practices that underpin social justice advocacy. But the present coexistence of a new surge in the critique of rights on the one hand, and of mobilizing rights in social struggles on the other, raises questions about the relation between critical theory and emancipatory action.<sup>5</sup>

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<sup>1</sup> Philip Alston, *Human Rights Under Siege*, 14 SUR INT'L J. ON HUM. RTS. 267, 268 (2017).

<sup>2</sup> See, e.g., RADHA D'SOUZA, WHAT'S WRONG WITH RIGHTS? SOCIAL MOVEMENTS, LAW AND LIBERAL IMAGINATIONS xiv (2018); Wendy Brown, "The Most We Can Hope For . . .": *Human Rights and the Politics of Fatalism*, 103 S. ATLANTIC Q. 451 (2004); David Kennedy, *International Human Rights Movement: Part of the Problem?*, 15 HARV. HUM. RTS. J. 101 (2002); see also Ben Golder, *Beyond Redemption? Problematising the Critique of Human Rights in Contemporary International Legal Thought*, 2 LONDON REV. OF INT'L L. 77, 80 (providing a "critique of the critique").

<sup>3</sup> For diverse positions on this debate, see, e.g., JOHN LINARELLI, MARGON SALOMON & MUTHUCUMARASWAMY SORNAJAH, THE MISERY OF INTERNATIONAL LAW: CONFRONTATIONS WITH INJUSTICE IN THE GLOBAL ECONOMY (2018); SAMUEL MOYN, NOT ENOUGH: HUMAN RIGHTS IN AN UNEQUAL WORLD (2018); Susan Marks, *Four Human Rights Myths* (LSE Legal Studies Working Paper No. 10/2012, 2012), <https://ssrn.com/abstract=2150155>.

<sup>4</sup> MOYN, *supra* note 3.

<sup>5</sup> Paul O'Connell, *On the Human Rights Question*, 40 HUM. RTS. Q. 962, 963 (2018) ("This disjuncture—between critical theory and critical practice—raises . . . questions about the relationship between ideas and social movements, law and struggles to bring about social change, and . . . about the role of human rights in emancipatory politics."); see also Zachary Manfredi, *Recent Histories and Uncertain Futures: Contemporary Critiques of International Human Rights and Humanitarianism*, 22 QUI PARLE 3 (2013).

International law has long provided fertile ground for the interplay of human rights and social justice. International tribunals have adjudicated on human rights claims that were informed by a concern for social justice, for example, with regards to the litigation that indigenous peoples initiated to defend or reclaim their ancestral lands.<sup>6</sup> Similarly, the international bodies responsible for interpreting human rights treaties have had to grapple with social justice issues in the elaboration of their jurisprudence, and the involvement of activists in the development of new international human rights instruments has become an increasingly significant occurrence.

Outside the realm of institutionalized proceedings, public advocacy in wide-ranging socio-political arenas has often invoked the terms, and the authority, of international human rights treaties to advance social justice goals.<sup>7</sup> This role of international law in the interface between human rights and social justice means that the recent surge in the critique of rights raises questions about the theory and practice of international law, and ultimately about the emancipatory potential of international law itself.

This Article reflects on the place of human rights, particularly international human rights law, in strategies to advance social justice. It argues that, while some critique takes aim at an encompassing human rights “project,” the contested nature of human rights calls for more granular analyses that consider the diverse constellations of actors, agendas, arenas, and approaches connecting human rights to social justice. And while much public debate has focused on institutionalized human rights actors and frameworks, the article identifies human rights’ primary emancipatory promise in the agency of the social actors—indigenous peoples, agrarian movements, trade unions, non-governmental organizations (NGOs), grassroots groups—that have appropriated and in some cases reconfigured human rights from the bottom up.

Examples include international litigation to validate new interpretations of long-recognized rights; public campaigning for new international instruments to shift the contours of human rights; and invoking internationally recognized rights to change public discourses in local to global policy arenas. This re-centring of the discussion around how social actors mobilize internationally recognized human rights is part of a wider shift in the way international law is conceived of, not just as a practice located in the global centers of

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<sup>6</sup> See, e.g., *Indigenous Communities of the Xingu River Basin*, Pará, Brazil, PM 382/10, Inter-Am. Comm’n H.R. (Apr. 1, 2011) (requiring consultations that are “culturally informed,” among other social justice-based concerns).

<sup>7</sup> Sylvia Arzey & Luke McNamara, *Invoking International Human Rights Law in a “Rights-Free Zone”: Indigenous Justice Campaigns in Australia*, 33 HUM. RTS. Q. 733, 735 (2011) (analyzing the efficacy of the invocation of human rights in aboriginal public advocacy in Australia).

international diplomacy, but as a phenomenon that is both experienced and to some extent shaped at the grassroots as well.<sup>8</sup>

The remainder of the Article is structured as follows. Section II briefly outlines the relation between human rights and social justice, cursorily reviewing—and critically engaging with—some of the main strands of the recent critique of rights. Section II also articulates the case for disaggregating the interface between human rights and social justice in the light of two interlinked but distinctive modes of human rights advocacy: “reactive” strategies, whereby recourse to existing human rights concepts and instruments responds to specific instances or patterns of social injustice; and “constitutive” strategies, whereby advocacy aims for a more foundationally normative reconfiguration of human rights themselves, in pursuit of longer-term social justice goals.

Sections III and IV examine two case studies of “reactive” and “constitutive” forms of rights-claiming to distil qualitative insights on the place of human rights in social justice strategies. While much debate about the relation between human rights and social justice has been primarily grounded in European and North American experiences, the analysis deliberately focuses on experiences of advocacy conducted by actors that are located, at least in part, in the “global South,” often through alliances that cut across conventional North-South divides, and largely outside the mainstream “human rights movement,” in order to facilitate fuller consideration of the geographic and ideological diversity of human rights activism.

The first case study, discussed in Section III, concerns the “reactive” use of human rights in indigenous peoples’ struggles to challenge the award of commercial natural resource concessions in their ancestral territories. This case study relies particularly heavily on human rights litigation and jurisprudential developments that occurred within the regional human rights systems of Africa and the Americas. The second case study (Section IV) considers the use of human rights in “constitutive” strategies to transform the economic paradigm that underpins the global food system. This part focuses on the longstanding and ultimately successful advocacy of international agrarian movements for the adoption, by the United Nations General Assembly, of the United Nations Declaration on the Rights of Peasants and Other People Working in Rural Areas.<sup>9</sup>

Each of the two case studies is examined through a common socio-legal prism that interrogates: i) the political and juridical terrain from which the

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<sup>8</sup> See generally LUIS ESLAVA, *LOCAL SPACE, GLOBAL LIFE: THE EVERYDAY OPERATION OF INTERNATIONAL LAW AND DEVELOPMENT* (2015); see also Lorenzo Cotula, *Land, Property and Sovereignty in International Law*, 25 *CARDOZO J. INT’L & COMP. L.* 219 (2017); Sarah Mason-Case, *On Being Companions and Strangers: Lawyers and the Production of International Climate Law*, 32 *LEIDEN J. INT’L L.* 625 (2019).

<sup>9</sup> G.A. Res. 73/165, U.N. Declaration on the Rights of Peasants and Other People Working in Rural Areas (Dec. 17, 2018).

relevant rights-claiming practices emerged; ii) any normative reconfigurations the rights-claiming led to, whether in the form of jurisprudential developments or international (soft) law making; and iii) whether and how rights-claiming ultimately achieved the changes sought in social, political, and economic trajectories.

While extremely diverse in their actors, agendas, arenas and approaches, the two case studies illustrate the ways in which social actors have wielded human rights to reclaim land, resources and territories, to renegotiate control over national development pathways, and to challenge aspects of global economic ordering. These aspects range from the “extractivist” paradigm whereby large-scale agribusiness, mining, petroleum and hydro projects are converting indigenous lands to commodity extraction, all the way to control over the means of production and value chain relations in the context of global food systems.

The conclusion (Section V) develops cross-cutting reflections based on the findings of the two case studies, comparing the operation of reactive and constitutive modes, and identifying areas for cross-fertilization between the two. The reflections highlight the inherent limitations of mobilizing human rights concepts that are ultimately implicated with dominant economic and political structures. But they also point to conscious efforts to appropriate, and to some extent reconfigure, human rights in social struggles. The findings suggest that, while critiques of rights identify real problems, there is a need to broaden current debates, recognise the diversity of human rights forms, and more fully consider the practices of actors located outside the human rights mainstream. By shifting the focus from institutionalized human rights actors and frameworks, to rights-claiming as a practice of contestation, it might become possible to ask different questions about whether and how human rights can sustain emancipatory action.

## II. HUMAN RIGHTS AND SOCIAL JUSTICE: ANATOMY OF THE CRITIQUE— AND OF ITS LIMITS

### A. *On Social Justice*

The relation between human rights and social justice raises complex, multifaceted issues. This is partly because there are many conceptions of social justice, which have formed the object of variegated philosophical and political debates. Suffice it to say, for the purposes of this study, that a traditional emphasis in some social justice theories on the distribution of primarily material assets within or among national polities, and ultimately on the role of the state in national and international institutional configurations,<sup>10</sup> has been

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<sup>10</sup> See, e.g., JOHN RAWLS, A THEORY OF JUSTICE (1999); JOHN RAWLS, THE LAW OF PEOPLES (2001).

complemented by ideas of justice that, to diverse extents: more explicitly consider issues of recognition and representation;<sup>11</sup> focus on human capabilities rather than material goods alone;<sup>12</sup> and engage with the global and transnational dimensions of political and economic ordering.<sup>13</sup>

A framing that complements distributive issues with questions of identity and status (recognition), and of power and politics (representation),<sup>14</sup> provides a useful point of departure for interrogating the place of international human rights law in social justice advocacy. Some recent scholarly debates have placed particular emphasis on the interface between human rights and economic (in)equality.<sup>15</sup> In effect, economic inequality reflects one subset of (primarily distributive) issues within a broader social justice framing. While inequality is more easily measurable and more directly resonates with public concerns currently debated in many polities, a more encompassing social justice framing can more effectively capture the broad spectrum of issues and relations that are associated with contemporary global ordering.

### *B. The Critique in Outline*

Critiques of human rights are rooted in diverse normative perspectives, and it is impossible to do justice to them in the limited space available. By way of extreme synthesis, critics have developed both complementary and diverging accounts of what they see as the failure of human rights to confront injustice in socio-economic relations.

Some critics have argued that deep-level commonalities exist between human rights and capitalist organization, particularly the emphasis that both place on individual autonomy, and on the agency of the individual as a political and economic actor.<sup>16</sup> These critics have noted that certain human rights are instrumental to, and inherently associated with, the functioning of dominant economic models (for example, the role of the right to property in

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<sup>11</sup> See, e.g., NANCY FRASER & AXEL HONNETH, REDISTRIBUTION OR RECOGNITION? A POLITICAL-PHILOSOPHICAL EXCHANGE (Joel Golb, James Ingram & Christiane Wilke trans., 2003).

<sup>12</sup> See AMARTYA SEN, THE IDEA OF JUSTICE (The Belknap Press of Harvard Univ. Press 2009).

<sup>13</sup> See, e.g., THOMAS POGGE, WORLD POVERTY AND HUMAN RIGHTS (2008); KOR-CHOR TAN, TOLERATION, DIVERSITY, AND GLOBAL JUSTICE (2000).

<sup>14</sup> See Nancy Fraser, Hanne M. Dahl, Pauline Stolz, & Rasmus Willig, *Recognition, Redistribution and Representation in Capitalist Global Society: An Interview with Nancy Fraser*, 47 ACTA SOCIOLOGICA 374 (2004).

<sup>15</sup> See, e.g., MOYN, *supra* note 3.

<sup>16</sup> For a discussion of these positions, see Zak Manfredi, *Compatibility as Complicity? On Neoliberalism and Human Rights*, *Law and Political Economy*, L. & POL. ECON. BLOG (May 28, 2018), <https://lpeblog.org/2018/05/28/compatibility-as-complicity-on-neoliberalism-and-human-rights/>.

underpinning capitalist modes of production), and that public discourses have mobilized human rights to legitimize neoliberal economic reforms.<sup>17</sup> In these accounts, human rights have, in effect, sustained the foundations of an unjust economic order.<sup>18</sup>

Another body of critique has interrogated the perceived lack of ambition or effectiveness of human rights in confronting injustice, arguing that human rights “settled for preventing and mitigating deprivations but not changing the terms under which that suffering is not only made possible but is reproduced.”<sup>19</sup> In these—admittedly diverse and not always converging—accounts, human rights are potentially an emancipatory force, but they have failed to advance a truly transformative agenda that challenges unjust socio-economic relations. Rather, they have been primarily interpreted as establishing a minimum level of provision, a social safety net, to ensure that certain “basic needs” are met.<sup>20</sup>

These arguments, articulated in recent academic and policy debates, need to be understood in the light of a longer term ideational stratification of critiques, including Marxist and post-Marxist perspectives, that have questioned the conceptual framing of human rights and its historical association with liberal political theory<sup>21</sup> and delineated human rights as involving a fundamentally state-centric and conservative theory of change that can displace more radical “political and moral possibilities.”<sup>22</sup>

The recent wave of critique also ties in with a longstanding body of empirically grounded studies that pointed to the limitations of human rights in real-life social justice strategies. In some of these accounts, recourse to law inherently marginalizes the poor, because it shifts agency from social actors to legal professionals, in situations where the respective visions are often misaligned.<sup>23</sup> For example, some argue that disadvantaged groups may pragmatically prefer political engagement and negotiation over human rights

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<sup>17</sup> Jessica Whyte, *Powerless Companions or Fellow Travellers? Human Rights and the Neoliberal Assault on Post-Colonial Economic Justice*, RADICAL PHIL. (June 2018), <https://www.radicalphilosophy.com/article/powerless-companions-or-fellow-travellers>. On use of rights language to advance neoliberal reform, see QUINN SLOBODIAN, GLOBALISTS: THE END OF EMPIRE AND THE BIRTH OF NEOLIBERALISM 120–45 (2018).

<sup>18</sup> Whyte, *supra* note 17.

<sup>19</sup> LINARELLI ET AL., *supra* note 3, at 228.

<sup>20</sup> MOYN, *supra* note 3, at 162–73.

<sup>21</sup> See D'SOUZA, *supra* note 3.

<sup>22</sup> Jarrett Zignon, *Maintaining the “Truth”: Performativity, Human Rights, and the Limitations on Politics*, 17 THEORY & EVENT (2014), <https://muse.jhu.edu/article/553385>.

<sup>23</sup> Sheela Patel & Diana Mitlin, *Reinterpreting the Rights-Based Approach: A Grass-roots Perspective on Rights and Development*, in RIGHTS-BASED APPROACHES TO DEVELOPMENT: EXPLORING THE POTENTIAL AND PITFALLS 107, 108 (Sam Hickey & Diana Mitlin eds., 2009).



strategies that are deemed to be inherently confrontational and capable of damaging important social relations.<sup>24</sup>

Overall, critiques of rights command a substantial evidence base spanning different phases of contemporary human rights processes, both in relation to constitutional law in a variety of national contexts, and to the development and implementation of international human rights law. There is little doubt, for example, that many human rights concepts have historically emerged in connection with a political tradition that emphasises protecting individual rights against the exercise of state power, and that is coextensive with the architecture of the global capitalist economy.

This does not mean that human rights' contemporary horizon is restricted to one political project or economic model. Developments in international law have taken human rights in diverse directions, including the explicit recognition of collective rights and of a range of economic, social and cultural rights.<sup>25</sup> But in developing authoritative interpretations of these rights, some international jurisprudence has been reluctant to confront distributive issues or interrogate the foundations of economic ordering.<sup>26</sup>

It is also the case that, when international human rights bodies have issued judgments or declarations, these instruments have often failed to deliver hoped-for results, partly owing to the limited effectiveness of international enforcement mechanisms in the face of determined state non-compliance. Empirical research shows that many human rights decisions have not been implemented, in full or in part, or the outcomes of their implementation have fallen short of expectations.<sup>27</sup>

Further, questions of agency are a recurrent issue in human rights advocacy, as the worldviews of social actors and their (often highly trained, urban-based) legal advisors may not fully align, even more so when substantial geographical and cultural distances are at play, and as differentiated access to understanding and to action in the context of international legal proceedings

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<sup>24</sup> *Id.*

<sup>25</sup> Margot E. Salomon, *Why Should It Matter That Others Have More? Poverty, Inequality, and the Potential of International Human Rights Law*, 37 *REV. OF INT'L STUD.* 2137, 2155 (2011) ("Its tenets hold the possibility for an interpretation that better accommodates this collective venture of distributive justice; there is nothing inherent in its theoretical underpinnings on the nature of rights or obligations that limit the human rights project to sanctioning merely the bare bones of what it means to be human").

<sup>26</sup> *Id.* at 2137–55.

<sup>27</sup> OPEN SOC'Y JUST. INITIATIVE, *STRATEGIC LITIGATION IMPACTS: INDIGENOUS PEOPLES' LAND RIGHTS* (2017), <https://www.justiceinitiative.org/uploads/8c45f0be-d3be-40d6-aae8-a0b046bf6511/slip-land-rights-20170620.pdf> [hereinafter *STRATEGIC LITIGATION IMPACTS*]; Joel E. Correia, *Adjudication and Its Aftereffects in Three Inter-American Court Cases Brought Against Paraguay: Indigenous Land Rights*, 11 *ERASMUS L. REV.* 43, 43–56 (2018).

can raise difficult challenges in ensuring the agenda genuinely proceeds from the bottom up.<sup>28</sup>

### C. *Human Rights in 3D*

These considerations confirm the relevance of critically interrogating the viability of human rights concepts and practices, and of international human rights law, in transforming socio-economic relations. At the same time, recourse to human rights in diverse social justice struggles raises questions about whether parts of the critique do not in fact rest on a reductionist view of human rights and downplay their evolving and contested nature.<sup>29</sup> Beyond the apparent “common language of humanity” human rights have been claimed to provide,<sup>30</sup> the human rights field involves radically different actors and arenas—from global law firms advising large corporations on business and human rights due diligence, to international agencies and the multilateral architecture of human rights diplomacy, through to grassroots lawyers working with disadvantaged people in often challenging and even dangerous environments.

In this context, diverse human rights actors—from social activists to legal technocrats—have advanced different and possibly conflicting human rights conceptions and practices. While some advocates have espoused both human rights and neoliberal positions,<sup>31</sup> and while human rights have been enlisted to support neoliberal reform,<sup>32</sup> attempts to “hijack” human rights did not go unchallenged,<sup>33</sup> and some radical scholars have reconceptualised human

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<sup>28</sup> See, e.g., Deval Desai, *A Qui l'Homme Sauvage? The Text, Context, and Subtext of Agreements Between Mining Corporations and Indigenous Communities*, in *SOCIO-LEGAL APPROACHES TO INTERNATIONAL ECONOMIC LAW: TEXT, CONTEXT, SUBTEXT* 153–56 (Amanda Perry-Kessaris ed., 2013).

<sup>29</sup> See Julia Dehm, *Rights as Potential Sites of Distributive Struggle*, TOQUEVILLE21 (July 10, 2018), <https://tocqueville21.com/focus/rights-as-potential-sites-of-distributive-struggle/> (discussing the contested nature of human rights).

<sup>30</sup> Boutros Boutros-Ghali, U.N. Secretary-General, *Human Rights: The Common Language of Humanity, Statement at the Opening of the World Conference on Human Rights* (June 14, 1993), in *WORLD CONFERENCE ON HUMAN RIGHTS* 5–21 (Digumarti Bhaskara Rao ed., 2003).

<sup>31</sup> See, e.g., Whyte, *supra* note 17.

<sup>32</sup> See, e.g., SLOBODIAN, *supra* note 17, at 134–42; Joseph Slaughter, *Hijacking Human Rights: Neoliberalism, the New Historiography, and the End of the Third World*, 40 *HUM. RTS. Q.* 735, 737–75 (2018).

<sup>33</sup> Philip Alston, *Resisting the Merger and Acquisition of Human Rights by Trade Law: A Reply to Petersmann*, 13 *EUR. J. INT'L L.* 815, 815–44 (2002); see also Andrew T. Lang, *Re-Thinking Trade and Human Rights*, BEPRESS LEGAL REPOSITORY (2006), <https://law.bepress.com/expresso/eps/1685> (discussing generally the relationship between human rights and trade law).

rights as an “ideology of struggle”<sup>34</sup> that places human rights directly on a collision course with prevailing economic structures.

Scholars from the global South have been particularly attentive to this diversity of human rights modes, distinguishing human rights as a technique of global governance from human rights as an “insurrectionary praxis” that, in giving voice to human suffering, destabilises and at times disrupts political and economic power,<sup>35</sup> and have called for a “structural approach” to human rights that would fundamentally question international economic ordering.<sup>36</sup> Partly as a result of the interplay between diverse human rights conceptions, the past two decades have witnessed significant evolutions in discursive and jurisprudential human rights practices, which are not always fully reflected in critical analyses grounded in the historical origins or ideational matrices of human rights.

In this evolving kaleidoscope of human rights forms, the penetration of hegemonic discourses into the fabric of human rights can coexist with human rights advocacy that challenges fundamental parameters of economic ordering. Far from “[making themselves] at home in a plutocratic world,”<sup>37</sup> more radical activists have mobilized human rights to renegotiate socioeconomic relations. Examples include human rights organizations and alliances such as FIAN International and ESCR-Net,<sup>38</sup> but also organizations that do not primarily frame their institutional mandates in human rights terms, such as international agrarian movement La Via Campesina.<sup>39</sup>

The public gaze has often focused on international NGOs based in Europe and North America, and on the institutions of multilateral diplomacy. However, a richer tapestry of human rights concepts and strategies emerges once fuller consideration is given to the ways in which social movements, including in the global South, have harnessed human rights to sustain their struggles. This includes not only confrontational strategies such as campaigning and litigation, but also approaches based on dialogue and engagement, sometimes in spaces opened by the more adversarial action.<sup>40</sup>

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<sup>34</sup> ISSA G. SHIVJI, *THE CONCEPT OF HUMAN RIGHTS IN AFRICA* 3 (1989).

<sup>35</sup> UPENDRA BAXI, *THE FUTURE OF HUMAN RIGHTS* 10–22 (2008).

<sup>36</sup> See Julia Dehm, *Highlighting Inequalities in the Histories of Human Rights: Contestations over Justice, Needs and Rights in the 1970s*, 31 *LEIDEN J. INT’L L.* 871, 871–95 (2018).

<sup>37</sup> Samuel Moyn, *How the Human Rights Movement Failed*, *N.Y. TIMES* (Apr. 23, 2018), <https://www.nytimes.com/2018/04/23/opinion/human-rights-movement-failed.html>.

<sup>38</sup> See generally FIAN INT’L, <https://www.fian.org/> (last visited Feb. 29, 2020); ESCR-NET, <https://www.escr-net.org/> (last visited Nov. 17, 2019).

<sup>39</sup> *The International Peasant’s Voice*, LA VIA CAMPESINA, <https://viacampesina.org/en/interantional-peasants-voice/> (last visited Nov. 17, 2019).

<sup>40</sup> For an example of rights harnessing in a dialogue process, see Samuel Nguiffo, Victor Amougou Amougou, Brendan Schwartz & Lorenzo Cotula, *Indigenous Peoples’ Land Rights in Cameroon: Progress to Date and Possible Futures*, *INT’L INST. ENV’T & DEV.* (2017), <http://pubs.iied.org/17448IIED/>.

As political space shrinks in many places, activists have paid a high price for pursuing social justice goals through human rights. In 2017 alone, 209 human rights activists defending land, environmental and indigenous peoples' rights, particularly in the context of extractive industry and mega projects, were reportedly murdered, with many more reported to have suffered attacks, harassment, and intimidation.<sup>41</sup>

Overall, these circumstances question the appropriateness of interrogating the relation between human rights and social justice in the light of a single "human rights project." This single project would also encompass, for example, neoliberals reading human rights as coextensive with a business-friendly climate, and hegemonic states justifying military intervention in the name of actual or perceived rights violations.<sup>42</sup> Rather, the contested nature of human rights calls for fully considering the plurality of human rights theories and approaches, the internal tensions and contradictions, and the ways in which both concepts and practices are subject to contestation and evolution over time.

*D. Social Movements and Human Rights: "Reactive" and "Constitutive" Strategies*

The processes by which activists mobilize human rights to advance social justice are complex and manifold. There are several possible ways to classify these processes, and the boundaries of such classifications are typically blurred. One set of divides concerns the place of rights-claiming in advocacy strategies. In what can broadly be referred to as "reactive" modes, social actors have harnessed existing human rights norms and institutions to challenge specific instances or patterns of social injustice. While in "constitutive" modes, they have sought to shift the contours of human rights themselves, by advocating for the recognition of new rights or the reconfiguration of existing ones.

On one level, reactive and constitutive modes seem to correlate to traditional conceptions of the separation of powers. Access to justice can feature prominently in reactive strategies. As a result, judges can play a prominent

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<sup>41</sup> FRONT LINE DEFENDERS, ANNUAL REPORT ON HUMAN RIGHTS DEFENDERS AT RISK IN 2017 (2017), [https://www.frontlinedefenders.org/sites/default/files/annual\\_report\\_digital.pdf](https://www.frontlinedefenders.org/sites/default/files/annual_report_digital.pdf); see also *At What Cost? Irresponsible Business and the Murder of Land and Environment Defenders in 2017*, GLOB. WITNESS (July 24, 2018), <https://www.globalwitness.org/en/campaigns/environmental-activists/at-what-cost/>; Special Rapporteur on The Rights of Indigenous Peoples, *Rep. of Special Rapporteur on the Rights of Indigenous Peoples*, U.N. Doc. A/HRC/39/17 (Aug. 10, 2018).

<sup>42</sup> See generally ANNE ORFORD, *READING HUMANITARIAN INTERVENTION: HUMAN RIGHTS AND THE USE OF FORCE IN INTERNATIONAL LAW* (2003) (e.g., observing the increasingly hegemonic nature of humanitarian interventions towards the end of the twentieth century).

role both in providing redress to the petitioners and in advancing “progressive” interpretations of the law that can have repercussions beyond the dispute at stake. On the other hand, the foundational dimensions of constitutive strategies would more closely resonate with the role of legislatures in processes of legal change—or, in an international context, with the role of states and international organizations in their treaty making or law development capacity.

However, this apparent correlation is partial if not ultimately misleading, not least because rights-claiming is not confined to formal legal proceedings, whether judicial or legislative, and can instead be primarily located in social and discursive practices that are centred on collective action, public advocacy and social mobilization.<sup>43</sup> In addition, border lines between reactive and constitutive modes are often blurred in practice, and the two modes can substantially overlap in real-life social struggles, which often mobilize elements of both, whether simultaneously or sequentially.

That said, taken in their archetypal forms, the two modes represent distinctive approaches to the relation between human rights and social justice. The former possibly reflects a pragmatic, instrumentalist activation of human rights to challenge certain abuses; the latter embodies a more normative approach aimed at shifting the legal and ideational foundations of political and economic ordering. Examining the relation between human rights and social justice struggles through the prism of the two modes can add granularity, and possibly analytical clarity, to ongoing debates about the place of human rights in emancipatory strategies.

What follows is a closer examination of the human rights and social justice interface considered in its reactive and constitutive modes, drawing on experiences of indigenous and agrarian movements mobilizing human rights in their struggles over land, resources and territories.

### III. HUMAN RIGHTS IN “REACTIVE” MODE: THE RIGHT TO COLLECTIVE PROPERTY AND INDIGENOUS PEOPLES’ LAND STRUGGLES

#### A. *Introductory Remarks*

In what this study refers to as reactive strategies, social actors invoke human rights to challenge specific instances or patterns of unjust socio-

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<sup>43</sup> Arzey & McNamara, *supra* note 7, at 743 (noting the practice of invoking human rights law in political advocacy).

economic relations—from land grabbing<sup>44</sup> to labor exploitation.<sup>45</sup> Where advocacy mobilizes human rights that are formally recognized in applicable positive law, as it may be necessary to do in the context of international human rights litigation, activists may have to rely on concepts that are implicated with prevailing political and economic ordering, or otherwise not fully aligned with the social justice goals pursued, but that can be instrumental to pragmatically advancing the cause. In addition, the emphasis on challenging egregious violations may be vulnerable, at least at first sight, to the critique that human rights can merely “humanize” socio-economic relations without fundamentally transforming them.<sup>46</sup>

However, advocacy in reactive modes often confronts distributive issues, for example concerning control over land and natural resources, with potentially far-reaching implications for decision-making processes and for policy choices over development models and socio-political organization. Reactive advocacy also situates human rights as an evolving, contested space, with the normative content of rights being the outcome of struggle between different legal interpretations, and between different visions of society. The resulting reframing of issues and rights can sustain public advocacy well beyond the dispute directly at stake, blurring divides between reactive and constitutive modes.

Take the right to property, a quintessentially liberal human right that has traditionally been associated with providing a foundation for the capitalist economy, with resisting redistribution, and with promoting a vision of development based on individual ownership and so-called free markets.<sup>47</sup> In many resource-dependent countries the intensification of natural resource extraction, as part of an “extractivist” development model that places the commodification and exploitation of natural resources at the centre of economic growth strategies,<sup>48</sup> has fostered widespread concerns about social and

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<sup>44</sup> See, e.g., FIAN INT'L, LAND GRABBING IN KENYA AND MOZAMBIQUE: A REPORT ON TWO RESEARCH MISSIONS AND A HUMAN RIGHTS ANALYSIS OF LAND GRABBING (2010), [https://www.fian.org/fileadmin/media/publications\\_2015/2010\\_4\\_Landgrabbing\\_Kenya\\_Mozambique\\_e.pdf](https://www.fian.org/fileadmin/media/publications_2015/2010_4_Landgrabbing_Kenya_Mozambique_e.pdf).

<sup>45</sup> See, e.g., *Whoever Raises Their Head Suffers the Most: Workers' Rights in Bangladesh's Garment Factories*, HUMAN RIGHTS WATCH (Apr. 22, 2015), <https://www.hrw.org/report/2015/04/22/whoever-raises-their-head-suffers-most/workers-rights-bangladeshs-garment#91c5bc>; *“Work Faster or Get Out”: Labor Rights Abuses in Cambodia's Garment Industry*, HUMAN RIGHTS WATCH (Mar. 11, 2015), <https://www.hrw.org/report/2015/03/11/work-faster-or-get-out/labor-rights-abuses-cambodias-garment-industry>.

<sup>46</sup> Umut Özsu, *Grabbing Land Legally: A Marxist Analysis*, 32 LEIDEN J. INT'L L. 215, 215–33 (2019).

<sup>47</sup> See generally FRANK K. UPHAM, *THE GREAT PROPERTY FALLACY: THEORY, REALITY, AND GROWTH IN DEVELOPING COUNTRIES* (2018) (deconstructing the perceived necessity of westernized property rights to economic development).

<sup>48</sup> Linda Farthing & Nicole Fabricant, *Introduction: Open Veins Revisited – Charting the Economic, Social, and Political Contours of the New Extractivism in Latin America*,

environmental impacts, the dispossession of rural people, and structural imbalances in the legal frameworks that underpin resource extraction.<sup>49</sup>

These processes have been associated with hotly contested debates about desirable development pathways; with complex local-to-global political economies that tend to place the apparatus of the state at the service of extractivism; and with diverse strategies of co-option, co-operation or resistance on the part of indigenous peoples affected by commercial operations.<sup>50</sup>

In the context of often tense socio-political confrontations, resistance strategies mobilizing international human rights law have driven the emergence of new jurisprudential dimensions of the right to property: in a string of cases before regional human rights institutions in Africa and the Americas, indigenous peoples have invoked this right in order to resist natural resource extraction on their ancestral lands, and to advance a relation between humans and

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45 LATIN AM. PERSP. 4, 4–17 (2018); Lorenzo Pellegrini, *Imagineries of Development Through Extraction: The ‘History of Bolivian Petroleum’ and the Present Value of the Future*, GEOFORUM 130, 130–41 (2018); Maristella Svampa, *Commodities Consensus: Neoextractivism and Enclosure of the Commons in Latin America*, 114 S. ATLANTIC Q. 65, 65–82 (2015).

<sup>49</sup> For a more detailed review, see LORENZO COTULA, ‘Land Grabbing’ and International Investment Law: Toward a Global Reconfiguration of Property?, in YEARBOOK ON INTERNATIONAL INVESTMENT LAW & POLICY 2014–2015 177 (Andrea K. Bjorklund ed., 2015). See generally Saturnino M. Borras Jr. & Jennifer Franco, *From Threat to Opportunity? Problems with the Idea of a “Code of Conduct” for Land-Grabbing*, 13 YALE HUM. RTS. & DEV. L.J. 507 (2010); KAITLIN Y. CORDES, LISE JOHNSON & SAM SZOKE-BURLE, LAND DEAL DILEMMAS: GRIEVANCES, HUMAN RIGHTS, AND INVESTOR PROTECTIONS (2016), <https://doi.org/10.7916/D8513ZFG>; LORENZO COTULA, HUMAN RIGHTS, NATURAL RESOURCE AND INVESTMENT LAW IN A GLOBALISED WORLD: SHADES OF GREY IN THE SHADOW OF THE LAW (2012); DARIA DAVITTI, INVESTMENT AND HUMAN RIGHTS IN ARMED CONFLICT: CHARTING AN ELUSIVE INTERSECTION (2019); NATURAL RESOURCES GRABBING: AN INTERNATIONAL LAW PERSPECTIVE (Francesca Romanin Jacur, Angelica Bonfanti, & Francesco Seatzu eds., 2015); Cotula, *supra* note 8; Özsu, *supra* note 46; Surabhi Ranganathan, *Ocean Floor Grab: International Law and the Making of an Extractive Imaginary*, 30 EUR. J. INT’L L. 573 (2019); Philip Seufert, *The FAO Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests*, 10 GLOBALIZATIONS 181 (2013); Nina Tzouvala, *A False Promise? Regulating Land-Grabbing and the Post-Colonial State*, 32 LEIDEN J. INT’L L. 235 (2019). For a more general reflection, see also Julia Dehm, *Review Essay*, 19 MELBOURNE J. INT’L L. 763 (2019) (reviewing THE MISERY OF INTERNATIONAL LAW: CONFRONTATION WITH INJUSTICE IN THE GLOBAL ECONOMY (John Linarelli, Margot Salomon & Muthucumaraswamy Sornarajah eds., 2018)).

<sup>50</sup> Penelope Anthias, *Indigenous Peoples and the New Extraction: From Territorial Rights to Hydrocarbon Citizenship in the Bolivian Chaco*, 45 LATIN AM. PERSP. 136, 143 (2018) (noting the options the Guaraní people faced when confronted with encroaching hydrocarbon claims); Ruth Hall, Marc Edelman, Saturnino M. Borras, Ian Scoones, Ben White & Wendy Wolford, *Resistance, Acquiescence or Incorporation? An Introduction to Land Grabbing and Political Reactions ‘From Below’*, 42 J. PEASANT STUD. 467, 483 (2015) (observing “a spectrum of reactions to land deals which extend far beyond resistance *per se*”).

their surrounding environment that is founded on the collective and socio-cultural dimensions of lands and resources.<sup>51</sup>

These developments raise intriguing questions as to whether and how a right that is arguably so closely associated with the “status quo” can be fruitfully appropriated and reconfigured in social justice claims. In fact, the apparent gap between the logic of emancipatory struggles and the mainstream framing of the right to property makes judicial recourse to this right an instrumentalist, reactive strategy *par excellence*, and a useful testing ground for critically interrogating the place of these strategies in social justice struggles.

### B. Mapping the Terrain

Use of human rights discourses in land struggles is a socially diffuse phenomenon the bounds of which are difficult to delineate with precision. On the other hand, indigenous peoples' reliance on the right to property in international human rights proceedings aimed at challenging extractivist development models has primarily developed in some fifteen cases taken to the Inter-American Court of Human Rights (Inter-American Court),<sup>52</sup> and to a lesser extent to Africa's continental human rights institutions, namely the African Commission on Human and Peoples' Rights (African Commission)<sup>53</sup> and the African Court on Human and Peoples' Rights (African Court).<sup>54</sup>

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<sup>51</sup> See cases cited *infra* note 52.

<sup>52</sup> *Kaliña v. Suriname*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 309, ¶ 61 (Nov. 25, 2015); *Garifuna Triunfo de la Cruz Cmty. v. Honduras*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 305, ¶ 204 (Oct. 8, 2015); *Kuna Indigenous People of Madungandí v. Panama*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 284 (Oct. 14, 2014); *Operation Genesis v. Colombia*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 270 (Nov. 20, 2013); *Kichwa Indigenous People of Sarayaku v. Ecuador*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 245 (June 27, 2012); *Saramaka People v. Suriname*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 172 (Nov. 28, 2007); *Sawhoyamaxa Indigenes Cmty. v. Paraguay*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 146 (Mar. 29, 2006); *Yakye Axa Indigenous Cmty. v. Paraguay*, Merits, Reparation, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 125 (June 17, 2005); *Moiwana Cmty. v. Suriname*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 124 (June 15, 2005); *Mayagna (Sumo) Awas Tingni Cmty. v. Nicaragua*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 79 (Aug. 31, 2001).

<sup>53</sup> *Afr. Comm'n on Human and Peoples' Rights v. Kenya*, No. 006/2012, Decision, Afr. Ct. H.P.R. (May 26, 2017).

<sup>54</sup> *Cent. for Minority Rights Dev. ex rel. Endorois Welfare Council v. Kenya*, No. 276/2003, Decision, Afr. Comm'n on Hum. and Peoples' Rts. [Afr. Comm'n H.P.R.] (Nov. 2009); see also Giovanna Gismondi, *Denial of Justice: The Latest Indigenous Land Disputes Before the European Court of Human Rights and the Need for an Expansive*



The cases present extremely diverse factual fabrics and legal arguments, and advocacy objectives also differed considerably. Further, the place of the right to property varied in the different cases, reflecting diversity in the underlying human rights treaties and the legal strategies pursued, with several cases also relying on other human rights. In the lead Inter-American Court case *Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, an indigenous community claimed that, by granting logging concessions in its ancestral lands, the government of Nicaragua violated their right to an effective remedy, their right to property and several other human rights recognized by the American Convention on Human Rights.<sup>55</sup>

The Inter-American Court found that, while Nicaragua's domestic law formally recognized indigenous land rights, it did not provide effective means for identifying and protecting indigenous lands in practice. The Court ultimately ordered the government to conduct the demarcation and collective registration of the community's ancestral lands before proceeding with any further resource allocations that could impinge on those lands.<sup>56</sup>

A few other Inter-American Court cases also stemmed from indigenous and tribal peoples' resistance to large-scale petroleum, mining, forestry, or infrastructure projects, but the emphasis was on consultation processes more than land titling. In *Saramaka People v. Suriname*—a case concerning the allocation of logging and mining concessions in a tribal people's territory—the Court devoted considerable attention to issues of consultation and free, prior and informed consent (FPIC).<sup>57</sup> In finding in favor of the Saramakas, the Inter-American Court required the government of Suriname to demarcate and title the community's land, but it also called for a wider range of measures to ensure consultation and FPIC, independent impact assessments, and effective redress, among other things.<sup>58</sup> The Inter-American Court further elaborated on consultation requirements in the later *Kichwa Indigenous People of Sarayaku v. Ecuador*, a case concerning the allocation of petroleum concessions in the Amazon.<sup>59</sup>

Yet other cases concern indigenous claims for the restitution of long-dispossessed ancestral lands now occupied by commercial ranching operations. This includes several Inter-American Court cases—*Yakye Axa Indigenous*

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*Interpretation of Protocol 1*, 18 YALE HUM. RTS. & DEV. L.J. 1 (2016) (discussing relevant jurisprudence in Europe).

<sup>55</sup> Organization of American States, American Convention on Human Rights, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123.

<sup>56</sup> *Mayagna (Sumo) Awas Tingni Cmty. v. Nicaragua*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 79, ¶ 173 (Aug. 31, 2001).

<sup>57</sup> *Saramaka People v. Suriname*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 172, ¶¶ 125–37 (Nov. 28, 2007).

<sup>58</sup> *Id.* at 214.

<sup>59</sup> *Kichwa Indigenous People of Sarayaku v. Ecuador*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 245, ¶¶ 124–232 (June 27, 2012).

*Community v. Paraguay*, *Sawhoyamaya Indigenous Community v. Paraguay*, and *Xákmok Kásek Indigenous Community v. Paraguay*—initiated by indigenous peoples in the Paraguayan Chaco, who were dispossessed of their ancestral lands from the late 19th century. These judgments place greater emphasis on investigating the continuing relationship between the indigenous peoples and their lands, and the relevance of the right to collective property as a normative foundation for land restitution.<sup>60</sup>

Some of the right-to-property cases argued before the African Commission and the African Court also concern situations of historical or ongoing evictions and land dispossessions, though in these cases recourse to the right to property tends to feature within a much wider range of rights recognized by the African Charter on Human and Peoples' Rights, including non-discrimination, the right to life, the right to freedom of conscience, the right to education and cultural life, peoples' right to freely dispose of their natural resources and the right to development.<sup>61</sup> Conservationist arguments were also a feature of some of the African Commission and African Court cases, with governments claiming that the eviction of indigenous peoples from their ancestral lands was necessary to preserve fragile ecosystems.<sup>62</sup>

Beyond the important differences in the factual circumstances and the legal arguments that characterised each dispute, as a broad generalisation the cases' social justice claims variously combined elements of distribution (insofar as they concerned ownership or control of land and natural resources), recognition (because in seeking respect for cultural difference, the legal claims often challenged cultural domination and assimilationist logics), and representation (seeking to transform patterns of voice in decision making).<sup>63</sup>

While litigation was typically confined to demands concerning a specific people or territory, these social justice claims often sought to challenge the legal arrangements associated with the prevailing extractivist model, and ultimately the political economy of vested interests and socio-political relations that underpins that model. This was the case whether the claims sought to reconfigure control of natural resources in the face of the expanding petroleum or mining frontier, or claim restitution of lands now used to sustain a major pillar of the national economy. For these reasons, several legal cases were

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<sup>60</sup> See, e.g., *Sawhoyamaya Indigenous Cmty. v. Paraguay*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 146, ¶¶ 126–41 (Mar. 29, 2006).

<sup>61</sup> African Charter on Human and Peoples' Rights arts. 2, 4, 8, 14, 17, 21, 22, June 27, 1981, 1520 U.N.T.S. 217; see also Afr. Comm'n on Human and Peoples' Rights v. Kenya, No. 006/2012, Decision, Afr. Ct. H.P.R., ¶ 130 (May 26, 2017).

<sup>62</sup> Afr. Comm'n on Human and Peoples' Rights v. Kenya, No. 006/2012, Decision, Afr. Ct. H.P.R., ¶ 130 (May 26, 2017).

<sup>63</sup> FRASER & HONNETH, *supra* note 11, at 380.

embedded in highly politicized disputes, and litigation often formed part of wider strategies of socio-political mobilization.<sup>64</sup>

The central role of indigenous and tribal peoples in advancing the claims requires further elaboration. In the Americas, that role correlates with a significant number of ratifications of the International Labour Organization's (ILO) Convention No. 169 Concerning Indigenous and Tribal Peoples in Independent Countries;<sup>65</sup> with broad-based *formal* support for the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP);<sup>66</sup> and, in some jurisdictions, with the existence of national legislation that establishes tailored safeguards for indigenous peoples.<sup>67</sup>

In contrast with these formal commitments to indigenous peoples' rights, and sometimes with a political rhetoric that emphasises ethnic diversity and respect for minorities, the region has also experienced recurring conflicts between indigenous movements on the one hand and extractivist interests that link the state apparatus to domestic and international businesses on the other, within an overarching political economy that tends to hollow out applicable legal safeguards from within and to favor the expansion of natural resource extraction.<sup>68</sup>

In these contexts, resource conflicts are relatively frequent, including violent conflicts with tragic outcomes, and the adoption of "progressive" legal texts has at times been a way for authorities to (be seen to) address the political imperative to respond to the tensions, without however fundamentally

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<sup>64</sup> For an example concerning the Inter-American Court *Sawhoyamaxa* case, see Julia Cabello Alonso, *Sawhoyamaxa and the Path Towards Dignity*, 9 RIGHT TO FOOD J. 13 (2014), [https://www.fian.org/fileadmin/media/publications\\_2015/Right\\_to\\_Food\\_Journal\\_021214.pdf](https://www.fian.org/fileadmin/media/publications_2015/Right_to_Food_Journal_021214.pdf) (writing about land occupation following delays in the implementation of the Inter-American Court judgment).

<sup>65</sup> Convention (No. 169) Concerning Indigenous and Tribal Peoples in Independent Countries, June 27, 1989, 1650 U.N.T.S. 383 (entered into force Sept. 5, 1991). Fifteen of the twenty-two states that have ratified the convention are from Latin America.

<sup>66</sup> G.A. Res. 61/295, United Nations Declaration on the Rights of Indigenous Peoples (Sept. 13, 2007) [hereinafter UNDRIP]; see also JESSE HOHMANN & MARC WELLER, *THE U.N. DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES: A COMMENTARY* (2018); Jérémie Gilbert & Corinne Lennox, *Towards New Development Paradigms: The United Nations Declaration on the Rights of Indigenous Peoples as a Tool to Support Self-Determined Development*, 23 INT'L J. HUM. RTS. 104 (2019).

<sup>67</sup> See, e.g., Law Decree No. 29785 [Ley del derecho a consulta previa a los pueblos indígenas u originarios, reconocido en el convenio 169 de la organización internacional del trabajo (OIT)] Sept. 7, 2011 (Peru). For a critique, see Roger Merino Acuña, *Coloniality and Indigenous Territorial Rights in the Peruvian Amazon: A Critique of the Prior Consultation*, CTR. FOR DEV. STUDIES, UNIV. OF BATH (2015), <https://www.econstor.eu/bitstream/10419/128133/1/bpd38.pdf>.

<sup>68</sup> Armando Guevara Gil & Carla Cabanillas Linares, *Mineralizing the Right to Prior Consultation: From Recognition to Disregard of Indigenous and Peasant Rights in Peru*, GLOB. JURIST 1 (2019).

changing the development model that created those tensions in the first place.<sup>69</sup> More generally, formal commitments to the international instruments that protect indigenous peoples' rights coexist with widespread lack of awareness about legal texts and rights, including among government officials, resulting in highly uneven patterns of penetration of international instruments into national and subnational administrative practices.<sup>70</sup>

In Africa, questions of indigeneity have often involved gaps between anthropological conceptions, political positions and international norms. Because most of the population is of African descent, several governments have questioned the relevance of notions of indigeneity, thereby rejecting the very premises on which the international protection of indigenous peoples' rights is founded.<sup>71</sup> However, recent years have witnessed growing appropriation of indigenous peoples language by marginalized groups such as forest dwellers and pastoralists, including via litigation before national courts.<sup>72</sup>

The African Commission and the African Court have applied the concept of indigenous peoples to marginalized minority groups having a strong cultural relationship with land and resources.<sup>73</sup> In a case concerning the Ogiek of Kenya, for example, the African Court noted the deep relationship that the Ogiek had with their traditional land and resources, the Ogiek's cultural distinctiveness, and their continued marginalization. It concluded that the Ogiek are "an indigenous population . . . having a particular status and deserving special protection."<sup>74</sup> This jurisprudential orientation follows the approach developed over the years by the African Commission's Working Group on Indigenous Populations/Communities.<sup>75</sup>

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<sup>69</sup> *Id.*

<sup>70</sup> Benedict Kingsbury, *Indigenous Peoples*, in MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW (2012).

<sup>71</sup> AFR. COMM'N ON HUMAN AND PEOPLES' RIGHTS & INT'L WORKING GRP. FOR INDIGENOUS AFFAIRS, EXTRACTIVE INDUSTRIES, LAND RIGHTS AND INDIGENOUS POPULATIONS'/COMMUNITIES' RIGHTS 24 (2017). See Jérémie Gilbert, *Litigating Indigenous Peoples' Rights in Africa: Potential, Challenges and Limitations*, 66 INT'L & COMP. L. Q. 657, 658 (showing that the Central African Republic is the only African state to have ratified ILO Convention No. 169. African states have also been reluctant to adopt constitutional or legislative provisions on indigenous peoples, but some have recently done so).

<sup>72</sup> Gilbert, *supra* note 71. For an anthropological perspective, see Micaela Pelican & Junko Maruyama, *The Indigenous Rights Movement in Africa: Perspectives from Botswana and Cameroon*, 36(1) AFR. STUDY MONOGRAPHS 49 (2015) (showing an anthropological perspective).

<sup>73</sup> Gilbert, *supra* note 71, at 658–59.

<sup>74</sup> Afr. Comm'n on Human and Peoples' Rights v. Kenya, No. 006/2012, Decision, Afr. Ct. H.P.R., ¶¶ 105–112 (May 26, 2017).

<sup>75</sup> Afr. Comm'n on Human and Peoples' Rights, Rep. of the Afr. Comm'n's Working Group on Indigenous Populations/Cmtys., OC/OS(XXXIV)/345 (May 14, 2003), available at [https://www.achpr.org/public/Document/file/Any/expert\\_report\\_on\\_indigenous\\_c](https://www.achpr.org/public/Document/file/Any/expert_report_on_indigenous_c)

Further complexities must be acknowledged in discussing actors and issues of agency, not least because social realities do not always neatly fit legal categories: social identities may present fluid boundaries and evolve over time; indigeneity may only be one register among several that a group may use in advocacy strategies; and “communities” may present significant social differentiation and divided opinion. The relationship between indigenous peoples and their legal advisors would also deserve closer exploration: public interest lawyers may advance their own strategies,<sup>76</sup> and practitioners recognize that deliberate arrangements are needed to ensure that those whose rights are at stake are in the driving seat—from framing public campaigns to conducting human rights litigation.<sup>77</sup>

### C. Normative (Re)configurations

In a sense, indigenous peoples’ recourse to the internationally recognized human right to property is remarkable given the ways in which international law concepts were historically deployed to marginalize indigenous peoples;<sup>78</sup> how colonial powers deployed Lockean notions of property to legitimize their appropriation of indigenous lands;<sup>79</sup> and the gulf between property concepts and indigenous ideas.<sup>80</sup> While property presupposes a clear “separation between the owner and the owned,” and a commodity (a “thing”) that forms the object of the property relations, many indigenous systems emphasise the all-encompassing inter-penetration between people and the environment

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ommunities.pdf; see also Paul Tamuno, *New Human Rights Concept for Old African Problems: An Analysis of the Challenges of Introducing and Implementing Indigenous Rights in Africa*, 61 J. AFR. L. 305 (2017).

<sup>76</sup> See, e.g., Peter Brett, *Cause Lawyers sans Frontières: Juristes Sud-Africains et Judicialisation du Politique en Afrique Australe* [*Cause Lawyers Beyond Borders: The South African Legal Profession and Regional Judicialization*], 138 POLITIQUE AFRICAINE [AFR. POL.] 93 (Raphaël Botiveau trans., 2015) (discussing the spread of public litigation approaches, including indigenous peoples’ claims, from the United States to South Africa and its neighboring countries, as well as the political processes influencing South African lawyers’ involvement with national, regional, and transnational litigation).

<sup>77</sup> See, e.g., MAXIMILIANO MENDIETA MIRANDA & JULIA CABELLO ALONSO, *ADVANCING INDIGENOUS PEOPLES’ RIGHTS THROUGH REGIONAL HUMAN RIGHTS SYSTEMS: THE CASE OF PARAGUAY* (2017), <https://pubs.iied.org/pdfs/17602IIED.pdf> (discussing the authors’ role in supporting five indigenous rights cases at the Inter-American human rights system); see also TOM LOMAX, *ASSERTING COMMUNITY LAND RIGHTS USING RSPO COMPLAINT PROCEDURES IN INDONESIA AND LIBERIA* (2015), <https://pubs.iied.org/pdfs/12584IIED.pdf>.

<sup>78</sup> See generally ANTHONY ANGHIE, *IMPERIALISM, SOVEREIGNTY AND THE MAKING OF INTERNATIONAL LAW* (2004).

<sup>79</sup> AFR. COMM’N WORKING GRP. ON INDIGENOUS POPULATIONS/CMTY., *supra* note 71, at 31–32.

<sup>80</sup> Stuart Kirsch, *Juridification of Indigenous Politics*, in *LAW AGAINST THE STATE: ETHNOGRAPHIC FORAYS INTO LAW’S TRANSFORMATIONS* 23, 39 (Julia Eckert et al. eds., 2012).

surrounding them, reflected in the intimate connection between land, traditional ways of life and systems of belief.<sup>81</sup> And while Western conceptions of property have often identified in the right to sell a key attribute of property, many indigenous systems frame land as inalienable collective heritage.

It was the explicit affirmation of the right to property in regional human rights treaties that, from a pragmatic viewpoint, made this right a relevant normative reference for indigenous peoples' strategies to protect their claims to land and resources.<sup>82</sup> Recourse to international law partly responded to perceived shortcomings of arrangements for contesting decision making in national legal and political arenas: legal activists have talked of the "structural discrimination" that indigenous peoples experience in some national legal systems—owing to legal categories that are not aligned with indigenous peoples' conceptions, to the non-recognition of indigenous peoples' claims, and/or to a general policy thrust that favors commercial interests.<sup>83</sup> The exhaustion of domestic remedies requirements commonly included in human rights treaties inherently frame recourse to international redress as a last resort.<sup>84</sup>

In mobilizing the internationally recognized human right to property, indigenous peoples translated indigenous concepts into property terms. But they also sought to reconfigure the right to property as a vehicle for reclaiming control of strategic resources and articulating a more complex relation between people and territory, whereby land and resources are interrelated with history, culture, way of life and sense of belonging, and with political and economic agency via free, prior and informed consent.<sup>85</sup> In addressing these claims, regional human rights institutions have drawn extensively on international instruments concerning indigenous peoples' rights, particularly ILO Convention No. 169 and the UNDRIP.<sup>86</sup> This has promoted cross-fertilisation

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<sup>81</sup> PIERRE-ETIENNE KENFACK, SAMUEL NGUIFFO & TÉODYL NKUINTCHUA, *LAND INVESTMENTS, ACCOUNTABILITY AND THE LAW: LESSONS FROM CAMEROON* 9 (Int'l Inst. for Env't & Dev., 2016); see also James Anaya, *Indigenous Peoples' Participatory Rights in Relation to Decisions about Natural Resource Extraction: The More Fundamental Issue of What Rights Indigenous Peoples Have in Lands and Resources*, 22 ARIZ. J. INT'L & COMP. L. 7, 7 (2005); Kirsch, *supra* note 80, at 34.

<sup>82</sup> See Organization of American States, American Convention on Human Rights art. 21, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123; African Charter on Human and Peoples' Rights art. 14, June 27, 1981, 1520 U.N.T.S. 217.

<sup>83</sup> MIRANDA & ALONSO, *supra* note 77, at 1.

<sup>84</sup> Organization of American States, American Convention on Human Rights art. 46(1)(a), Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123; African Charter on Human and Peoples' Rights art. 50, June 27, 1981, 1520 U.N.T.S. 217.

<sup>85</sup> See *Saramaka People v. Suriname*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 172, ¶ 134 (Nov. 28, 2007); Cent. for Minority Rights Dev. *ex rel.* Endorois Welfare Council v. Kenya, No. 276/2003, Decision, Afr. Comm'n on Hum. and Peoples' Rts. [Afr. Comm'n H.P.R.], ¶¶ 226–28 (Nov. 2009).

<sup>86</sup> See *Sahoyamaya Indigenous Community v. Paraguay*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 146, ¶¶ 117, 119 (Mar. 29, 2006); *Saramaka People v. Suriname*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R.

between generally applicable human rights concepts and international norms tailored to the specific circumstances of indigenous peoples.

The fragmentation of the international human rights regime, including geographically into different regional systems, makes it impossible to draw general conclusions about the contours of the right to property that are not contingent on relevant contextual and normative parameters.<sup>87</sup> However, the resulting jurisprudence of the Inter-American Court, and to some extent of its African counterparts, does provide pointers for understanding the legal configuration of the right to property in relation to indigenous land claims. Two points deserve particular attention: one concerning the scope of the right to property, the other the arrangements for its protection under international law.

First, international human rights jurisprudence has broadened the relevance of the right to property to a wide range of tenure configurations. While the liberal tradition tended to anchor the right to property to protecting individual ownership over assets often conceived of in monetary terms, it is now clear that regional human rights instruments protect diverse sets of rights, including collective rights founded on indigenous tenure systems and not formally recognized as ownership under domestic law, and that they recognize the social, cultural and spiritual dimensions of land and natural resources.

This orientation was already apparent in the early *Mayagna (Sumo) Awas Tingni Community v. Nicaragua* judgment, in which the Inter-American Court held that the right to property has an “autonomous meaning” under international law, which “cannot be made equivalent to the meaning given to them in domestic law”; that this right protects collective rights held under customary law, even in the absence of officially recognized title deeds; and that “the close ties of indigenous people with the land must be recognized and understood as the fundamental basis of their cultures, their spiritual life, their integrity, and their economic survival.”<sup>88</sup>

Subsequent jurisprudence has further elaborated on these notions, for example extending protection to the collective claims of tribal peoples based on “their longstanding use and occupation of the land and resources necessary for their physical and cultural survival,” irrespective of clearly established

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(ser. C) No. 172, ¶¶ 92–93 (Nov. 28, 2007); *Kichwa Indigenous People of Sarayaku v. Ecuador*, Merits, and Reparations, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 245, ¶¶ 70, 161, 163–64, 176, 201, 215 (June 27, 2012); *Afr. Comm’n on Human and Peoples’ Rights v. Republic of Kenya*, No. 006/2012, Judgment, Afr. Court on Hum. and Peoples’ Rts. [Afr. Ct. H.P.R.], ¶¶ 126–28 (May 26, 2017).

<sup>87</sup> Lorenzo Cotula, *Property in a Shrinking Planet: Fault Lines in International Human Rights and Investment Law*, 11 INT’L J.L. IN CONTEXT 113, 129 (2015).

<sup>88</sup> *Mayagna (Sumo) Awas Tingni Cmty. v. Nicaragua*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 79, ¶ 146–151 (Aug. 31, 2001); *see also Sawhoyamaya Indigenous Cmty. v. Paraguay*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 146, ¶¶ 120–21 (Mar. 29, 2006); *Yakye Axa Indigenous Cmty. v. Paraguay*, Merits, Reparation, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 125, ¶ 131 (June 17, 2005).

customary law claims;<sup>89</sup> and even to situations where an indigenous people has unwillingly long been deprived of the physical possession of the land but has maintained strong cultural and spiritual ties to it, in which case the right to collective property may provide the basis for land restitution claims.<sup>90</sup>

Second, regional human rights jurisprudence has reconfigured the mechanisms for the legal protection of the right to property. In the liberal tradition, these are usually centered on legal safeguards against expropriation, and possibly regulatory interferences, including compensation, non-discrimination, public purpose and/or due process. These conceptions are broadly reflected in the jurisprudence of the European Court of Human Rights, which has highlighted the need for authorities to strike a fair balance between public and private interests including through appropriate procedural and compensatory safeguards.<sup>91</sup>

On the other hand, in cases concerning commercial or development projects in ancestral territories, regional human rights institutions have placed considerable emphasis on connecting the right to collective property to consultation and consent processes. In *Saramaka People v. Suriname*, the Inter-American Court noted that, while states can ultimately compress tribal peoples' right to collective property, they can only do so if certain conditions are met. These conditions were held to include the "effective participation" of the tribal people in decisions concerning developments on their lands; a "reasonable benefit" for the tribal people from any such developments; and a prior and independent environmental and social impact assessment.<sup>92</sup> The Court further clarified that, in the case of large-scale projects having major impacts, "effective participation" requires the state "not only to consult with the Saramakas, but also to obtain their free, prior, and informed consent, according to their customs and traditions."<sup>93</sup>

The more recent *Kichwa Indigenous People of Sarayaku v. Ecuador* judgment referred in more general terms to a "right to consultation," rather than specifically to free, prior and informed consent, though it also clarified that the consultation must be in good faith and "with the aim of reaching an agreement or obtaining consent."<sup>94</sup> African human rights institutions have

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<sup>89</sup> See, e.g., *Saramaka People v. Suriname*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 172, ¶ 96 (Nov. 28, 2007).

<sup>90</sup> *Sawhoyamaya Indigenous Cmty. v. Paraguay*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 146, ¶ 128 (Mar. 29, 2006).

<sup>91</sup> See *James and Others v. United Kingdom*, App. No. 8793/79, 8 Eur. H. R. Rep. 123, ¶ 50 (1986); *Lithgow and Others v. United Kingdom*, App. No. 9006/80, 8 Eur. H. R. Rep. 329, ¶ 120 (1986).

<sup>92</sup> *Saramaka People v. Suriname*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 172, ¶ 129 (Nov. 28, 2007).

<sup>93</sup> *Id.* at ¶¶ 134, 137.

<sup>94</sup> *Kichwa Indigenous People of Sarayaku v. Ecuador*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 245, ¶¶ 160, 163–67, 185 (June 27, 2012).



developed broadly comparable approaches to configuring the protection of the right to property in relation to indigenous peoples, including by explicitly cross-referencing the jurisprudence of the Inter-American Court.<sup>95</sup>

While this jurisprudence leaves the boundaries of consultation and consent indeterminate, the approach goes beyond the traditional liberal framing of the right to property, moving away from primarily negative safeguards aimed at protecting rights holders against arbitrary or discriminatory conduct, toward a greater emphasis on voice in decision making and control over processes of change. This orientation resonates with some of the ways indigenous peoples themselves have framed their claims to land and resources, particularly the importance they have traditionally attached—in both legal and discursive practices—to prior consultation and consent as vehicles for exercising their right to self-determination.<sup>96</sup>

#### *D. Preliminary Appraisal*

The international jurisprudence on the right to collective property situates human rights as a contested space, casting the normative content as the product of contestation between different interpretations of human rights norms, and—at a deeper level—between different conceptions of property and ultimately different visions of society. The activation of the right to property in emancipatory struggles also raises some difficult questions about the interface between human rights and social justice.

A first set of questions exposes the conceptual and concrete limitations of the approach, in both jurisprudential and practical terms. Arguably, even a reconfigured right to collective property can translate into outcomes that are coextensive with resource extraction and commodification. Regional human rights institutions have recognized that the protection of “the right to property . . . is not absolute,” and that under certain circumstances the state can lawfully restrict that right.<sup>97</sup> Commercial projects that undermine indigenous livelihoods and ways of life could still go ahead if certain conditions are complied

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<sup>95</sup> Cent. for Minority Rights Dev. *ex rel.* Endorois Welfare Council v. Kenya, No. 276/2003, Decision, Afr. Comm’n on Hum. and Peoples’ Rts. [Afr. Comm’n H.P.R.], ¶¶ 226–28 (Nov. 2009); see also Elisa Morgera, *Fair and Equitable Benefit-Sharing at the Cross-Roads of the Human Right to Science and International Biodiversity Law*, 4 LAWS 803 (Oct. 30, 2015), <https://www.mdpi.com/2075-471X/4/4/803>; Elisa Morgera, *The Need for an International Legal Concept of Fair and Equitable Benefit-Sharing*, 27 EUR. J. INT’L L. 353 (2016).

<sup>96</sup> See Jennifer N. Costanza, *Indigenous Peoples’ Right to Prior Consultation: Transforming Human Rights from the Grassroots in Guatemala*, 14 HUM. RTS. J. 260 (2015) (providing an anthropological study of indigenous peoples claiming the “right of prior consultation” through local referenda on proposed extractive industry products in Guatemala).

<sup>97</sup> *Saramaka People v. Suriname, Merits, Reparations, and Costs*, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 172, ¶ 127 (Nov. 28, 2007).

with, within a state-centric system that grants governments latitude in over-riding traditional claims.<sup>98</sup>

In this context, FPIC is itself a hotly contested concept, with different actors (governments, businesses, indigenous movements) putting forward different interpretations that range from transformative to box-ticking,<sup>99</sup> private sector-driven “thin” notions of consent acquiring growing traction; and substantial power imbalances often leading to ineffectual processes that reform, and as such legitimize, but do not fundamentally challenge, extractivism.<sup>100</sup> Further, critical scholars have pointed to the “problematic heritage” of concepts such as consultation and consent, the ideational roots of which were found to go back to the colonial enterprise, with enduring consequences for the ability of those notions to underpin truly transformational agendas.<sup>101</sup>

In addition, a focus on consultation in externally driven development models could obscure more foundational rights necessary to advance a proactive indigenous agenda.<sup>102</sup> And while reframing indigenous claims in right to property terms can provide indigenous peoples with well-established international protection in the face of powerful commercial interests, it can also undermine some of the fundamental parameters of indigenous peoples’ relationship with their surrounding environment. Indigenous tenure concepts do not necessarily translate well into property terms, even if these terms are substantially reconfigured.

Indeed, the private law notion of property seems ill-suited as a vehicle for territorial claims that are closely associated with collective identity, traditional ways of life, and the exercise of the right to self-determination. At root, those claims pertain to the realm of the political: they embody an attempt to reimagine the national social contract, and the structures of sovereignty and public governance. Conceptual misalignments between the notions of property and territory can have practical implications, for example in legal regimes where the titling of property requires evidence of productive land use. This results in legal title protections for relatively small portions of territory to the exclusion

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<sup>98</sup> Thomas M. Antkowiak, *Rights, Resources, and Rhetoric: Indigenous Peoples and the Inter-American Court*, 35 U. PA. J. INT'L L. 113, 162–172 (2013).

<sup>99</sup> For a discussion of FPIC, see CATHAL DOYLE, *INDIGENOUS PEOPLES, TITLE TO TERRITORY, RIGHTS AND RESOURCES: THE TRANSFORMATIVE ROLE OF FREE PRIOR AND INFORMED CONSENT* (2015).

<sup>100</sup> James Anaya & Sergio Puig, *Mitigating State Sovereignty: The Duty to Consult with Indigenous Peoples*, 67 U. TORONTO L.J. 435 (2016); Nathan Yaffe, *Indigenous Consent: A Self-Determination Perspective*, 19 MELBOURNE J. INT'L L. 1 (2018).

<sup>101</sup> Marina Brillman, *Consenting to Disposition: The Problematic Heritage and Complex Future of Consultation and Consent of Indigenous Peoples*, 49 COLUM. HUM. RTS. L. REV. 1 (2018).

<sup>102</sup> Acuña, *supra* note 67, at 12.

of traditional hunting, gathering or fishing grounds, of sacred sites, and of land reserves set aside for future generations.<sup>103</sup>

Further, the emphasis regional human rights institutions have placed on the demarcation and titling of indigenous peoples' lands, including as a form of reparation in the face of commercial encroachments, could be at odds with traditional systems that often envisage inherently more fluid conceptions of space and territory, and even of communities themselves. Some passages cited in the international jurisprudence resonate with common *topoi* of the literature that, often starting from liberal premises, makes the economic case for land titling as a pathway to tenure security conceived of in eminently Western terms.<sup>104</sup>

To be sure, there are diverse approaches to land demarcation and registration. While some reflect productivist concerns about individual ownership, incentives to invest, access to credit, and ultimately increased production,<sup>105</sup> others are primarily framed in collective terms, and motivated by concerns about promoting endogenous development strategies and protecting collective lands from dispossession by powerful political and economic actors.<sup>106</sup>

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<sup>103</sup> *Id.* at 13.

<sup>104</sup> For example, in *Mayagna (Sumo) Awas Tingi Cmty v. Nicaragua*, the Inter-American Court stated: "the Court notes that the limits of the territory on which that property right exists have not been effectively delimited and demarcated by the State. This situation has created a climate of constant uncertainty among the members of the Awas Tingni Community, insofar as they do not know for certain how far their communal property extends geographically and, therefore, they do not know until where they can freely use and enjoy their respective property." *Mayagna (Sumo) Awas Tingni Cmty. v. Nicaragua*, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 79, ¶ 153 (Aug. 31, 2001). By way of comparison, a recent World Bank blog argued that "rural communities need secure rights, clear boundaries, and accessible land services for economic growth," and "[a]uthorities need accurate spatial information to plan roads, public services, and infrastructure, while creating jobs." See *Why Secure Land Rights Matter*, WORLD BANK (Mar. 24, 2017), <https://www.worldbank.org/en/news/feature/2017/03/24/why-secure-land-rights-matter> (also noting that a World Bank-financed project supported the demarcation and registration of the land of the Awas Tingni, the indigenous community that initiated the *Mayagna* case).

<sup>105</sup> Unlike the Inter-American Court's indigenous rights jurisprudence, for example, much World Bank literature emphasizes individual rather than collective land registration, and frames issues in primarily productivist terms. "Secure individual property rights to land would therefore not only increase the beneficiaries' incentives and provide collateral for further investment but, if all markets were competitive, would automatically lead to socially and economically desirable land market transactions." See Klaus Deininger & Hans Binswanger, *The Evolution of the World Bank's Land Policy: Principles, Experience, and Future Challenges*, 14 WORLD BANK RES. OBSERVER, 247, 249–50 (1999), <http://document.s.worldbank.org/crated/en/614861468326135799/pdf/766330JRN0WBRO00Box374385B00PUBLIC0.pdf>.

<sup>106</sup> For conceptual and practical illustrations of this latter set of approaches, see generally Daniel Fitzpatrick, 'Best Practice' Options for the Legal Recognition of Customary Tenure, 36 DEV. & CHANGE 449, 472; Rachael Knight, Jaron Vogelsang & Marena Brinkhurst, *Community Land Protection: Facilitators Guide*, NAMATI 1, 5 (2016), <https://namati.org/re>

Depending on the situation, however, border lines may be fluid, for example where multiple objectives coexist in the same public intervention, where ambiguities affect the framing or prioritization of those objectives, or where changes in emphasis occur over time.

The tensions inherent in the property framing may themselves create space for these ambiguities and transitions. In their concrete historical manifestations, land demarcation and registration programs—particularly those inspired by a productivist logic—have been shown to result in complex long-term socio-economic outcomes. These often involve processes of land commodification and indirect dispossession, including through transactions under varying economic and political pressures after the issuance of titles.<sup>107</sup> These circumstances call for empirical research to more rigorously assess the long-term outcomes of international human rights litigation.<sup>108</sup>

In more immediate concrete terms, there have been significant delays in the implementation of several international rulings, and some judgments are yet to be complied with, in full or in part.<sup>109</sup> This mixed record of compliance begs questions about the effectiveness of human rights strategies. A particularly fine-grained empirical picture of the politics of implementation is emerging in relation to regional human rights litigation initiated by indigenous peoples in the Paraguayan Chaco.<sup>110</sup>

As discussed, indigenous peoples in the Chaco were dispossessed of their traditional territories from the late 19th century and were eventually employed as laborers on cattle ranches.<sup>111</sup> Over time, the area came to host commercial ranching activities on a substantial scale.<sup>112</sup> Law reforms and legal support

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sources/community-land-protection-facilitators-guide/. On participatory mapping and indigenous peoples' rights, see also Samuel Nguiffo & Robinson Djeukam, *Using the Law as a Tool to Secure the Land Rights of Indigenous Communities in Southern Cameroon*, in 2008 LEGAL EMPOWERMENT IN PRACTICE: USING LEGAL TOOLS TO SECURE LAND RIGHTS IN AFRICA 29, 43 (Lorenzo Cotula & Paul Mathieu eds., Int'l Inst. for Env't & Dev./Food & Agric. Org. of the U.N. 2008); Jeremie Gilbert & Ben Begbie-Clench, "Mapping for Rights": *Indigenous Peoples, Litigation and Legal Empowerment*, 1 ERASMUS L. REV. 6, 6–13 (2018).

<sup>107</sup> See, e.g., David A. Atwood, *Land Registration in Africa: The Impact on Agricultural Production*, 18 WORLD DEV. 659, 663 (1990) (noting that land registration programs may actually increase land insecurity among rural people accustomed to less formalized forms of landholding); Kathryn Firmin-Sellers & Patrick Sellers, *Expected Failures and Unexpected Successes of Land Titling in Africa*, 27 WORLD DEV. 1115, 1125 (1999) ("As land becomes more valuable, farmers find themselves threatened by family members seeking to claim private title to jointly held land, by neighbors encroaching on customarily defined boundaries, and by businessmen and politicians seeking to claim undeveloped land.").

<sup>108</sup> This point benefited from a stimulating conversation with Professor Nehal Bhuta.

<sup>109</sup> See Correia, *supra* note 27, at 47–52 (noting the varied levels of implementation of rulings).

<sup>110</sup> See Anthias, *supra* note 50, at 136–55

<sup>111</sup> Correia, *supra* note 27, at 43.

<sup>112</sup> *Id.*

from the 1980s led the indigenous communities to initiate land restitution claims.<sup>113</sup> Parallel or subsequent developments saw many community members leaving the ranches and relocating to precarious settlements at the margin of the local highway, in extremely challenging living conditions.<sup>114</sup>

After protracted and ultimately unsuccessful domestic litigation, several communities initiated human rights proceedings at the Inter-American human rights system.<sup>115</sup> The proceedings resulted in favorable Inter-American Court judgments, including land restitution orders, based on the Inter-American Court's finding that the petitioners had maintained a strong socio-cultural relationship with their ancestral lands, and the Court's framing of the right to property as protecting collective land claims considered in their socio-cultural dimensions.<sup>116</sup>

However, these "wins" were followed by long implementation delays. Ultimately, social mobilization led to some advances in implementation, including the return of some 7,700 hectares of land to an indigenous community (out of a total 10,700 concerned by the court case) with regards to *Xákmok Kásek Indigenous Community v. Paraguay*, and the allocation of alternative land in lieu of restitution to another community, in relation to *Yakye Axa Indigenous Community v. Paraguay*.<sup>117</sup>

In *Sawhoyamaxa Indigenous Community v. Paraguay*, the community sought to break the impasse in the implementation of a land restitution judgment by (re)occupying the land.<sup>118</sup> Mobilization led to Parliament passing legislation providing for the expropriation of the land and for its formal restitution to the community.<sup>119</sup> However, even these successes were partial and contingent: field-based research found the alternative land allocated to the *Yakye Axa* indigenous community to be inaccessible, and the expropriation law adopted in the *Sawhoyamaxa* case was not yet implemented.<sup>120</sup> This

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<sup>113</sup> *Id.*

<sup>114</sup> *Id.* at 47; *see also* *Sawhoyamaxa Indigenous Cmty. v. Paraguay*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 146, ¶ 73 (Mar. 29, 2006) (explanatory).

<sup>115</sup> MIRANDA & ALONSO, *supra* note 77.

<sup>116</sup> *Yakye Axa Indigenous Community v. Paraguay*, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 125 (Jun. 17, 2005); *Sawhoyamaxa Indigenous Community v. Paraguay*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 146 (Mar. 29, 2006); *Xákmok Kásek Indigenous Community v. Paraguay*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 214 (Aug. 24, 2010).

<sup>117</sup> STRATEGIC LITIGATION IMPACTS, *supra* note 27; Correia, *supra* note 27, at 54–55.

<sup>118</sup> *Sawhoyamaxa Indigenous Community v. Paraguay*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 146, ¶¶ 11–12 (Mar. 29, 2006).

<sup>119</sup> *Id.* at 203, 229 (describing the legislation implemented as "acquiescence").

<sup>120</sup> Joel E. Correia, *Indigenous Rights at a Crossroads: Territorial Struggles, the Inter-American Court of Human Rights, and Legal Geographies of Liminality*, 97 GEOFORUM 73, 79 (2018) ("State officials have failed to fully enforce the expropriation, creating a

situation reportedly led to the creation of inherently unstable “liminal spaces” where *de jure* and *de facto* land control were fundamentally misaligned.<sup>121</sup>

Overall, these conceptual and practical considerations provide a cautionary tale about the effectiveness of reactive human rights strategies in sustaining social justice struggles. At the same time, nearly twenty years since the Inter-American Court *Mayagna* case that first pioneered use of the right to property to protect indigenous peoples' lands, it is easy to take for granted the significance of these jurisprudential developments. In having recourse to regional human rights institutions, social actors have, in effect, sought to renegotiate politically sensitive national and subnational governance spaces associated with natural resource extraction. In so doing, and despite the inherent limitations of the property framing, and those flowing from the politics of implementation, human rights advocates have confronted difficult social justice issues at the foundations of prevailing economic models, with the reconfigured right to collective property tending to shift control over land and territories to groups that manage resources according to systems that are not coherent with neoliberal or extractivist ordering.

The political backlashes the legal cases unleashed in several countries, particularly in Latin America, including fundamental threats to the system thinly veiled as proposals for “reform,”<sup>122</sup> suggest that, for all its limitations, mobilizing human rights can touch a politically sensitive nerve capable of upsetting political and economic interests. These interests include those of the commercial actors most directly affected and their political allies, but they also relate, in more general terms, to the ability of the state to advance a vision of development premised on the exploitation of natural resources as a mode for integrating resource-dependent countries into capitalist modes of production.

Viewed in this light, the mixed record of compliance is not surprising: human rights strategies ultimately challenge aspects of the prevailing model of national development, and the political economy that sustains it. Any emancipatory strategy deployed in these circumstances would arguably be likely to meet stiff resistance. And where material outcomes are disappointing, questions remain as to whether and how rights-claiming can still help move the agenda forward in political and discursive terms. Indeed, even unenforced judgments can produce consequences, for example if they help cement social

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persistent state of uncertainty that draw [company] staff and the Sawhoyamaya into conflict over land control.”).

<sup>121</sup> *Id.* at 74–76.

<sup>122</sup> Duane W. Krohnke, *Failed Efforts to Weaken the Inter-American Human Rights System Under the Guise of Reform*, DWKCOMMENTARIES BLOG (Mar. 26, 2013), <http://dwkcommentaries.com/2013/03/26/failed-efforts-to-weaken-the-inter-american-human-rights-system-under-the-guise-of-reform/>; Dinah Shelton, *The Rules and the Reality of Petition Procedures in the Inter-American Human Rights System*, 5 NOTRE DAME J. OF INT'L & COMP. L. 1, 27–28 (2015).

identities, catalyze public mobilization, reframe contested issues and ultimately shift public policy.<sup>123</sup>

In the *Sawhoyamaya* case, for example, wielding the favorable Inter-American Court judgment was reported to have featured prominently in social mobilization, including to legitimize a land occupation that, while illegal under national law, would now be justified by the higher moral authority of international law, effectively reframing the issues at stake and “allowing indigenous peoples to transform cases of trespassing into land rights claims.”<sup>124</sup> The land occupation in the aftermath of the *Sawhoyamaya* judgment also illustrates how appropriating human rights can catalyze public mobilization in ways that go significantly beyond the perimeter inscribed by a strict juristic interpretation of the legal concepts at play: while juristic notions are necessarily central to the legal case, public mobilization around the litigation can involve more far-reaching—and radical—social and discursive practices.<sup>125</sup>

In turn, this “reframing effect” of rights-claiming can generate repercussions well beyond the specific resource dispute the relevant case originally referred to.<sup>126</sup> This is not only because regional human rights institutions have cross-referenced their own and each other’s decisions, leading to the progressive development of an authoritative body of international jurisprudence that can have a bearing on large numbers of resource disputes.<sup>127</sup> Outside of any legal proceedings, indigenous peoples from different geographical and socio-economic contexts have invoked advances in international human rights jurisprudence as part of their advocacy to persuade government agencies to recognize their natural resource claims.<sup>128</sup>

While highlighting both the conceptual and the material limitations of the right to collective property, these jurisprudential and discursive developments show that human rights have deeply contested meanings. They also show that use of human rights in social struggles can push the boundaries of juristic interpretations, and ultimately shift the normative contours of human rights themselves. And even a right that is so closely associated with the functioning of the capitalist economy has been tactically appropriated and to some extent reconfigured to challenge aspects of the natural resource extraction upon which that economy rests.

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<sup>123</sup> CÉSAR RODRÍGUEZ-GARAVITO, *Beyond Enforcement: Assessing and Enhancing Judicial Impact*, in *SOCIAL RIGHTS JUDGMENTS AND THE POLITICS OF COMPLIANCE* 75, 78–79 & 86–89 (Malcolm Langford, César Rodríguez-Garavito, & Julieta Rossi eds., 2017).

<sup>124</sup> STRATEGIC LITIGATION IMPACTS, *supra* note 27, at 74.

<sup>125</sup> *Id.* at 21, 36.

<sup>126</sup> RODRÍGUEZ-GARAVITO, *supra* note 123, at 93.

<sup>127</sup> Cent. for Minority Rights Dev. *ex rel.* Endorois Welfare Council v. Kenya, No. 276/2003, Decision, Afr. Comm’n on Hum. and Peoples’ Rts. [Afr. Comm’n H.P.R.], ¶¶ 159–162, 191 (Nov. 2009).

<sup>128</sup> See, e.g., NGUIFFO ET AL., *supra* note 81 (discussing the ACtHPR’s *Ogiek* judgment in the context of policy advocacy by indigenous peoples in Cameroon).

#### IV. "CONSTITUTIVE" HUMAN RIGHTS STRATEGIES: THE STRUGGLE FOR PEASANTS' RIGHTS

##### A. *Introductory Remarks*

While reactive strategies mobilize imperfectly aligned human rights instruments to respond to a given problem or situation, constitutive strategies—as conceived of in this study—aim to sustain systemic change at scale and in the longer term, through creating new rights or reconfiguring existing ones. In practice, border lines are blurred: as discussed, reactive strategies can shift the normative content of human rights law, with potential implications beyond the situation the action originally responded to.

Examples of constitutive strategies include the public mobilization that led to the development of the United Nations Declaration on the Rights of Indigenous Peoples,<sup>129</sup> the harnessing of rights by social movements and NGOs working to change the international legal and institutional architecture of food and agriculture,<sup>130</sup> and agrarian movements' use of rights to articulate their struggles over land, seeds and the global food regime.<sup>131</sup> The rights-based advocacy of agrarian movements provides an insightful case study to interrogate constitutive modes. The recent culmination of that advocacy in the United Nations Declaration on the Rights of Peasants and Other People Working in Rural Areas makes the case study a particularly timely one.<sup>132</sup>

##### B. *Mapping the Terrain*

In spite of skepticism for rights discourses and legal processes, agrarian movements have long mobilized rights not only to challenge the building blocks of economic ordering through "reactive" legal action in national and

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<sup>129</sup> See generally S.J. Rombouts, *The Evolution of Indigenous Peoples' Consultation Rights Under the ILO and U.N. Regimes*, 53 STAN. J. INT'L L. 169 (2017).

<sup>130</sup> See *Civil Society and Indigenous Peoples' Mechanism for Relations with the UN Committee on World Food Security*, INT'L FOOD SEC. & NUTRITION CIVIL SOC'Y MECHANISM, <http://www.csm4cfs.org/> (last visited Feb. 29, 2020); see also Oliver De Schutter (Special Rapporteur on the Right to Food), *Final Rep.: The Transformative Potential of the Right to Food*, U.N. Doc. A/HRC/25/57 (Jan. 24, 2014); Michael Fakhri, *Rethinking the Right to Good (Part Two)*, LEGAL FORUM (Sept. 10, 2018), <https://legalform.blog/2018/09/10/rethinking-the-right-to-food-part-two-michael-fakhri/>; Tomaso Ferrando & Jose Luis Vivero-Pol, *Commons and 'Commoning': A 'New' Old Narrative to Enrich the Food Sovereignty and Right to Food Claims*, RIGHT TO FOOD & NUTRITION WATCH (2017), [https://www.righttofoodandnutrition.org/files/02.rtfanw-2017\\_eng\\_17\\_12\\_article-5\\_web\\_rz.pdf](https://www.righttofoodandnutrition.org/files/02.rtfanw-2017_eng_17_12_article-5_web_rz.pdf) (providing rights-based perspectives on the global food system).

<sup>131</sup> See PRISCILLA CLAEYS, *LA VIA CAMPESINA, FROM FOOD SOVEREIGNTY TO PEASANTS' RIGHTS: AN OVERVIEW OF VIA CAMPESINA'S STRUGGLE FOR NEW HUMAN RIGHTS* (2013), <https://www.viacampesina.org/en/wp-content/uploads/sites/2/2013/05/EN-02.pdf>.

<sup>132</sup> G.A. Res. 73/165, *supra* note 9.



international spaces,<sup>133</sup> but also to articulate the vision of a locally controlled food system that significantly departs from prevailing forms. The international agrarian movement La Via Campesina has been at the forefront of these efforts, deploying rights language in its own statements and declarations, and advocating for a United Nations instrument that would affirm the rights of peasants.<sup>134</sup>

This human rights advocacy has been inscribed in a wider process of transnational political mobilization that gained momentum from the 1990s, as a reaction to the pressures that changing policy and market forces placed on rural areas in many parts of the global South. Depending on the context, these forces included structural adjustment, trade liberalization, the dumping of subsidized farm produce, and growing concentration in agricultural value chains both upstream (e.g., seeds, machinery agrochemicals) and downstream (e.g., processing, distribution) of farming.<sup>135</sup>

In this context, re-appropriating the notion of “peasants” and advocating for the international recognition of peasants’ human rights became part of a “struggle among models” of agricultural development, and a vehicle to demand normative shifts towards a different economic paradigm.<sup>136</sup> Perceived gaps in the ability of existing human rights instruments to cater for the needs and aspirations of rural people led agrarian movements to prioritize the creation of new human rights over the mobilization of existing ones, and to seek to institutionalise conceptions of human rights that would depart from the liberal political tradition.<sup>137</sup>

A milestone in this process was the adoption, by La Via Campesina’s international conference in Maputo, 2008, of the “Declaration of Rights of Peasants – Women and Men.”<sup>138</sup> This document represented the culmination of a long-term process originating in village-level deliberations that took place in Indonesia from the late 1990s.<sup>139</sup> Under the leadership of national peasant

<sup>133</sup> See, e.g., YUDHA FATHONI, INT’L INST. ENV’R & DEV., CHALLENGING THE CONSTITUTIONALITY OF INDONESIA’S INVESTMENT LAW (2014), <http://pubs.iied.org/G03721/>.

<sup>134</sup> Marc Edelman & Carwil James, “Peasants’ Rights and the UN System: Quixotic Struggle? Or Emancipatory Idea Whose Time Has Come?” 38 J. PEASANT STUD. 1, 81 (2011); see also Priscilla Claeys, *Food Sovereignty and the Recognition of New Rights for Peasants at the UN: A Critical Overview of La Via Campesina’s Rights Claims over the Last 20 Years*, 12 GLOBALIZATIONS 4 (2014).

<sup>135</sup> See Saturnino M. Borras Jr., *The Politics of Transnational Agrarian Movements*, 41 DEV. & CHANGE 5; see also Edelman & James, *supra* note 134, at 88–89.

<sup>136</sup> Edelman & James, *supra* note 134, at 83, 92.

<sup>137</sup> *Id.*; Claeys, *supra* note 134, at 2.

<sup>138</sup> LA VIA CAMPESINA, DECLARATION OF RIGHTS OF PEASANTS – WOMEN AND MEN (2009), <https://viacampesina.org/en/wp-content/uploads/sites/2/2011/03/Declaration-of-rights-of-peasants-2009.pdf>.

<sup>139</sup> See MANSOUR FAKIH ET. AL, INT’L INST. ENV’T & DEV., COMMUNITY INTEGRATED PEST MANAGEMENT. IN INDONESIA: INSTITUTIONALIZING PARTICIPATION AND PEOPLE

organization, and La Via Campesina member, Serikat Petani Indonesia, the action was taken to the regional and then global level.<sup>140</sup> This process of internationalization was not without challenges, due to the somewhat different emphases and priorities in the advocacy led by La Via Campesina members from different regions,<sup>141</sup> but it ultimately federated the movement around a clear set of demands. The Via Campesina Declaration provided a springboard to advance, at the United Nations, a tailored human rights instrument that would more fully align the international human rights system to the life experiences of rural people and small-scale rural producers.

Through alliances with supportive states, United Nations human rights mandate holders, and human rights NGOs such as FIAN International and CETIM, La Via Campesina worked to inscribe the issue on the agenda of the United Nations Human Rights Council.<sup>142</sup> In 2012, the Human Rights Council established a working group to develop an international soft-law instrument on the rights of peasants—the Open-Ended Inter-Governmental Working Group on a United Nations Declaration on the Rights of Peasants and Other People Working in Rural Areas.<sup>143</sup> Over the years, the Working Group received extensive inputs from La Via Campesina and other international federations representing rural constituencies (pastoralists, indigenous peoples, fishers, agricultural workers), supported by FIAN International and CETIM, and by engaged academics.<sup>144</sup> In September 2018, the Human Rights Council adopted the United Nations Declaration on the Rights of Peasants and Other People Working in Rural Areas,<sup>145</sup> and the United Nations General Assembly followed suit in December 2018.<sup>146</sup>

While many high-income countries abstained or voted against the resolution both at the Human Rights Council and the General Assembly,<sup>147</sup> this

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CENTERED APPROACHES (2003), <https://pubs.iied.org/9293IIED/?s=IP> (particularly Annex 5 containing a draft of The Peasant's Rights Charter).

<sup>140</sup> Claeys, *supra* 134, at 5–6.

<sup>141</sup> *Id.* at 458–459.

<sup>142</sup> Priscilla Claeys, *The Rise of New Rights for Peasants: From Reliance to NGO Intermediaries to Direct Representation*, 9 *TRANSNAT'L LEGAL THEORY* 386, 391–392 (2018).

<sup>143</sup> Human Rights Council Res. 21/19, U.N. Doc. A/HRC/RES/21/19, at 2 (Oct. 11, 2012). The resolution was adopted with the votes of developing and transition economies (23), while most European and North American states voted against (9), and fifteen states abstained. *Id.*

<sup>144</sup> See, e.g., CHRISTOPHE GOLAY, *GENEVA ACAD. OF INT'L HUMANITARIAN LAW AND HUMAN RIGHTS, LEGAL REFLECTIONS ON THE RIGHTS OF PEASANTS AND OTHER PEOPLE WORKING IN RURAL AREAS* (2013), <https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGPLeasants/Golay.pdf>.

<sup>145</sup> Human Rights Council Res. 39/3, U.N. Doc. A/HRC/39/L.16 (Sept. 26, 2018).

<sup>146</sup> G.A. Res. 73/74(b) (Dec. 17, 2018).

<sup>147</sup> At the Human Rights Council, Australia, Hungary and the United Kingdom voted against, while Belgium, Germany, Japan, the Republic of Korea and Spain were among the eleven states that abstained. See *Human Rights Council Adopts Five Resolutions, Including*

outcome represents a remarkable success for an advocacy campaign that many saw as facing an uphill struggle. The very recent adoption of the U.N. Declaration makes it impossible to draw conclusions on its effectiveness in catalysing the change agrarian movements sought. However, some initial reflections on the text of the Declaration and the process that led to its adoption can shed some light on the place of human rights in social justice advocacy.

### C. Normative (Re)configurations

The United Nations Declaration is framed as a comprehensive document that engages, through a human rights lens, the diverse arenas in which peasants and other people working in rural areas encounter the public policies and business practices that shape the global food system. The Declaration tackles “distributive” issues such as control of the means of production, and the parameters of trading relations, but it also embodies concerns about recognition and representation.<sup>148</sup> These concerns are partly reflected in the Declaration’s re-appropriation of the notion of “peasants,” and its emphasis on the special circumstances of peasants and their particularly strong connection to rural lands. This is particularly explicit in the Via Campesina Declaration, which defines “peasant” as “a man or woman of the land,”<sup>149</sup> but it is also present in the U.N. Declaration, which refers to peasants’ “special dependency on and attachment to the land.”<sup>150</sup>

According to the U.N. Declaration, a peasant is

any person who engages or who seeks to engage alone, or in association with others or as a community, in small-scale agricultural production for subsistence and/or for the market, and who relies significantly, though not necessarily exclusively, on family or household labour and other non-monetized ways of

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*on Burundi, Syria, and on the Rights of Peasants*, U.N. HUMAN RIGHTS OFFICE OF THE HIGH COMM. (Sept. 28, 2018), <https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=23660&LangID=E>. At the General Assembly, Australia, Hungary, Israel, New Zealand, Sweden, the United Kingdom and the United States were among the eight states that voted against, while Austria, Belgium, Bulgaria, Canada, Croatia, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Ireland, Italy, Japan, Latvia, Liechtenstein, Lithuania, Malta, the Netherlands, Norway, Poland, the Republic of Korea, Romania, the Russian Federation, Singapore, Slovakia, Slovenia and Spain were among the fifty-four that abstained. See U.N. GAOR, 73rd Sess., 55th plen. mtg., at 25, U.N. DOC. A/73/PV.55 (Dec. 17, 2018).

<sup>148</sup> See also Claeys, *supra* 134, at 9.

<sup>149</sup> LA VIA CAMPESINA, *supra* note 138, at art. 1, ¶ 1.

<sup>150</sup> G.A. Res. 73/165, *supra* note 9, at art. 1, ¶ 1.

organizing labour, and who has a special dependency on and attachment to the land.<sup>151</sup>

This definition covers wide-ranging livelihood strategies spanning the spectrum of subsistence to commercial agriculture, with key defining features including the small scale of operation, the significant reliance on family or otherwise non-monetised labour, and the special relation to the land.

In line with the constitutive nature of the strategy, the U.N. Declaration establishes significant departures from existing human rights forms. Following on the strong definitional connection the Declaration draws between peasants and land, the Declaration's substantive provisions place considerable emphasis on the relation between human rights on the one hand, and the land and resource rights of peasants and other people working in rural areas on the other. While all rights are indivisible and the Declaration explicitly rules out hierarchies of rights,<sup>152</sup> it nonetheless seems significant that, in the outline of the Declaration, the right of peasants and other people working in rural areas "to have access to . . . the natural resources . . . that are required to enjoy adequate living conditions"<sup>153</sup> precedes the affirmation of other rights such as the rights to life, physical and mental integrity, liberty and security of person.<sup>154</sup>

In addition, the U.N. Declaration affirms that peasants and other people living in rural areas have a right to land, both individually and collectively.<sup>155</sup> This includes the right "to achieve an adequate standard of living, to have a place to live in security, peace and dignity and to develop their cultures."<sup>156</sup> The right to land is subject to limitations that are determined by law, that comply with international human rights obligations, and that are necessary to respect the rights of others or for "meeting the just and most compelling requirements of a democratic society."<sup>157</sup>

It should be noted that the close relation between land and human rights has long been recognized, including in the international jurisprudence discussed in Section III. Examples of most obviously relevant human rights include the rights to property, to housing, to food (where people depend on natural resources for their food security), to enjoy one's own culture (where traditional cultures are connected to land and resources) and to self-determination, as well as indigenous peoples' rights to their ancestral territories, to name but a few internationally recognized human rights. That said, all human

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<sup>151</sup> *Id.*

<sup>152</sup> *Id.* at annex, ¶ 5.

<sup>153</sup> *Id.* at art. 5.

<sup>154</sup> *Id.* at art. 6.

<sup>155</sup> *Id.* at art. 17, ¶ 1.

<sup>156</sup> *Id.*

<sup>157</sup> *Id.* at art. 28, ¶ 2.

rights are interdependent and interrelated, so the interface between land rights and human rights encompasses all internationally recognized human rights.<sup>158</sup>

With a few exceptions,<sup>159</sup> however, the relationship between land and human rights has traditionally been a mediated one, for example by the role land plays in enabling human rights holders to enjoy tangible or intangible goods such as housing, food, and culture. While the full implications of the U.N. Declaration will depend on how it is interpreted and applied, a “right to land” establishes a more direct relationship between people and land, reflecting the importance of land and natural resources in the lives of peasants and other people working in rural areas.

In fact, while earlier human rights instruments partly frame land issues in the context of strategies to implement other more fundamental human rights, such as the right to an adequate standard of living and the right to be free from hunger,<sup>160</sup> the U.N. Declaration inverts that relationship by inscribing the attainment of an adequate standard of living within the framework of an encompassing human right to land—though the Declaration also recognizes a separate, free-standing right to an adequate standard of living for peasants and their families.<sup>161</sup>

Unlike the right to property, which—like the right to land—arguably establishes a more immediate connection between land and human rights, the right to land provides more explicit normative foundations for redistributive agrarian reform, provided the reform complies with the significant qualifications established in the U.N. Declaration itself, such as “securing due recognition and respect for the rights and freedoms of others.”<sup>162</sup> Indeed, in addition to requiring states to recognize the land tenure rights of peasants and people working in rural areas, including “customary land tenure rights not currently protected by law,” and to protect peasants from arbitrary eviction, the U.N. Declaration calls on states, “where appropriate,” to take “appropriate

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<sup>158</sup> On the relation between land rights and human rights, see Oliver De Schutter, *The Emerging Human Right to Land*, 12 INT’L COMMUNITY L. REV. 303 (2010); Jeremie Gilbert, *Land Rights as Human Rights: The Case for a Specific Right to Land*, 18 SUR-INT’L J. ON HUM. RTS. 113 (2014); Cotula, *supra* note 8; Kaitlin Cordes, *Is There a Human Right to Land?*, COLUM. CTR. ON SUSTAINABLE INV. BLOG (Nov. 8, 2017), <https://blogs.ei.columbia.edu/2017/11/08/is-owning-land-a-human-right/>.

<sup>159</sup> See, e.g., Convention (No. 169) Concerning Indigenous and Tribal Peoples in Independent Countries, June 27, 1989, arts. 13–19, 1650 U.N.T.S. 384.

<sup>160</sup> For example, in recognizing the “fundamental right of everyone to be free from hunger,” states are required to take a range of necessary measures, as relevant, including “reforming agrarian systems in such a way as to achieve the most efficient development of natural resources.” International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, art. 11, ¶ 2, 993 U.N.T.S. 3.

<sup>161</sup> G.A. Res. 73/165, *supra* note 9, at art. 16.

<sup>162</sup> *Id.* at art. 28.

measures to carry out agrarian reforms in order to facilitate the broad and equitable access to land and other natural resources.”<sup>163</sup>

The Declaration’s emphasis on peasants’ access to means of production such as land and natural resources also emerges in other novel human rights configurations. For example, the Declaration affirms peasants’ “right to seeds,” which is defined to include protection of traditional knowledge and the right to save, use, exchange and sell their farm-saved seeds.<sup>164</sup> Even well-established human rights acquire new productive dimensions when applied to the specific circumstances of peasants and other people working in rural areas. In reaffirming the right to seek, receive, develop and impart information, for example, the Declaration clarifies that this right includes “information about factors that may affect the production, processing, marketing and distribution of [peasants’] products.”<sup>165</sup>

Similarly, the right to adequate standards of living is connected to a right “to facilitated access to the means of production necessary to achieve them, including production tools, technical assistance, credit, insurance and other financial services,” as well as “appropriate measures to favor the access of peasants and other people working in rural areas to the means of transportation and the processing, drying and storage facilities necessary for selling their products on local, national and regional markets at prices that guarantee them a decent income and livelihood.”<sup>166</sup>

Besides this emphasis on the concrete, productive dimensions of food and agriculture and the real-life factors that affect rural livelihoods and the structure of agricultural value chains, the Declaration also pays significant attention to the voice of peasants and other working rural people in public decision making. For example, through a carefully worded provision that essentially calls on states to ensure that peasants and other people working in rural areas can have a say in decisions that could affect them,<sup>167</sup> and by recognising the

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<sup>163</sup> *Id.* at art. 17, ¶¶ 3, 6.

<sup>164</sup> *Id.* at art. 17, 19. The wording of the Declaration echoes the preamble of the International Treaty on Plant Genetic Resources for Food and Agriculture, which refers to “the rights recognized in this Treaty to save, use, exchange and sell farm-saved seed and other propagating material.” Nov. 3, 2001, 2400 U.N.T.S. 303.

<sup>165</sup> G.A. Res. 73/165, *supra* note 9, at art. 11, ¶ 1.

<sup>166</sup> *Id.* at art. 16, ¶¶ 1–2.

<sup>167</sup> The provision states:

Without disregarding specific legislation on indigenous peoples, before adopting and implementing legislation and policies, international agreements and other decision-making processes that may affect the rights of peasants and other people working in rural areas, States shall consult and cooperate in good faith with peasants and other people working in rural areas through their own representative institutions, engaging with and seeking the support of peasants and other people working in rural areas who could be affected by decisions before those decisions are made, and responding to their contributions, taking into consideration existing

role of “strong and independent” organizations representative of peasants and people working in rural areas.<sup>168</sup> The concern about voice in decision making arguably applies across—without being necessarily limited to—the wide spectrum of issues the U.N. Declaration explicitly addresses, including the above-mentioned provisions dealing with control over land and natural resources.

On one level, the normative contours of the U.N. Declaration reflect an attempt to translate the implications of internationally recognized human rights to the specific circumstances of peasants and other people working in rural areas. Indeed, the preamble of the Declaration explicitly refers to several key international human rights instruments, including the Universal Declaration of Human Rights and a number of treaties and soft-law instruments, reaffirming important elements of the international human rights law *acquis*, such as the universality, indivisibility, interrelatedness, and interdependence of all human rights.<sup>169</sup>

However, this brief discussion of a few illustrative provisions exemplifies how the Declaration departs in significant ways from established human rights instruments. In effect, its cumulative provisions sustain a “right to produce food” that differs from the prevalent emphasis on food access and consumption that characterizes, for example, much international jurisprudence on the right to adequate food.<sup>170</sup>

This “right to produce” emerges from the Declaration’s specific provisions dealing with control over land, seeds, and the means of production, along with the place of small-scale rural producers in agricultural value chains, discussed above. But it also emerges, in more general terms, from the emphasis the Declaration places on the value of work, which is reflected in the very title of the document (referring to people *working* in rural areas), in the Declaration’s definitional provisions (as discussed, peasants are defined by their reliance on family or household labour<sup>171</sup>), and in the substantive parts of the

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power imbalances between different parties and ensuring active, free, effective, meaningful and informed participation of individuals and groups in associated decision-making processes.

*Id.* at art. 2, ¶ 3.

<sup>168</sup> *Id.* at art. 10.

<sup>169</sup> *Id.* at preamble, ¶¶ 2–5.

<sup>170</sup> Edelman & James, *supra* note 134, at 85. However, the link between the right to food and agrarian reform has long been recognized. *See, e.g.*, International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, art. 11, ¶ 2, 993 U.N.T.S. 3. The U.N. Declaration also affirms the right to adequate food and to be free from hunger, which is defined in terms of “physical and economic access at all times to sufficient and adequate food,” but which also explicitly includes the “right to produce food.” G.A. Res. 73/165, *supra* note 9, at art. 15.

<sup>171</sup> The Declaration applies to persons engaged in broadly defined agricultural activities, such as “artisanal or small-scale agriculture, crop planting, livestock raising, pastoralism,

Declaration.<sup>172</sup> More than establishing safety nets for secure access to basic goods such as food and housing, the U.N. Declaration affirms the agency of peasants and rural people in the face of the often inequitable economic relations that affect production and trading.

These departures in human rights configurations partly correlate to differences between diverse ideational and normative paradigms of agriculture and food systems. Crudely put, existing human rights instruments are broadly consistent with the concept of food security, which also provides the basis for the normative and operational activities of the specialized agencies, funds and programs of the United Nations system that have explicit institutional mandates for food and agriculture. In contrast, the overall framing of the U.N. Declaration correlates more closely with the public advocacy agrarian movements that have long operated around the notion of food sovereignty, which emphasises local control over agricultural production and food systems.<sup>173</sup> While the U.N. Declaration ultimately falls short of affirming a full-fledged right to food sovereignty, it does articulate its key elements within the structure of the rights it recognizes, and it asserts that “[p]easants and other people working in rural areas have the right to determine their own food and agriculture systems, recognized by many States and regions as the right to food sovereignty.”<sup>174</sup>

Despite the significant textual differences that exist between the Via Campesina and U.N. Declarations, many of the novel human rights configurations embodied in the U.N. Declaration are partly rooted in concepts that were originally developed in the Via Campesina Declaration. For example, the Via Campesina Declaration contains provisions on the “right to land and territory,” the “right to seeds” and the “right to information.”<sup>175</sup> While some other provisions of the Via Campesina Declaration have no full equivalents in the U.N. Declaration,<sup>176</sup> this trajectory of normative development highlights the role of social movements in the development of international instruments, and

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fishing, forestry, hunting or gathering, and handicrafts related to agriculture.” G.A. Res. 73/165, *supra* note 9, at art. 1, ¶ 2.

<sup>172</sup> See, e.g., *id.* at art. 13.

<sup>173</sup> MICHAEL WINDFUHR & JENNIE JONSÉN, FOOD SOVEREIGNTY: TOWARDS DEMOCRACY IN LOCALIZED FOOD SYSTEMS 13 (2005); Olivier de Schutter, *Food Sovereignty a Critical Dialogue*, TRANSNATIONAL INST. (Feb. 26, 2014), <https://www.tni.org/en/article/olivier-de-schutter-food-sovereignty-a-critical-dialogue>. For an articulation of food sovereignty, see Nyeleni Declaration, FORUM ON FOOD SOVEREIGNTY (2007), <https://nyeleni.org/IMG/pdf/D eelNyeleni-en.pdf> and the commentary in Claeys, *supra* note 142, at 454–58.

<sup>174</sup> G.A. Res. 73/165, *supra* note 9, at art. 8, ¶ 4; see also *id.* at art. 15, ¶ 5; *id.* at preamble, ¶ 24.

<sup>175</sup> LA VIA CAMPESINA, *supra* note 138, at arts. IV–V, VII.

<sup>176</sup> For example, the “right to obtain funds from the State to develop agriculture.” *Id.* at art. VI, ¶ 1.



the relevance of a bottom-up perspective to interrogating the place of human rights in social justice struggles.<sup>177</sup>

*D. Preliminary Appraisal*

As with the international jurisprudence on indigenous peoples' rights, the development and adoption of the U.N. Declaration has raised multifaceted issues that interrogate the interface between human rights and social justice. In building on advocacy led by transnational social movements, and on concepts and even texts developed by those movements prior to the institutionalized inter-governmental process, the U.N. Declaration presents the distinctive contours of international (soft) law making from the bottom up.<sup>178</sup> And while global advocacy translating grassroots-level social justice demands into international human rights claims has often relied on "intermediaries" such as non-governmental human rights organizations, in this case a transnational peasant movement representing millions of rural people directly led the advocacy from local to global levels—with NGOs and engaged academics characterized as primarily providing technical and logistical support.<sup>179</sup> These reconfigured roles of the movements and their allies outline a different approach to agency and representation in international policy spaces, and to channelling advocacy from local to global arenas.

Substantively, the text of the U.N. Declaration departs from established human rights approaches and establishes a strong relation between social justice claims and human rights norms. This relation is reflected, for example, in the emphasis the Declaration places on collective rights, on control over the means of production and agricultural value chains, on the intimate connection many rural people experience with their land and resources, and on the place of work as a source of social identity. The provisions of the Declaration that deal with control over land, seeds, and market systems embody a challenge to prevailing economic structures, and their full implementation would change the way agriculture and food systems are presently organised.

This does not mean that questions have not been asked about the real emancipatory potential of some of the Declaration's provisions, and diverse ideational matrices appear to coexist in the tapestry of the Declaration. Critical analyses have highlighted internal tensions within the text, pointing to some provisions that could indirectly reinforce, or at least presuppose and

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<sup>177</sup> On social movements and international law, see Balakrishnan Rajagopal, *Counter-Hegemonic International Law: Rethinking Human Rights and Development as a Third World Strategy*, 27 *THIRD WORLD Q.* 767 (2006). For a discussion of bottom-up perspectives in international human rights law, see Basak Bagalayan, *Searching for Human Rights Norms for Corporate Conduct in Domestic Jurisprudence: A Bottom-Up Approach to International Law*, 36 *NORDIC J. HUM. RTS.* 371 (2018).

<sup>178</sup> See generally Rajagopal, *supra* note 177.

<sup>179</sup> Claeys, *supra* note 142, at 394–97.

recognize, features of prevailing economic ordering.<sup>180</sup> For example, the Declaration conditions the commercial exploitation of resources on which peasants depend to the conduct of impact assessments, to good-faith consultation and to “fair and equitable” benefit sharing.<sup>181</sup> Seemingly inspired to the international jurisprudence on indigenous peoples’ right to collective property, which as discussed was primarily developed in a reactive rather than constitutive mode, these requirements are ultimately consistent with the penetration of commercial forms of production—so long as the specific conditions set are complied with.

Further, institutionalisation may raise new challenges for a process that has so far relied on social movements’ agency. As a soft-law instrument, the U.N. Declaration will undoubtedly require continued public advocacy if its provisions are to have any follow-through. However, the existence of an internationally negotiated normative text establishes authoritative parameters the interpretation of which is no longer under the movements’ exclusive control, making the concepts, and the norms, more vulnerable to reinterpretation and possibly co-option.

From a sociological perspective, the notion of peasantry has formed the object of extensive debates,<sup>182</sup> both scholarly and activist, stemming from the considerable diversity of contexts, from the social differentiation that typically exists in rural areas, of the blurred lines between rural and urban worlds, and from overlapping and often shifting registers of social identity.<sup>183</sup> In addition, how the Declaration will be used and implemented in practice, including in national policy contexts, remains to be seen, and its non-binding nature would be expected to reduce its effectiveness in addressing entrenched socio-economic injustices, including those that are rooted in imbalances within hard law.<sup>184</sup>

Overall, however, there is little doubt that the adoption of the U.N. Declaration constitutes an important milestone in the appropriation of human rights in the context of social justice struggles. This milestone offers a reminder that the catalogue of internationally recognized human rights is the product of

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<sup>180</sup> Margot E. Salomon, *Nihilists, Pragmatists and Peasants: A Dispatch on Contradiction in International Human Rights Law* (NYU Law Sch. Inst. of Int’l Law & Justice, Working Paper No. 2018/5, 2018), [https://www.iilj.org/wp-content/uploads/2018/11/Salomon-IILJ\\_2018\\_5-Megareg.pdf](https://www.iilj.org/wp-content/uploads/2018/11/Salomon-IILJ_2018_5-Megareg.pdf).

<sup>181</sup> G.A. Res. 73/165, *supra* note 9, at art. V.

<sup>182</sup> Edelman & James, *supra* note 134, at 82.

<sup>183</sup> *See, e.g.*, G.A. Res. 73/165, *supra* note 9, at art. 1, ¶ 3 (clarifying application to indigenous peoples “working the land” and thus raising questions about overlapping identities and legal regimes).

<sup>184</sup> *See generally* Cotula, *supra* note 87 (discussing imbalances present in the interplay of domestic and international law); Cotula, *supra* note 8 (discussing those imbalances, and the limitations of attempts to address these through “soft” law).

historically determined negotiation processes,<sup>185</sup> that the configuration of human rights may significantly depart from the traditional liberal canon, and that human rights can provide arenas for activists to seek to renegotiate important aspects of socio-economic ordering.

#### V. DISCUSSION

##### *A. Human Rights: Intellectual Histories, Legal Configurations, and Social Practices*

Critiques of human rights have traction because they identify real challenges. They also raise deeper questions about how ideas are developed, renegotiated and mobilized to inform action and sustain change. While extremely different in the legal concepts they deploy, the socio-political trajectories they embody, and the “reactive” and “constitutive” strategies they pursue, the two case studies explored in this article exemplify efforts to mobilize human rights for social justice advocacy. Both reflect significant “wins,” whether in the form of public interest litigation or international (soft) law making. Yet both also beg difficult questions about the real scale of the advances made, and whether these advances can ultimately transform socio-economic relations.

The issue is not just that it is difficult for social actors to secure international judgments or declarations, or to properly enforce or implement them once they have been obtained, particularly in the face of powerful vested interests. The more probing question is whether even a properly implemented ruling or instrument would meaningfully reshape socio-economic ordering. Taken alone, a few judgments do not reverse the long history of mass dispossession affecting indigenous lands, and an international soft-law instrument does not alter entrenched patterns of land ownership, the international protection of intellectual property rights affecting the governance of seed systems, or the structure of agricultural value chains. By resorting to the instruments of positive law, social actors must translate their demands into conceptual categories—such as the right to property—that are associated with dominant economic and political organization.

In harnessing such hegemonic concepts in counter-hegemonic terms,<sup>186</sup> and in locating social justice advocacy within institutionalized human rights processes, strategies to “juridify” inherently political disputes must operate “within the system.” They may entail advocated-for and even actually

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<sup>185</sup> Sofía Monsalve Suárez, *The Human Rights Framework in Contemporary Agrarian Struggles*, 40 *J. PEASANT STUD.* 239, 241–242 (2013).

<sup>186</sup> Alan Hunt, *Rights and Social Movements: Counter-Hegemonic Strategies*, 17 *J.L. & SOC’Y.* 309 (1990); see also Martti Koskenniemi, *International Law and Hegemony: A Reconfiguration*, 17 *CAMBRIDGE REV. INT’L AFF.* 197 (2004).

observed reforms, as illustrated by the jurisprudential reconfiguration of the right to property in the light of legal categories that resonate with indigenous conceptions. But they do not necessarily challenge the foundational parameters of the system. Indeed, the mobilizing and even the reconfiguring ultimately rest on the acceptance of the very state-centric international system of control over natural resources and development pathways that is instrumental to advancing commercial modes of production and to the dispossession of peasants and indigenous peoples in many parts of the world. While the two case studies illustrate bottom-up agency by indigenous and agrarian movements, states played important roles in both, whether as bearers of human rights obligations and respondents in human rights litigation, or as negotiators and adopters of international soft law.

While the United Nations Declaration on the Rights of Peasants exemplifies radical departures from the established human rights canon, crystallizing concepts into legal texts and subjecting them to the techniques of legal interpretation can inherently limit the emancipatory potential of the rights at play. As regional human rights institutions have expressly acknowledged, from a legal standpoint, even duly recognized and protected collective rights to natural resources can be overridden by measures taken in the exercise of state sovereignty, so long as those measures comply with the safeguards established by international law. In fact, there are questions as to whether, in articulating demands through legal notions that are so deeply implicated with the status quo, advocacy strategies may become more vulnerable to capture—for example, with contestation framed in property terms paving the way to processes, such as land demarcation and registration, that could ultimately compound the commodification of natural resource relations. There are also questions as to whether the disconnections between the normative and the experienced, and between the law in the books and in practice, might create expectations that are inevitably difficult to meet, and thus cause frustration and demoralization among social actors, and possibly short-circuit relations that could have sustained alternative empowerment pathways.

However, the use of internationally recognized human rights in discursive strategies and social processes can transcend the juristic limitations of the legal concepts at play. In both case studies, human rights language and processes are embedded in wider public mobilization, with institutionalized proceedings (court litigation, inter-governmental negotiations) being sustained by, and sustaining, social and discursive practices. While mutually reinforcing, legal actions and social practices may reflect distinctive ways to conceptualise and mobilize human rights, and the intersections between the two can affect both jurisprudential and material outcomes.

Indeed, where activists appropriate human rights to catalyse public mobilization, the scope of the resulting action is not necessarily restricted to the perimeter delineated by jurisprudential interpretations of international human rights law. The experience of the *Sawhoyamaxa* community occupying its

traditional lands now under commercial operations exemplifies how social actors can shift registers—moving from legal proceedings to direct action—in different times and places, while also using the human rights register to legitimize land occupations that would otherwise contravene positive law.

In these regards, any assessments of the emancipatory potential of human rights in social justice struggles cannot be limited to a discussion of the ways in which those rights have been construed by drafters, tribunals and jurists, or of the intellectual origins and cultural matrices that have affected the historical development of human rights law. While legal experts will be primarily concerned with the techniques of legal drafting and interpretation, emancipatory potential is a function of a wider range of socio-political as well as juridical variables.

Therefore, those assessments would also need to consider how human rights are appropriated in socio-political arenas, where discursive practices may create ruptures with established ideational matrices and departures from the traditional canons of juristic interpretation. Considering these practices would require broadening the methods of inquiry to pursue a more grounded understanding of rights in their social context. To different extents and in different ways, both the indigenous rights jurisprudence and the United Nations Declaration on the Rights of Peasants indicate that this “activist” use of human rights can ultimately sustain evolutions in normative configurations, via jurisprudential interpretations and international (soft) law making, thereby intersecting with, and cross-fertilizing, the traditional purview of doctrinal analyses.

In these respects, the two case studies call for expanding the horizons of current debates about the relation between human rights and social justice. While public debates have often focused on the work of mainstream human rights organizations based in the global North, both examples highlight the prominent role that social movements that are at least partly located in the global South—including actors that do not primarily identify themselves as human rights organizations—have played in developing distinctive modes to invoke and reshape human rights in pursuit of social justice.

#### *B. From Human Rights Frameworks to Rights-Claiming as a Practice of Contestation*

This broadening of the horizon of inquiry adds new insights to existing debates and nuances to some recurring themes in the critique of rights. For example, while some of the critique pointed to the unwillingness or inability of human rights approaches to tackle economic inequality and wider social justice issues, in both case studies social actors have established human rights as a site for contesting aspects of socio-economic ordering, even though ultimately with mixed practical results.

While some scholarly work has associated human rights with meeting “basic needs” through a minimum level of access to certain goods and services,<sup>187</sup> in both case studies advocacy is about recognition, voice, and historical redress, as much as it is about ensuring that material needs are met. This circumstance offers a reminder that realising human rights is ultimately about increasing control over an individual’s or group’s life, which may require transformational change in social, economic and political structures. This perspective aligns with shifts in public understanding of poverty and deprivation, which for a long time were framed primarily if not exclusively in terms of access to material goods, and are now widely recognized to be multi-dimensional phenomena that can be underpinned by marginalization and lack of voice, as well as low incomes.<sup>188</sup>

The emphasis that agrarian and indigenous peoples’ movements have placed on collective rights also questions assumptions about the supposedly inherently individualistic and individualising nature of human rights. Further, while much public debate on the interface between human rights and social justice has focused on relations within national polities, or in relations among states (e.g., in connection with demands for a New International Economic Order), the case studies illustrate how social movements have also wielded human rights to contest the transnational arrangements that underpin the contemporary global economy.

This harnessing of human rights by indigenous and agrarian movements illustrates the need to re-center the debates about the emancipatory potential of human rights from institutionalized human rights actors and frameworks to rights-claiming as a practice of contestation. In this perspective, invoking human rights may constitute a channel for social actors to articulate a rupture with aspects of socio-political ordering,<sup>189</sup> as much as a juridical avenue for producing legally enforceable outcomes to change a given material situation. Human rights are therefore viewed as both vehicles and outcomes of political struggle, and their development is, at least in part, the story of how social actors—including groups that do not primarily define their institutional mandates in human rights terms—have appropriated rights language and instruments to advance their agendas.

This perspective outlines a different set of dimensions in the practice of human rights, one where legal forms are embedded in social processes and where human rights are advanced, at least in part, through the vision, resolve

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<sup>187</sup> See, e.g., MOYN, *supra* note 3.

<sup>188</sup> See AMARTYA SEN, POVERTY AND FAMINES: AN ESSAY ON ENTITLEMENT AND DEPRIVATION (1983).

<sup>189</sup> See the notion of disagreement developed by Jacques Rancière, *Introducing Disagreement*, 9 ANGELAKI 3 (2004); Jacques Rancière, *Who is the Subject of the Rights of Man?*, 103 SOUTH ATLANTIC Q. 297 (2004). For a legal perspective, see Kathryn McNeilly, *After the Critique of Rights: For a Radical Democratic Theory and Practice of Human Rights*, 27 L. CRITIQUE 269 (2016).

and action of social groups. In addition, the import and effectiveness of rights-claiming are to be assessed not only in terms of judicial, legislative, or even material outcomes, but also in relation to the ways in which advocacy can use human rights to legitimize counter-hegemonic worldviews and catalyse collective action.<sup>190</sup>

These considerations apply in different ways to reactive and constitutive strategies, and failure to disaggregate the discussion can lead to analytical confusion. In reactive modes, the main concern may be about addressing a specific situation or pattern of human rights abuse. In many situations, this reactive rights-claiming will reflect a principled position that fundamentally espouses the framing of the human rights being invoked. But recourse to human rights in reactive mode can also be instrumental and even opportunistic. It can be a vehicle for achieving certain goals, even if activating rights processes may require accepting normative or juridical configurations, such as the right to property, that contrast with the ultimate vision of relevant social actors, or that seem removed from the daily realities those actors experience.

Rather than inevitably revealing limited ambition in the underlying social change agendas, these circumstances may reflect pragmatic tactical choices driven by immediate imperatives, such as the need to anchor advocacy to legal rights that are formally recognized and effectively protected by applicable positive law.

In constitutive modes, on the other hand, recourse to human rights may have more foundational and normative connotations, there may be more space for more explicit ruptures with prevailing juridical arrangements. This does not necessarily mean that the substantive social justice demands are themselves qualitatively more radical than in reactive modes, and if the advocacy translates into formalised inter-governmental processes it may have to come to terms with the compromises that tend to characterise international negotiations and law making. But when articulating social justice demands in constitutive human rights modes, advocates are less constrained by established human rights forms, and they may enjoy greater latitude in aligning human rights concepts with their own social justice goals.

### *C. Rights-Claiming in Contested Socio-Political Terrains*

The limitations in the material outcomes of both reactive and constitutive strategies, discussed above, provide a cautionary tale about the real difference human rights can make in hotly contested socio-political terrains. However, they also reflect the fact that rights-claiming can get in the way of national development models and of transnational economic relations premised on large-scale resource exploitation, and it can upset powerful interests from local to global levels.

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<sup>190</sup> See Hunt, *supra* note 186; RODRÍGUEZ-GARAVITO, *supra* note 123.

The political backlashes the Inter-American Court cases triggered in several Latin American countries, and the repression many human rights defenders have suffered for their advocacy in the face of agribusiness and extractive industry projects worldwide, particularly in the context of shrinking political spaces,<sup>191</sup> are a reminder of the complex political economies of vested interests and power relations that rights-claiming may be confronted with. In such political economy contexts, social justice advocacy—whether or not based on human rights—can meet stiff and often brutal opposition, change is an inevitably slow and difficult process, and the ultimate outcomes may differ considerably from those advocated for.

The association between rights-claiming and socio-political contestation is also apparent on the ideational plane. Both case studies illustrate how rights-claiming can situate struggles in the realm of ideas, as much as in political and economic organization, and seek to subvert the cultural subjugation that is often associated with socio-political marginalization. Social movements' reclaiming the notion of "peasants," their asserting the intimate connection between people and land, and their aiming to shift public narratives about development paradigms all challenge ingrained prejudices about the "backwardness," or "modernity," of different systems of livelihoods and beliefs, and of different forms of natural resource use. Such prejudices underpin the structural discrimination that peasants and indigenous peoples experience in many legal systems,<sup>192</sup> so the ideational plane intersects with the juristic and material dimensions.

On these ideological battlegrounds, different conceptions of human rights can come directly into contest—for example, where the commercial actors that resist indigenous peoples' land restitution claims invoke the right to property to protect their own assets. These situations can expose tensions between different conceptions of the right to property—such as those premised on a deeply felt socio-cultural bond between people and land, and those that emphasise security of market transactions and the place of land in productive activities. The diverse ideational matrices of human rights can coexist within the same jurisprudential approach or legal instrument. For instance, the notions of prior consultation and benefit sharing, developed by the Inter-American Court in reactive mode, could ultimately operate in ways that are coextensive with extractivist models. In an example of apparent norm diffusion, these notions penetrated the formulation of a new human rights instrument advocated for in constitutive terms, namely the U.N. Declaration on the Rights of Peasants, which in other respects embodies a more fundamental departure from prevailing human rights practices.

These considerations point to the impossibility of interrogating the human rights and social justice interface in connection with an encompassing and

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<sup>191</sup> See GLOB. WITNESS, *supra* note 41.

<sup>192</sup> MIRANDA & ALONSO, *supra* note 77.



undifferentiated human rights “project,” or “movement,” as doing this would obscure the contested and evolving nature of human rights, and the different and often contrasting strands of human rights thought and action. Such an encompassing and undifferentiated framing risks marginalising the practices and the voices of certain actors, particularly those located at the grassroots, in geographic and economic global peripheries, or at the fringes of the human rights “movement.”

Critique is the engine of change, so it is essential that social justice (and human rights) thinkers and practitioners continuously interrogate their assumptions and approaches and, where necessary, reorient them accordingly. Critiques of rights both old and new have exposed human rights’ limitations—whether structural or contingent—in promoting more just socio-economic relations. They have established a challenge for advocates to develop ever more ambitious and effective human rights practices, and to explore alternative or complementary strategies to comprehensively address social justice challenges. At the same time, there is a need to broaden current debates to more plural perspectives that recognize the diversity of human rights actors, agendas, arenas and approaches, and to open spaces for more fully engaging with the practices of actors located outside the human rights mainstream. By seeking to understand how diverse social actors have appropriated and reimagined human rights from the bottom up, it might become possible to ask different questions about whether and how human rights can sustain emancipatory action.