Legal Pluralism and International Human Rights Law: A Multifaceted Relationship

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1. INTRODUCTION

This chapter analyses some characteristics of the relationship between international human rights law and the concept of legal pluralism at two levels. The first part provides some theoretical reflections on the linkages between human rights, international human rights law and legal pluralism. The use of the term ‘legal pluralism’ in relation to ever-smaller bodies of law, such as international human rights law itself, then leads to some reflections as to where this process may bring us. A distinction is proposed between ‘legal pluralism’, as referring to the simultaneous applicability of various normative systems in a given social field, and ‘applying a legal pluralist perspective’ to the study of the simultaneous applicability of norms originating from the same normative (sub)system.

The second part of the chapter further explores the relationship between legal pluralism as a social phenomenon and international human rights law on the basis of a concrete issue, namely the land, territorial and resource rights of indigenous peoples. How does the empirical fact of legal pluralism interplay with the emergence and implementation of human rights standards in the domain of indigenous land, territorial and resource rights? It will be also highlighted that the relationship between substantive provisions in international human rights law, on the one hand, and norms of other legal orders,

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on the other, may go in various, parallel or opposing, directions. In this way, the richness and variability of possible relations between various normative orders are illustrated, defying any unidimensional characterisations of normative orders as regards a particular issue—for instance, of human rights law as supporting indigenous land and resource claims ‘all the way’.

2. ABOUT LEGAL PLURALISM, HUMAN RIGHTS AND INTERNATIONAL HUMAN RIGHTS LAW

2.1. Legal Pluralism in Sociolegal Scholarship

Franz von Benda-Beckmann (2002: 72) has noted that there is ‘little uniformity in the conceptualisation of … legal pluralism’. This is partly because the concept of legal pluralism has been employed across various disciplines, including anthropology, sociology and legal science (ibid: 73). In the socio-legal literature, the concept of legal pluralism is most commonly understood as referring to ‘a situation in which two or more legal systems coexist in the same social field’ (Merry 1988: 870) or, in a similar vein, ‘the coexistence of different normative orders within one socio-political space’ (von Benda-Beckmann 1997: 1). These normative orders may coexist independently from one another, each with their own basis of legitimacy. This has been named ‘strong’ legal pluralism (Griffiths 1986) or ‘wild’ legal pluralism (von Benda-Beckmann 2006: 59), standing in contrast to ‘weak’ legal pluralism (Griffiths 1986). In the latter case, the functioning of a certain normative system is dependent upon its recognition by another normative order—often, but not necessarily, the state legal system.

De Sousa Santos prefers the expression ‘plurality of legal orders’ over ‘legal pluralism’, because the latter term has in his view a normative undertone and seems to imply that there is something ‘inherently good, progressive or emancipatory’ about legal pluralism, which he contests (de Sousa Santos 2002: 89). As an example, he refers to the repressive legal orders established by paramilitary groups in territories under their control. Other authors, working on gender issues, have preferred the term ‘legal pluralities’, considering that this term ‘best evokes the fluid, multilayered, contradictory and transnational forms of legal ordering that shape women’s life prospects today’ (Siedler et al 2013: 1) or ‘plural legalities’ (Hellum et al 2007). Notwithstanding the different denominations, they all refer to a multiplicity of forms of normative ordering that simultaneously apply to a particular social field. In that sense, they do not fundamentally seem to differ from one another, even though the term legal pluralism may evoke somewhat more the impression of ‘discrete’, ‘separate’ legal orders, whereas the notions of ‘legal pluralities’ and ‘plural legalities’ emphasise more the fluidity and intersection of these forms of ordering. In the latter vein, de
Sousa Santos (2002: 437) has coined the term ‘interlegality’ to indicate ‘different legal spaces superimposed, interpenetrated and mixed in our minds, as much as in our actions’.

2.2. Legal Pluralism, Human Rights and International Human Rights Law

Legal pluralism and human rights are at first sight ‘strange bedfellows’, as Mégret (2013: 69) has noted: human rights are inherently normative in nature, whereas the concept of legal pluralism usually refers to a social fact of multiple legal orders coexisting in the same sociopolitical space. Legal pluralism and human rights are thus not ‘conceptual analogues’ (Provost et al 2013: 1).

I understand one of the objectives of this volume to be to try to describe and explain under which circumstances human rights may be realised in a world characterised by the simultaneous applicability of multiple normative systems in a given social field. As will be illustrated below regarding indigenous land, territorial and resource rights, the relationship between human rights and legal pluralism is ambivalent and context dependent: a legally plural situation on the ground may contribute or not to the realisation of human rights, depending on the specific circumstances and the interpretation and application of both human rights standards and other norms.

A key role in the realisation of human rights is—or should be—played by international human rights law, ie the codification of human rights in international legal instruments. From a human rights perspective, international human rights law is an important vehicle for the protection and promotion of human rights, one that has been specifically designed for and is supposed to be exclusively dedicated to this goal. This does not imply that the application of international human rights law is the only way of realising human rights. Human rights may also be respected, protected and fulfilled through the functioning of other legal systems, such as state law, other branches of international law (eg international humanitarian law or international criminal law) or non-state legal orders. Non-legal ways to enhance human rights include the use of media, political action and social mobilisation. Human rights may thus have considerable impact even when they are not mobilised as ‘law’ (Merry et al 2010).

From a legal pluralist perspective, international human rights law is one of the legal orders that is applicable today in practically every social field.²

² Quane (2013: 677) notes that ‘when viewed in conjunction with a state’s national law, the very existence of international human rights law represents a particular form of legal pluralism’. In her exploration of the relationship between international human rights law and legal pluralism, she seems to limit herself to a ‘weak’ conception of legal pluralism (cf Griffiths 1986), namely aiming to ‘explore the extent to which a state’s acceptance de facto or de jure of religious and/or customary law within its territory is compatible with the requirements of international human rights law’ (Quane 2013: 677–78).
Tamanaha (2008: 397–400) has broadly identified six systems of normative ordering: official or positive legal systems; customary normative systems; religious normative systems; economic/capitalist normative systems; functional normative systems and community/cultural normative systems. He considers ‘human rights’ as one type of official legal systems, next to, among others, state law and European Union law. Given his characterisation of official legal systems as ‘linked to an institutionalised legal apparatus of some kind; … manifested in legislature, enforcement agencies, tribunals’ (ibid: 397), I submit that he actually intends to refer to human rights law instead of human rights as such.

The place of ‘human rights (law)’ in the scheme of Tamanaha as one type of official legal system already points to the fact that normative systems usually consist of different subsystems. This can be observed at various, and ever smaller, levels. For instance, official legal systems can roughly be divided into international law, regional law (eg of the European Union, the African Union and the Organisation of American States), national/federal state law, and various lower levels of official law depending on the state structure (eg provincial law and municipal law). International law itself also consists of multiple subsystems. International human rights law is, then, one of these subsystems, next to, among others, international humanitarian law, international criminal law, international environmental law, and international trade and investment law. Often, various subsystems of international law will apply concurrently, such as international environmental law and international investment law (see eg Onana 2012).

International human rights law is not a uniform system either. It is itself multilayered, consisting of a global system (United Nations) and various regional human rights systems, and has diversified towards specific categories of people (women, children, persons with disabilities, migrant workers, minorities, indigenous peoples, etc) and themes (torture, discrimination, etc) (Brems 2014). In recent years, the concept of ‘legal pluralism’ seems to be increasingly used also to refer to this diversity within a particular legal system or subsystem (see eg, as regards international law, Burke-White 2004). According to Twining (2010: 513), in the literature on global legal pluralism, the term ‘pluralism’ has moreover ‘sometimes been extended to encompass other referents’, such as the proliferation of actors in international relations, and the diversification of supranational courts and tribunals as well as norm-creating agencies.

2.3. The Smallest Constitutive Element?

The use of the concept of legal pluralism to refer to normative diversity within ever-smaller bodies of law as well as to other referents brings us to the question of where this process may lead us. Is it possible, desirable and/or
necessary to identify a smallest constitutive element to be able to speak of ‘legal pluralism’ in an analytical sense? Without wanting to essentialise the concept or being picky about labels, I would argue that this tendency of opening up the concept of legal pluralism very widely may lead to vagueness or confusion as to the characteristics that are generally associated with it, at least in sociolegal scholarship. In this sense, I concur with Twining (2010: 513) when he notes:

If ‘legal pluralism’ merely means more than one legal phenomenon without limit on the kinds of phenomenon referred to, it is doubtful whether it is a useful concept and whether the heritage of mainstream socio-legal literature on legal pluralism up to 1990 is very helpful in interpreting these very varied topics. 3

One of the most commonly shared distinctive features of legal pluralism within the sociolegal literature is the simultaneous applicability of different normative ‘orders’ or ‘systems’, as referred to above. A legal system in the analytical sense has been described by von Benda-Beckmann (1997: 8) as ‘the totality of legal phenomena generated and maintained in a given social unit’. He continues:

I speak of an empirical legal system when the *same basis of ultimate validity* is asserted for a body of law. Thus we can speak of state law, religious law, or traditional law, when state, religion or tradition refer to the ultimate basis on which the validity of the legal conceptions is grounded and which unifies the set of sources of valid law. (ibid, emphasis added)

Different legal systems thus originate in different sources of authority and are consequently often characterised by other underlying principles (eg legal certainty, reciprocity, harmony). This may lead to diverse ways of decision-making (eg democratic, autocratic, consensual) and of conflict resolution (eg conflict avoidance, mediation, adjudication). It was these fundamental disparities between legal systems as well as their interaction that triggered the interest of legal anthropologists.

Various authors have noted, however, that the requirement of a ‘system’ should not be interpreted as a *conditio sine qua non* or in a too restrictive manner, in order to be able to speak of legal pluralism. According to von Benda-Beckmann (ibid): ‘Apart from such “system” law, in which the systems are named, there may be also “unnamed law”, law not attributed to a system but, for instance, to the asserted self-regulatory autonomy of people.’ Tamanaha (2008: 399) has noted in relation to community/cultural normative systems that ‘[i]n its thinnest manifestation (which can nonetheless exert a powerful influence), the norms that bind and define the community may not be definite or reiterated enough to be considered a “system” in the same sense that that applies to the other categories’. This suggests that

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3 And specifically with respect to human rights: ‘The idea of “pluralism” applied to … the proliferation of human rights means little more than diversity’ (Twining 2010: 516).
the conceptualisation of ‘system’ should not be too strict, in order not to exclude such more fluid or vague community/cultural normative systems.

Not only do various norms within a certain legal system share their ‘basis of ultimate validity’ (von Benda-Beckmann 1997: 8), within the subsystem of international human rights law, these norms also share the objective of promoting and protecting human rights. There is no universally accepted understanding or definition of ‘human rights’: human rights mean different things for different people and the particular interpretation of the content of certain rights will vary with the context and situation. But at least there is some consensus on basic tenets and principles relating to, for instance, the goal of human dignity, the protection of the right to life and the prohibition of torture. Certain rules of other normative systems may be grounded, however, in fundamentally different aspirations, such as the perpetuation of a patriarchal society, the dominance of a particular religious worldview, or monetary gain. The potential clash between different systems of normative ordering will thus be greater when analysing the interaction between two normative orders that do not belong to a same ‘mother’ order than when looking at issues that relate to the diversity and divergence within a certain normative (sub)system, such as international human rights law.

If one, however, broadens the conceptualisation of legal pluralism towards the simultaneous applicability of legal norms that originate within the same ‘(sub)system’, then one comes on a ground with which doctrinal lawyers are also familiar, be it mostly in relation to state or supranational law: that of conflicting rules within one system. Since such rules belong to the same system, there is no clash between the ultimate authority and fundamental principles in which these rules are grounded. Mechanisms, institutions and rules have been devised within normative systems to deal with this kind of conflict. In state law, for instance, a hierarchy of norms has been established, and principles such as \textit{lex posterior derogat legi priori} and \textit{lex specialis derogat legi generali} are applied. In international law, the distinction between hard law and soft law may moreover be relevant (Hespel et al 2012). In addition, in customary normative systems, rules of prioritisation or principles that facilitate or indicate how to arrive at a decision in the case of conflicting rules will often be in place. An example constitutes the principle within the Andean community that harmony is the ultimate goal of dispute resolution or management (Drzewieniecki 1995: 8).

An overly broad conceptualisation of legal pluralism thus does not seem particularly useful for analytical purposes. It may therefore make sense to distinguish between ‘legal pluralism’ (as referring to the coexistence of different normative systems or other bodies of law, such as unnamed law, in a particular social field) and ‘applying a legal pluralist perspective’ to the study of the simultaneous applicability of various norms within one legal (sub)system. Applying a legal pluralist perspective then implies drawing on the insights of the field of legal pluralism to explain the dynamics and
manage the internal plurality of a particular (sub)system of law. Oomen (2014), for instance, has employed insights from the field of legal pluralism to increase our understanding of the multilayeredness of human rights law.

3. INDIGENOUS LAND, TERRITORIAL AND RESOURCE RIGHTS

In what follows, the relationship between international human rights law and legal pluralism is further analysed in the concrete domain of the land, territorial and resource rights of indigenous peoples. Two main scenarios may be analytically distinguished. First, as regards a particular issue, international human rights law and another normative order may stand, to a greater or lesser extent, in opposition to each other. Here, human rights law can be invoked against those rules of the other normative order that seem to violate human rights. Second, human rights law and another normative order may be aligned on particular themes, defending similar values, interests and rights. In this case, human rights law and the other normative order may be mutually reinforcing. This second scenario seems to have received less scholarly attention, as research more readily focuses on conflicting legal systems than on reciprocally supportive systems (see also Twining 2009: 27). In practice, the two scenarios will often occur together, in that standards of international human rights law and another legal order may strengthen each other on a particular issue (scenario two) to the detriment of norms originating within one or more other legal orders (scenario one). The extent to which international human rights law is supported or challenged by another normative system will also depend on the interpretation that is given to both human rights standards and the other norms involved.

Without denying the possible presence and impact of a variety of other forms of normative ordering in a concrete situation, such as religious law, project law (see eg Weilenmann 2009), or other branches of international law, the remainder of this chapter mainly focuses on the interplay between three legal orders: local (indigenous/customary) law, state law and international human rights law. These normative orders are among the most relevant ones to assess the interplay between international human rights law and legal pluralism in the domain of indigenous land, territorial and resource rights. The selection of and principal focus on the three levels of local, national and international may be justified by referring to the distinction made by de Sousa Santos (1987: 287) of ‘three different legal spaces and their correspondent forms of law: local, national and world legality’. He notes that these legal orders often have the same object of regulation, here the rights of indigenous peoples to their lands, territories and natural resources. In his symbolic cartography of law, de Sousa Santos links these three legal orders to three different ‘scales’: ‘Local law is a large-scale legality. Nation state law is a medium-scale legality. World law is a small-scale legality’ (ibid). He illustrates
this distinction with the example of a labour conflict. Within a local legality such as a factory code, the prevention and management of labour conflicts stand central and are regulated in great detail, similar to when a large cartographic scale is used. Within national state labour law, the labour conflict is only one aspect of a broader reality of industrial relations. Within the world legality of, for instance, international franchising, the labour conflict becomes a minor, almost negligible detail. Because of their different scale, these different legal orders thus create different legal realities, based on the same social object. However, ‘in real socio-legal life the different legal scales do not exist in isolation but rather interact in different ways’ (ibid: 288).

3.1. International Human Rights Law ‘versus’ Other Normative Orders

In the first scenario, international human rights law is invoked against norms or practices grounded in another legal order that appear to constitute human rights violations. Since states are the primary duty-bearers in international law, state law should, or at least could, be an important vehicle of implementation of human rights. Frequently, however, it is state law that goes against human rights, even though implicitly, subtly or at a lower legal level than the constitutional one, where fundamental rights and freedoms are formally entrenched (see eg Desmet 2011b).

As such, international human rights law has been used by indigenous peoples against actions grounded in the state legal system, such as the unilateral establishment by the state of protected areas situated in their ancestral territories. This drawing upon international human rights law to contest state conservation has been a gradual evolution. To start, during the past decades, international human rights law has become the primary vehicle for indigenous peoples to claim recognition of and respect for their rights at the international level. This was not always the case: the turn to human rights by the indigenous rights movement was prompted by a rejection at the international level of their claims of self-determination (Engle 2011). Moreover, within the human rights framework, attention to the potentially negative consequences of externally induced conservation initiatives has only recently increased (Campese et al 2007). In contrast to the general relationship between human rights and the environment, the particular link between human rights and nature conservation appeared later on the radar of the human rights community. Only in the past few years have violations of indigenous peoples’ human rights been found to be explicitly caused by the establishment of state-protected areas, and this both within the African and the Inter-American human rights system.

A landmark case on the relationship between indigenous rights and nature conservation is the Endorois decision, adopted in 2009 by the African
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Commission on Human and Peoples’ Rights. The Endorois, a semi-nomadic indigenous community of about 60,000 people, had for centuries been living in the Lake Bogoria area in Kenya. In 1973, the Kenyan government superimposed a protected area, the Lake Hannington Game Reserve (later renamed the Lake Bogoria Game Reserve), on their ancestral lands. This gazettement led to the forced eviction of the Endorois, without appropriate compensation. Moreover, their access to the Lake Bogoria area, necessary for their pastoral lifestyle and cultural integrity, was denied. After recognising the Endorois as an indigenous people, the African Commission found a violation of the Endorois’ right to practise religion (Article 8), the right to property (Article 14), the right to culture (Article 17(2) and (3)), the right to dispose freely of their natural resources (Article 21) and the right to development (Article 22) of the African Charter on Human and Peoples’ Rights. The Endorois case has been most commonly applauded because it is the first case in which the African Commission has pronounced on the definition of indigenous peoples and on their rights to land and natural resources. Moreover, it is also the first time that an international tribunal has found a violation of the right to development, since the African Charter is the only international treaty enshrining a right to development (Ashamu 2011: 302). I would like to stress, however, that this is also the first supranational case in which violations of indigenous peoples’ rights were directly linked to and caused by externally induced nature conservation initiatives, namely the creation of a protected area by the state on indigenous territory and the subsequent forced eviction.

In August 2010, the Inter-American Court of Human Rights, in its turn, issued its first judgment in a conservation-related case regarding indigenous peoples, namely Xákmok Kásek Indigenous Community v Paraguay. In 2008, a private nature reserve was declared for a period of five years, partially on land claimed by the Xákmok Kásek Indigenous Community. The creation of the protected area took place without consulting the members of the community or taking into account their territorial claims (§ 80). It prevented the community members from carrying out their traditional activities on that land, such as hunting, fishing and gathering, and impeded the expropriation and occupation of the land under any other condition (§ 82). The action on unconstitutionality filed by the community to redress the situation

6 Xákmok Kásek Indigenous Community Case (Merits, Reparations, and Costs Judgment), Inter-American Court of Human Rights Series C No 214 (24 August 2010). In the case of Salvador Chiriboga v Ecuador, the Court addressed the relationship between protected areas and the right to property of non-indigenous persons. Salvador Chiriboga Case (Preliminary Objection and Merits Judgment), Inter-American Court of Human Rights Series C No 179 (6 May 2008).
did not achieve any result. Consequently, the Court found a violation of the rights to communal property (Article 21(1)), judicial guarantees (Article 8(1)) and judicial protection (Article 25(1)) of the American Convention on Human Rights, in relation to Articles 1(1) and 2 thereof, to the detriment of the members of the Xákmok Kásek Community. The contribution of Rodolfo Stavenhagen, the former UN Special Rapporteur on the Rights of Indigenous Peoples, is noteworthy. In his expert testimony, he stated:

[T]he said declaration as a protected wooded area could constitute a new and sophisticated mechanism adopted by the private owners of land claimed by indigenous communities 'to obstruct the land claims of the original peoples ... using legal mechanisms and even invoking purposes as virtuous as the conservation of the environment.' (§ 169)

In two other cases concerning the impact of protected areas on the rights of indigenous peoples, judgments of the Inter-American Court are pending. In its merits report on the case of the Kaliña and Lokono peoples, the Inter-American Commission concluded that the State of Suriname violated the Kaliña and Lokono peoples’ property rights by ‘establishing and maintaining the Wia Wia, Galibi and Wane Kreek Reserves ... without conducting a consultation process aimed at obtaining their free, prior and informed consent according to Inter-American standards’. Similarly, although with less weight attached to the conservation initiative, in the case of the Garífuna Community of Triunfo de la Cruz, the Commission concluded that the State of Honduras had violated Article 21 of the American Convention, because it had failed to ensure the effective participation of the community and its members in measures affecting their territory. One of these measures was the establishment of the Punta Izopo National Park, which restricted access to the area and consequently prevented the community from carrying out its traditional cultural practices (§ 264). A third case concerning the adverse consequences of the establishment and management of a protected area without carrying out proper consultations, namely in relation to the Garífuna Community of Cayos Cochinos, was declared admissible by the Inter-American Commission in 2007.

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8 The Kaliña and Lokono Peoples (Suriname) (Merits Report), Inter-American Commission on Human Rights Report No 79/13, Case 12.639 (18 July 2013) § 167(3).
9 Garífuna Community of Triunfo de la Cruz and its members (Honduras) (Merits Report), Inter-American Commission on Human Rights Report No 76/12, Case 12.548 (7 November 2012) § 264, see also § 294(2). The Garífuna people are the result of cultural syncretism between indigenous and African peoples. They have asserted their rights in Honduras as an indigenous people; their indigenous character was not contested by the state in this case. Therefore, the Inter-American Commission analysed the case taking into account the Inter-American jurisprudence on indigenous peoples’ rights. ibid §§ 190–91.
10 Garífuna Community of Cayos Cochinos and its members (Honduras) (Admissibility Decision), Inter-American Commission on Human Rights Report No 39/07, Petition 1118-03
International human rights law can also be invoked against state law without having recourse to judicial avenues, for instance in negotiation processes with the local or national government. An example constitutes the categorisation process of a provisional protected area, the Giéppí Reserved Zone situated in the extreme north of the Peruvian Amazon. In this case, the ancestral habitants of that area, the Airo Pai, successfully invoked their right to be adequately consulted, which led to a new consultation round more in accordance with international human rights standards (Desmet 2011a: 600–10).

3.2. International Human Rights Law in Alliance with Other Normative Orders

The second scenario relates to situations in which international human rights law and other normative orders find themselves ‘on the same line’, and may thus be mutually reinforcing in a legally plural world. Again, this may be the case for human rights law in relation to any other normative system. A common perception is that local (indigenous/customary) law—as often based on ‘traditions’—tends to fit uneasily with international human rights standards. There are various areas, however, where customary and community normative orders are in line with or endorsed by current international human rights law. This is to a large extent the case for the land, territorial and resource rights of indigenous peoples, which have been recognised in international human rights law as based on customary normative systems. This is evident from Article 26 of the UN Declaration on the Rights of Indigenous Peoples,11 the jurisprudence within the Inter-American and African human right system, and—especially as far land and territorial rights are concerned—from ILO Convention 169 (Articles 13–15).12 Regarding indigenous land, territorial and resource rights, it is most often state law that stands in contrast with both international human rights and indigenous/customary law. Peruvian state legislation, for example, only awards limited lots of land to peasant and native communities, instead of recognising the territories of indigenous peoples. This approach contains two fundamental

(24 July 2007). A part of the original complaint, concerning acts of physical aggression by soldiers in charge of monitoring the environment on the archipelago of Cayos Cochinos, was broken down into a separate petition, which was declared admissible in 2013, Jesús Flores Satuye and Others (Honduras) (Admissibility Decision), Inter-American Commission on Human Rights Report No 93/13, Petition 1063-07 (4 November 2013).


flaws. First, the Peruvian constitution does not recognise the legal subject of indigenous ‘peoples’, but only attributes rights to ‘communities’ (comparable to villages).\textsuperscript{13} This has implied a fragmentation of the Peruvian indigenous peoples into various legal persons (Desmet 2011a: 372–77). The Airo Pai people, for instance, are divided into four officially registered native communities and one village that has not been legally recognised. Second, the Peruvian legislation does not incorporate the concept of ‘territory’, which goes beyond the concept of land and ‘covers the total environment of the areas which [indigenous peoples] occupy or otherwise use’.\textsuperscript{14} Only limited lots of land are given in title to the peasant and native communities (Desmet 2011a: 378–88). The land titles of the four Airo Pai native communities cover only a fraction of their ancestral territory. Peruvian state law qualifies the remainder of the Airo Pai territory, which includes their ancestors’ cemeteries and various historically and culturally important sites, as ‘state land’. Such an approach goes against both international human rights law and the customary normative systems of the peoples concerned.

There thus seems to be a shift in alliance, at least as far the rights of indigenous peoples are concerned. Whereas international law historically has served to legitimise the colonisation of indigenous peoples, supporting the efforts of the nation states involved in this endeavour, international human rights law has become increasingly receptive towards accommodating indigenous peoples’ claims, which are based on their customary normative orders (Anaya 2004). From the perspective of state duty-bearers, this raises additional concerns, as now the pressure comes from two sides: from below (via customary norms and institutions) and from above (via international human rights obligations). Other authors have made similar observations regarding the potential association between local (indigenous/customary) law and international human rights law. Colchester (2011: 38), for instance, has observed that: ‘Indigenous peoples are now practised at invoking international law to support reforms of State laws so they recognise indigenous peoples’ rights \textit{in line with countries’ international obligations and in ways respectful of their customary systems}’ (emphasis added). As concerns economic, social and cultural (ESC) rights, and more specifically subsistence rights, Gómez Isa (2011: 60) has written that: ‘Some local cultural practices … have a great potential for the realization of subsistence rights in local settings.’ He adds that more empirical research is needed regarding the extent to which ‘local cultural practices and social arrangements in the socio-economic domain … constitute a positive input for the local realization of ESC rights’ (ibid).

\textsuperscript{13} Constitution of Peru 1993, Art 89. The peasant communities (\textit{comunidades campesinas}) are mostly found in the Andes and coastal region, the native communities (\textit{comunidades nativas}) in the Amazon.

\textsuperscript{14} ILO Convention 169, Art 13(2). See also below.
Nevertheless, it must be emphasised that despite their overall alliance, international human rights law and customary normative orders (the latter, of course, also being internally diverse) generally do not completely coincide in their approaches to indigenous land, territorial and resource rights. Indigenous peoples generally approach nature in a holistic and spiritual way. The Indigenous Peoples’ Earth Charter was drafted in the margin of the 1992 UN Conference on Environment and Development at Rio de Janeiro as a response to the dominance of conservationists at the event. In the Charter, indigenous peoples express their vision: ‘Our territories are living totalities in permanent vital relation between human beings and nature. Their possession produced the development of our culture. Our territorial property should be inalienable, unceasable [sic] and not denied title’ (§ 32). They define their territory as including ‘space (air), land and sea’ (§ 34). The Charter of the Indigenous and Tribal Peoples of the Tropical Forests of 1996 declared that:

Our territories and forests are to us more than an economic resource. For us, they are life itself and have an integral and spiritual value for our communities. They are fundamental to our social, cultural, spiritual, economic and political survival as distinct peoples.

State legal systems, in contrast, usually adopt a diametrically different approach, whereby legislation compartmentalises the natural environment, dividing it into different sectors, including the land surface, subsoil resources, the water and the forests. These natural resources are then subjected to divergent finalities (ranging from strict conservation to large-scale exploitation) and to different legal regimes, which are designed and monitored by various—often rivalling—ministries and departments, at different levels (national, provincial, local). Moreover, state legislation traditionally focuses on (first) the economic and (second) the environmental value of natural resources, attaching less importance to cultural-spiritual dimensions. Such fragmentation of the natural environment negates the holistic vision of indigenous peoples.

Even though international human rights law generally recognises indigenous land, territorial and resource rights in line with customary normative systems, from the perspective of indigenous peoples, it does not go ‘all the way’. Article 15(2) of ILO Convention 169, for instance, explicitly envisages the possibility that ‘the State retains the ownership of mineral or sub-surface resources or rights to other resources pertaining to lands’ of indigenous peoples. Indigenous peoples must then (only) be consulted before any exploration or exploitation is undertaken, and they should participate in the benefits of such activities. With respect to water, von Benda-Beckmann (2009: 125) has pointed to the fact that local customary water rights may be very extensive, whereas the human right to water only covers a small part of these customary water rights, namely the access to clean drinking water.
He concludes: ‘In the domain of natural resource management and land and water rights, local people(s) claiming human rights may end up with less than they would have, had they based their economic and social claims on their own law’ (ibid). The overall alliance between international human rights law and indigenous customary orders must therefore be nuanced.

4. CONCLUSION

This chapter analysed some features of the relationship between legal pluralism and international human rights law, first at a conceptual level, then in the concrete case of indigenous land, territorial and resource rights. Given that the term ‘legal pluralism’ seems to be increasingly employed in relation to smaller bodies of law, it was suggested to maintain a distinction between a situation of ‘legal pluralism’ (as referring to the coexistence of different normative systems in a certain social field) and ‘applying a legal pluralist perspective’ when studying the simultaneous applicability of different legal norms originating from the same legal (sub)system. The chapter continued with exploring the relationship between international human rights law and other normative orders in the domain of indigenous land, territorial and resource rights. It was shown that a detailed analysis of the interrelation between substantive norms of different normative orders is necessary, so as to be able to adequately assess the relationship between these orders. Even within one domain, no overly broad statements can be made as to the alliance or opposition between various normative orders.